Constitutional Law I — Notes for Review
Revised April 15, 2018

Please bear in mind that these notes are fallible. The course consists of what we read and talk about in class, and not solely the contents of these notes. Also, please note that what we cover in this course varies somewhat from year to year.

Units 1-5. Introductory material.

1. In the beginning of our course, we talked about pure constitutional theory. What is a constitution? Is it a creature of binding positive law that may be changed only in accordance with its own terms? Is it a grant by the crown to the people that the crown may in turn rescind? Is it a grant by the people that the people as a body may rescind? Is it a contract between the constituent parts of civil society, such as between the people, the crown, and the lords spiritual and temporal, as represented in Parliament? How would John Locke have answered these questions? Thomas Hobbes? Edmund Burke? George III? Whose influence is most evident in our founding documents?

2. To examine these points more closely, we asked ourselves whether the Declaration of Independence (1776) was a legitimate political act, as opposed to an act of treason, and by what train of thought one could arrive at either conclusion. We asked similar questions the legitimacy of the Constitution of 1787 as a replacement for the Articles of Confederation (1781) and about South Carolina’s decision to secede in 1860. Our concluding reading for this part of the course was *Gatewood v. Matthews* (Ky. 1966), a decision about a proposed new constitution for Kentucky that had not been prepared pursuant to the procedures set forth in the existing document. Among other things, we saw the maxim of *expressio unius* at work in *Gatewood* — *expressio unius est exclusio alterius* — “to say the one is to exclude the other.” Like all maxims, *expressio unius* is not an absolute rule, but judges will often rely upon it. (Note: We do not discuss the legitimacy of the Constitution as a replacement for the Articles of Confederation or of South Carolina’s decision to secede every year.)

3. We then made a brief excursus into the realm of political theory, comparing models of governance, and in particular comparing the parliamentary model of the United Kingdom with the model we use. Our primary focus here was the wisdom of strict separation of powers in the Madisonian model. We saw Madison defend his theory in two papers, Federalists 10 and 51, and we saw Walter Bagehot criticize it.

4. A week or so into the course we took up the subject of potential amendments to the Constitution. We wrote, defended and opposed several proposed amendments, most or all of which were ultimately rejected by a majority of the class. We asked ourselves why this might be, given the *supersession* (replacement) of constitutions that took place earlier in our history.
Units 6-7. Implied powers and the Bank of the United States.

1. In these units, we took up several fundamental questions about the nature of our federal system. Are the states “quasi-sovereignties”? If so, what does that mean? Do the states retain a right to secede from the larger sovereignty, the United States? Do they retain the right to reject legislation from the larger sovereignty? How should the powers of the larger sovereignty be construed — with an eye toward expansiveness, to facilitate its operation, or with an eye toward narrowness, to preserve the autonomy of the states? Our vehicle for addressing these questions was McCulloch v. Maryland (1819). Among other things, we noted two maxims of construction that capture the tension underlying McCulloch, the maxim that “remedial statutes should be construed broadly, to effectuate their purposes,” and the maxim that “statutes in derogation of the common law should be construed narrowly.” We also saw Chief Justice Marshall rely heavily on communis opinio in McCulloch. “It is the common opinion, but communis opinio is good authoritie in the law,” wrote Lord Coke. As noted before, maxims do not always control, especially when they’re in conflict with each other!

2. To bring McCulloch into sharper focus, we talked about Congress’ implied powers. As a theoretical matter, the federal government is one of limited or enumerated powers. That is, it may only exercise powers that the Constitution gives it, subject to the restrictions set forth in the document. States, by contrast, theoretically enjoy the broader “police power,” that is, the power to legislate for the health, welfare, safety, and morals of the populace. State governments may exercise any power not denied to them by the federal Constitution or by other valid federal law, such as a federal statute, treaty, regulation, or executive order or agreement.

3. From McCulloch we learned about the Necessary and Proper Clause. As interpreted in McCulloch, this clause expands Congress’ power by allowing it to adopt any means that is appropriate to the accomplishment of a legitimate end, provided the means is not foreclosed by other language of the Constitution. Before and after McCulloch, we read several non-judicial statements on the wisdom or constitutionality of a Bank of the United States. The main point of this exercise was to expand our focus beyond courts and to ask ourselves how, if at all, non-judicial actors contribute to the development of our constitutional order. These statements included a speech by James Madison in the House of Representatives, opinions submitted to President Washington by members of his cabinet, and President Jackson’s explanation of why he used his veto against the Third Bank of the United States.

Units 8-17. Judicial review. We then turned our attention to judicial review.

1. In Marbury v. Madison (1803), we learned that federal courts may declare an act of Congress unconstitutional if it is inconsistent with the Constitution and if the question of its constitutionality arises in a case otherwise properly before the court. We talked about the wisdom of judicial review. We saw that judicial review preserves the integrity of a constitution, providing a fairly effective means to enforce it against the elected branches of government. We also saw that judicial review can protect people and interests that lack clout in electoral politics.
On the negative side, we saw that judicial review is counter-majoritarian, and that law made by judges is arguably illegitimate under pure majoritarian democratic theory. In support of these theoretical positions, we read influential pieces by Alexander Hamilton (Federalist 78) and Robert Yates (Brutus’ Fifteenth Paper).

2. In later cases, we saw that courts may also invalidate acts of the executive because they violate the Constitution. See, for example, *Youngstown Sheet & Tube v. Sawyer* (1952).

3. From such cases as *Marbury* and *Youngstown*, we saw that the Constitution is law in the United States. It’s not merely aspirational, like the Declaration. Because it’s law, it may be cited in court, and if it applies to a case it can resolve it. Moreover, if both a statute and the Constitution apply to a case, and they’re inconsistent, the Constitution will govern, because it’s higher. In fact, it is the highest form of positive law in the United States.

4. There are several bits of supporting evidence for the idea that the Constitution is law, but the proof is ultimately impressionistic. First, such clauses of the Constitution as the Supremacy Clause and the Arising Under Clause treat the document as law. Second, many of the document’s clauses, such as the Contract Clause, sound like law. But there’s no logically perfect proof in the document itself that it’s law in the sense that it may be cited in court as authority. At the end of the day, the Constitution is law because we treat it as law, because we agree as a political community to do so.

5. At some point in our discussion of *Marbury*, we talked about whether other branches of the federal government are bound by the Court’s interpretation of the Constitution. The answer to this is not perfectly clear, because there will be situations where some officer in the federal government other than the Court will have the final say on a particular matter. Where this happens, that officer will be bound by the Court’s interpretation only to the extent he or she feels so constrained. For example, although the Court held in *McCulloch v. Maryland* (1819) that Congress may create a national bank, President Andrew Jackson later refused to approve the charter for the Third Bank of the United States, on the ground (said he) that Congress lacked power to create it. Because no one could subject his veto to judicial process, it survived as a presidential interpretation of the Constitution contrary to an interpretation by the Court.

6. In connection with *Marbury*, we compared how Alexander Hamilton and James Madison thought separation of powers should work in practice. As we saw, Hamilton put extraordinary emphasis on judicial review, as exemplified in Federalist 78, whereas Madison, as exemplified in Federalist 51, put no emphasis on this function (and in fact appeared to disparage it), preferring to rely on the checks and balances between and within the elected branches of government. We asked whose vision proved more accurate. Some said Hamilton, others Madison, others both.

7. We noted a fascinating statutory wrinkle in *Marbury*. By one reading, Section 13 of the Judiciary Act of 1789 authorized the Court to grant William Marbury a writ of mandamus
in an original action, but by another reading it did not. (The maxim noscitur a sociis — roughly speaking, “words take their meaning from the company they keep” — comes into play here.) We asked ourselves why, if Chief Justice Marshall could have ducked the constitutional issue in Marbury, he chose to attack it head on. Courts ordinarily seek to avoid constitutional questions if they can. This is referred to as the doctrine of “constitutional avoidance.”

8. From Ex parte McCardle (1869) and Sheldon v. Sill (1850) we learned that Congress’ power to control the appellate jurisdiction of the Supreme Court and all the jurisdiction of the lower federal courts is theoretically “plenary” (i.e., “full”). In fact, Congress need not create lower federal courts at all. In theory, therefore, it could eliminate much, if not all, of the Supreme Court’s appellate docket and shut down the lower federal courts. We talked about whether this would or could ever happen, and we observed that, perhaps, the Constitution requires that the Supreme Court be allowed to perform certain “essential functions,” whose definition might vary from person to person.

9. We learned that federal courts may not provide advisory opinions. That is, they may not exercise jurisdiction in the absence of a case or controversy, which they define as a dispute between parties in adverse legal positions. We talked about the reasons for this rule. We saw that people may not argue vehemently when all they want is an opinion. We also saw that many issues disappear before they become real cases. Thus, the rule against advisory opinions preserves judicial resources and saves courts from unnecessary opinions. There is an obvious conceptual connection between the rule against advisory opinions and the requirement that a case be ripe, and most authors put these materials together.

10. We then learned about the doctrine of “independent and adequate state grounds” as per Michigan v. Long (1983). Under this doctrine, if a state court plainly states that its decision rests on state grounds that are independent of (that is, logically distinct from) federal law and adequate (that is, capable of resolving the case), then the Court will not review the case. This is because the Court could not possibly change its outcome.

11. Along with our discussion of Michigan v. Long, we also talked about whether the Court is bound by a state court’s assertion that a state ground for decision precludes assertion of a federal right. We learned that, although the Court will show deference to state courts, it will look into this aspect of a state court’s decision enough to assure itself that federal rights aren’t being frustrated. See Indiana ex rel. Anderson v. Brand (1938) for more on this. (Note: We do not discuss Brand every year.)

12. We talked about “political questions.” Under this doctrine, courts will not decide certain questions on the merits that are more appropriately left for final decision to another branch of the federal government. We saw that this doctrine is not a matter of federalism. In other words, the Supreme Court will not refuse to decide a case because a state government ought to have final say with regard to a particular issue.
13. We talked about standing. There are three basic constitutional requirements for standing: (1) injury in fact; (2) causation by the defendant; and (3) redressability. We saw that ideological injury does not qualify as injury in fact, but we also saw that, where a plaintiff appears to be attacking federal action on an ideological basis, one should consider the “double-nexus” test of *Flast v. Cohen* (1968). If a federal taxpayer can satisfy *Flast*, the Court will deem him or her to satisfy the requirement of injury in fact (as well as all the other constitutional and prudential requirements), even though eliminating the expenditure would not actually affect his or her pecuniary interests. We saw, however, that *Flast* has only been satisfied where a federal taxpayer attacks a federal appropriation as an establishment of religion.

14. With specific regard to the requirement of “redressability,” we said that analysis should proceed as follows: First, ask what kind of relief the plaintiff seeks. Second, ask whether that relief, if granted, would be substantially likely to relieve the plaintiff of the injury in fact alleges. The plaintiff need not guarantee that this relief would relieve the asserted injury.

15. A federal court will not decide a case if it isn’t ripe. That is, it must present a mature case or controversy. It must not be a matter of speculation whether or not a case exists. Ripeness is essentially a function of two considerations: (1) fitness; and (2) hardship. “Fitness” goes to whether the case is susceptible of judicial resolution. “Hardship” goes to the degree to which the parties (particularly the plaintiff) need resolution of the issue.

16. The requirement that a case not be moot is the flip-side of the requirement that it be ripe. Under this rule, the case must continue to exist throughout the litigation. If it is resolved at some point before judgment, such that the parties no longer have an adverse legal relationship, then a case or controversy no longer exists for purposes of the Constitution.

17. From *DeFunis v. Odegaard* (1974) we learned about an exception to this rule for disputes that are “capable of repetition, yet evading review.” Classically, this exception applies only if the dispute can recur between the parties, but this requirement is not always followed. We also learned that voluntary cessation of illegal behavior by a defendant will not ordinarily make a case moot, unless there is no reasonable expectation that the defendant will resume the allegedly wrongful conduct. Finally, mootness can often be avoided if the plaintiff sues on behalf of a class. So long as the plaintiff has a live case when he or she brings the action and someone in the class retains a live case at all stages of the litigation, dismissal on the grounds of mootness should not be a problem.

18. There are also at least two prudential requirements for standing: (1) the plaintiff must generally be asserting his or her own rights, not those of a third party; and (2) the plaintiff must generally be within the zone of interest of the provision of law that he or she says is being violated. These two requirements are conceptually closely related, if not identical.

19. With regard to the rule against standing by third parties, the Court has set forth two (perhaps three) considerations: (1) the closeness of the relationship between the plaintiff who
is in court and the missing party; (2) whether some obstacle prevents the missing party from
trying the case him or herself; and perhaps (3) whether the missing party’s rights will be lost if
the court doesn’t permit the present party to litigate. The courts dislike standing by third parties
in part because the present party may not litigate as effectively as the party whose rights are
actually at stake. Also, if missing parties aren’t concerned enough about their rights to litigate,
courts ask whether these rights are really in jeopardy. (As an aside, I don’t think the requirement
of a close relationship is one the Court always sticks to. Sometimes, it has allowed third-party
standing where no relationship at all existed. In Powers v. Ohio (1991), for example, it allowed a
Caucasian defendant to challenge the removal of non-Caucasians from his jury.)

20. With regard to zone of interest, analysis should proceed as follows: First, ask
what provision of law the plaintiff argues is being violated. Then ask whether the provision is
intended to protect someone in his or her situation. Remember that Congress may be able to
affect the outcome of this analysis, at least where a statute is involved, by authorizing “any
person aggrieved” by a particular act to sue under the statute. This would equate the requirement
of injury-in-fact with the requirement that the plaintiff be within the zone of interest of the
provision of law that the plaintiff says is being violated.

21. We also talked about organizational standing. An organization has standing on
behalf of its members (as opposed to having standing in its own right) if three requirements are
satisfied: (1) some of its members have standing to sue in their own right; (2) the interests it
seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief
requested requires that individual members of the association be parties to the case.

Units 19-27. Federalism from the perspective of the states. We then talked for a
number of classes about states’ powers in the federalist system. In particular, we talked about the
“dormant” aspects of the Commerce Clause, the Privileges and Immunities Clause, and pre-
emption of state law by federal law.

1. Through reading a series of cases, we learned that, in general (there are those who
disagree), there are two levels or “tiers” of review under the Dormant Commerce Clause. The
first applies to laws that overtly discriminate against interstate commerce, either on their face or
in practical effect. When courts review laws under this tier, they look at them closely and usually
strike them down. Among the things they consider are the importance of the legitimate public
interest at stake, if there is one, the extent to which the discrimination promotes that interest, and
the existence or non-existence of reasonable non-discriminatory alternatives. Remember that
economic protectionism is not a legitimate public interest.

2. The second tier of review applies to laws that are even-handed in their treatment
of interstate and intrastate commerce. Courts will not scrutinize these kinds of laws as closely as
laws that overtly discriminate against interstate commerce. Judicial review under this tier is
essentially a comparison of the legitimate benefits of a law with the extent of its interference with
interstate commerce. Under this analysis, courts will uphold a law unless its negative impact on
interstate commerce “clearly exceeds” its putative legitimate benefits. In theory, courts look at the existence or non-existence of reasonable non-discriminatory alternatives when conducting analysis under this tier, but the Court as a whole has never justified a decision on this ground. Finally, some justices have looked to evidence of an actual protectionist motive for a law. For them, the existence of such a motive has defeated the law, presumably on the ground that, but for this motive, the state would not have enacted the law at all. Other justices have insisted on looking only at the objective impact of the law. Remember that, under either tier of analysis, a protectionist effect of legislation receives no weight, because protectionism is considered an illegitimate public interest.

3. Also keep in mind that, under the Commerce Clause, Congress may authorize states to discriminate against interstate commerce. Remember too that Congress is allowed to act on protectionist motives. Thus, it can seek to “protect” one state’s economic interests against those of another, provided it complies with all other provisions of the Constitution. Similarly, Congress can seek to “protect” domestic industry against foreign competition.

4. We also talked a little bit about the reasons for the Dormant Commerce Clause. We observed that we want a national economy and a national marketplace, not one broken up into many small pieces. We also observed that the Dormant Commerce Clause prevents states from enacting bitter retaliatory legislation against each other.

5. We also talked about “virtual representation” as a reason for treating even-handed laws more leniently than overtly discriminatory laws. The idea of virtual representation is that, when a law hurts people inside as well as outside a state, the people inside the state can be relied upon to apply political pressure to change the law. When a law hurts only outsiders, however, no one can be relied upon to oppose the law in the legislature.

6. We talked about the “market-participant exception” to the Dormant Commerce Clause. We saw that states may discriminate in favor of locals when they participate in the market rather than simply regulating it. In South-Central Timber Development Co. v. Wunnicke (1984), however, we saw the Court strike down a law where a state tried to discriminate against outsiders at a point beyond its participation in the market. From West Lynn Creamery v. Healy (1994), we learned (among other things) that the Court has yet to give us a definitive answer about whether ordinary subsidies violate the Constitution. (Most observers think the Court will say they don’t.) The subsidy at issue in West Lynn Creamery violated the Constitution because it was connected to a tax on all producers of milk, both local and out of state, and because proceeds from the tax weren’t subject to the state’s full budgetary process.

7. At this point in the course, we spoke briefly about the Eleventh Amendment. We saw that states as such generally may not be sued in federal court. But we also learned about the “stripping doctrine” of Ex parte Young (1908), under which, to cause a state to conform its behavior to federal law by order of a federal court, one sues the officer responsible for enforcing
the law at issue, rather than the state itself, and asks solely for prospective injunctive or declaratory relief.

8. We talked briefly about the Privileges and Immunities Clause. We saw that, in general, states must afford the same privileges and immunities to out-of-staters as to in-staters.

9. There are three steps to analysis under this clause. First, one must decide whether a law discriminates on the basis of state of citizenship. If so, one must then decide whether the privilege or immunity denied to out-of-staters is one that triggers the clause. Not all interests are important enough to do this.

10. The third step is to decide whether the discrimination is allowable or not, assuming the interest at stake qualifies as a privilege or immunity under the second step. There are several formulations of this test, but I think they all point in the same direction. One formulation is to ask whether out-of-staters are a “peculiar source of the evil” the state seeks to eradicate. Another is to ask whether the discrimination is substantially related to a substantial governmental interest. It is technically an open question whether this clause has a market participant exception. I would argue that it does have an exception of sorts, but that the exception is not categorical. Instead, the fact that state money is at stake, or that the state is participating in the market, will be a factor in the court’s analysis.

10. Although the Dormant Commerce Clause and the Privileges and Immunities Clause of Article IV will both apply to many situations, there are some differences between them. First, only citizens may take advantage of the P&I Clause. It may not, therefore, be invoked by a corporation. Second, the P&I Clause requires some form of discrimination between in-staters and out-of-staters. Thus, a law that prohibited any person from bringing bait fish into a particular state arguably would not implicate the P&I Clause, because neither in-staters nor out-of-staters would be permitted to engage in the practice. The same law would be subject to aggressive review, however, under the first tier of the Dormant Commerce Clause. See Maine v. Taylor (1986). Third, as we have noted, the Dormant Commerce Clause’s market-participant exception is categorical, whereas that of the P&I Clause, if it exists, is contextual. Fourth, Congress may relieve states of the effect of the Dormant Commerce Clause, but it may not relieve them of the effect of the P&I Clause. Fifth, only the Dormant Commerce Clause will apply in instances where there is no interest at stake important enough to qualify for protection under the P&I Clause. Of course, “commerce” must be at issue for a violation of the Dormant Commerce Clause to occur, although this term covers a lot of ground.

11. The last thing we talked about in this chapter was federal pre-emption of state laws. We saw that pre-emption can be express or implied. We also saw that there can be two kinds of implied pre-emption: “field” pre-emption; and “conflict” pre-emption.

a. Express pre-emption arises when Congress expressly displaces state law that would otherwise apply to a particular situation. An issue that arises with respect to
express pre-emption is the scope of the pre-emption. Thus, even where Congress expressly pre-empts state law, the issue of whether a particular state law is pre-empted may still be subject to litigation.

b. “Field pre-emption” (a form of implied pre-emption) arises in areas of such pervasive federal regulation that all state legislation in the area is impliedly pre-empted. Foreign policy and immigration are often cited as examples of this. A related issue is whether Congress pre-empts a field by establishing an administrative agency and authorizing it to promulgate regulations governing activity in the field.

c. “Conflict pre-emption” (another form of implied pre-emption) arises when it is physically impossible for a regulated entity to obey both federal and state law, or when complying with state law would frustrate the achievement of Congress’ objectives.

d. Pre-emption generally: My sense is that, in deciding whether federal law pre-empts state law, courts will also take into account the historical role of states in regulating the area in question, and the need for state-by-state regulation rather than a uniform federal standard. Pre-emption analysis thus can closely resemble analysis under the second tier of the Dormant Commerce Clause.

Units 28-34. Federalism from the point of view of the United States. We then spent several classes talking about Congress’ powers under the Constitution. We talked mostly about commerce and spending, but of course Congress has a number of enumerated powers under the Constitution.

1. We saw that, until 1937 or so, the Court tended to distinguish between “interstate” and “intrastate” commerce on a strict basis. To be more specific, it tended to look precisely at the activity in question and ask whether, examined in isolation, it was interstate commerce. The Court did not care whether (or how much) the activity affected interstate commerce, unless the activity and interstate commerce were directly related. It considered effects for the most part irrelevant. Thus, the Court considered such activities as manufacturing, mining, agriculture, and professional baseball to be local, subject to regulation only by the states. *Carter v. Carter Coal* (1936) is an example of this.

2. This all changed around 1937 when the Court embraced an empirical approach to the distinction between interstate and intrastate commerce. Under this approach, Congress could regulate any phenomenon, no matter how local, so long as it was substantially related to interstate commerce. For example, see National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937). In applying this analysis, the Court did not confine itself to the activities of the specific parties before it. Instead, it emphasized the importance of putting together all similarly situated parties, and asking whether the conduct of such parties, in the aggregate, would have a substantial effect on interstate commerce. See *Wickard v. Filburn* (1942). This approach exemplified in such cases as *Jones & Laughlin* and *Wickard* brought so much formerly
“local” activity within the scope of congressional regulation that Archibald Cox, a commentator who later served as the first special prosecutor for Watergate, wrote that the limits on Congress’ power to regulate interstate commerce were exclusively political.

3. The Court seemed to put a slight judicial limit on Congress’ power to regulate interstate commerce in such cases as United States v. Lopez (1995). In Lopez, the Court said that Congress could not criminalize the possession of a gun within 1000 feet of a school because there was an insufficient relationship between Lopez’ action and interstate commerce.

4. In Lopez, the Court observed that there are three predicates for congressional power to regulate interstate commerce. First, it may regulate the channels of interstate commerce, meaning that Congress may exclude from these channels “undesirable items” (whatever they may be) subject to specific prohibitions elsewhere in the Constitution, such as the First Amendment, and that Congress may enact legislation to protect persons or items moving from state to state. Second, Congress may regulate the instrumentalities of interstate commerce, meaning that Congress may regulate the conduits of interstate commerce (highways, railroads, etc.) themselves. (There may be some overlap between these two categories.) Finally, Congress may regulate activities that are substantially related to interstate commerce. But the Court added a conceptual aspect to this third predicate in Lopez. Specifically, the Court said that the activity that is supposed to be substantially related to interstate commerce must itself be economic or commercial in nature, unless it is closely related to interstate commerce. The Court also suggested that there are certain enclaves of local prerogative, particularly education and domestic relations, that lie beyond the power of Congress to regulate. There was more of this analysis in United States v. Morrison (2000). (Note: We do not discuss Morrison every year.)

5. A few more notes about this. First, it isn’t clear how much Congress can help itself by putting language in its laws about the relationship between what it wants to regulate and interstate commerce. In Lopez, the Court suggested that, if the naked eye cannot see a solid relationship, findings might be helpful, but not dispositive. Substantial findings weren’t enough in Morrison, however. Second, Congress can probably avoid difficulty under cases like Lopez and Morrison by putting a jurisdictional requirement or “hook” in the law at issue. For example, if Congress had prohibited possession of a gun within 1000 feet of a school where the gun had recently moved in interstate commerce — thereby making the nexus with interstate commerce an element of the offense — it might have been possible to prosecute someone like Lopez under federal law.

6. In this part of the course, we also talked about the doctrine of “non-delegation.” Under this doctrine, Congress may exercise its power to make law or not exercise it. It may not delegate that power to someone else and adjourn sine die (i.e., without a set date of return before the next session). The main case we read in support of this principle was A.L.A. Schechter Poultry Co. v. United States (1935). But Congress may confer discretion (even broad discretion) on executive officials and administrators provided it gives them sufficient guidance to go with the discretion. The rule is that Congress provide an “intelligible principle” to guide the exercise
of discretion. We talked about this doctrine later in connection with United States v. Curtiss-Wright Export Corp. (1936), where we saw that the permissible amount of delegation expands where Congress is enhancing the President’s authority in the realm of foreign affairs.

7. In this part of the course, we also spoke briefly about so-called “Chevron deference.” Under Chevron (1984), if a federal statute contains ambiguous language (Chevron Step 1), and an agency charged with administering that statute has adopted a permissible (or reasonable) construction of that statute (Chevron Step 2), a court will accept that interpretation, even if, left to its own devices, the court might not have adopted that construction. Chevron deference reflects an implicit delegation of interpretive authority by Congress to the agency in question. Because many agencies are under the President’s aegis, Chevron is defended — on theoretical grounds — as an instantiation of the democratic process, inasmuch as the President is elected by, and accountable to, the people.

8. Recently, however, we have seen the emergence of the so-called “Major Questions Doctrine.” The Court has held on several occasions that Congress may not implicitly delegate authority to an administrative agency to resolve questions of of deep “economic and political significance.” Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427, 2444 (2014).

9. Although Congress’ regulatory authority, particularly its authority to regulate “Commerce . . . among the several States,” is quite broad, it nevertheless may not “commandeer” the states to do its dirty work. Instead, it must do its own dirty work. This does not mean that Congress may not regulate the states just as it would or could regulate private entities. It simply must not take over states’ regulatory (i.e., governmental) powers. In connection with this, consider Reno v. Condon (2000), in which the Court upheld the Driver’s Privacy Protection Act, which limited states’ ability to sell or distribute personal information about drivers without their consent. The Court upheld this act because Congress wasn’t commandeering states’ political powers; it was simply regulating their activities in the purchase and sale of information, which can be analogized to similar activities in the private sector.

10. Congress has broad authority to spend. Under the Constitution, Congress may spend money on anything that promotes the general welfare of, pays the debts of, or provides for the common defense of the country. Congress also may attach conditions to its expenditures, so long as it complies with the lenient test of South Dakota v. Dole (1987). Under Dole: (1) the expenditure must be for the general welfare; (2) the condition on which receipt of funds depends must be stated unambiguously; (3) the purposes of the expenditure and of the condition must be conceptually related; (4) Congress may not require the states to violate the Constitution in exchange for the money; and (5) Congress may not “coerce” the states into complying, although it may “induce” them. The line between “inducement” and “coercion” is a fine one.

11. Congress also has broad authority to enact legislation pursuant to treaties. As we saw in Missouri v. Holland (1920), even if Congress could not enact a law to protect migratory birds as an aspect of interstate commerce (which may have been the case in 1920), it could enact
exactly the same law to implement a valid treaty. Congress’ authority to implement treaties is thus the equivalent of a free-standing enumerated power. Remember, however, that even this authority is almost certainly subject to the specific prohibitions of the Constitution, such as the First Amendment.

12. At this point in the course, we also discussed the relationship between treaties and statutes, as well as the distinction between “self-executing” and “non-self-executing” treaties. A self-executing treaty is one that becomes operative as law without statutory implementation. A non-self-executing treaty requires implementation. A non-self-executing treaty that is never executed by implementing legislation arguably has no operative effect in a domestic court in the United States. Grievances about violations of such a treaty would have to be taken up by the political branches of the nations that have joined to make the treaty. A self-executing treaty or an executed non-self-executing treaty would have the same legal effect as a statute. If, therefore, such a treaty were inconsistent with and post-dated a statute, it would most likely control in litigation because it came later in time. Similarly, a self-executing or executed non-self-executing treaty that pre-dated an inconsistent statute would arguably not prevail over the statute, because the statute came later in time. See generally Whitney v. Robertson (1888).

13. We also spoke briefly about executive agreements, that is, agreements between the United States and other nations that are approved at our end only by the President. As we saw, such agreements exist and indeed are quite common, but there are some matters that only a treaty may accomplish. We also observed that even a treaty cannot cause funds to be disbursed from the treasury or create a federal crime. This takes an act of Congress.

14. Our last reading in this part of the course was National Federation of Independent Business v. Sebelius (2012). This case involved two major attacks on the Affordable Care Act. One of these went to Congress’ authority to adopt the act, specifically, to require certain people to purchase medical insurance. The other went to the so-called “Medicaid expansion,” under which states that participated in Medicaid (all fifty by the time Congress enacted the ACA) were obliged to cover substantially more people lest they lose all of their eligibility for federal funds under Medicaid. A deeply fractured Court, with Chief Justice Roberts often writing solely for himself, upheld the so-called “individual mandate” on the ground that it was valid as a tax, but struck down the mandatory aspect of the Medicaid expansion on the ground that it coerced the states, in violation of the “fifth” prong of the four-prong test for conditional federal spending set forth in South Dakota v. Dole.

Before the Chief Justice concluded that the individual mandate could stand as a tax, he first concluded that it could not stand as a regulation of interstate commerce. In his eyes, the Constitution gives power to Congress to regulate activity, not absence of activity, and here, he concluded, Congress was imposing its mandate on people not because they were doing something, but because they were not doing something. This was a bridge too far, in his estimation. Four other members of the Court — Justices Scalia, Kennedy, Thomas and Alito — agreed with him on this point, thus making a majority on this issue.
The Chief Justice then continued, however, to ask whether the individual mandate could withstand scrutiny as a tax. He concluded that it could, largely because it had the look and feel of a tax. On this point, four other members of the Court agreed with him — Justices Ginsburg, Breyer, Sotomayor and Kagan — thus making a majority on this issue.

In reviewing this aspect of NFIB, you should be mindful of why, according to the Chief Justice, he first had to conclude that the individual mandate could not stand as a regulation, if he was willing to uphold it as a tax. His answer tells us something about the idea of constitutional avoidance, or at least about the way he approaches that concept. In essence, the Chief Justice said that the mandate “presents itself” as a regulation — much as a patient might “present” him or herself to a doctor as having a cold, even if the real malady is something else. Because the mandate presented itself as a regulation, the Chief Justice said, his duty was to evaluate it on that basis. If it failed that evaluation — which he said it did — he would then ask whether it could be sustained on any other ground. Moreover, if he reached this point in his analysis, he would accept any basis for sustaining the statute that was “fairly possible,” so as to avoid having to strike the mandate down. By this chain of analysis, the Chief Justice was willing to sustain the mandate as a tax, even though it most naturally presents itself as a regulation.

In the last portion of the opinion that we read for class, the Chief Justice determined that the Medicaid expansion was so vast that the states could not have seen it coming when they first chose to participate in the program. He also concluded that requiring the states to participate in the expansion lest they lose all of their eligibility to participate in Medicaid left them with no real choice but to do so, given the amount of money at stake. Six members of the Court agreed with the him on this point — everyone but Justices Ginsburg and Sotomayor.

Finally, the Chief Justice determined that the statute could survive without the mandatory expansion of Medicaid. Therefore, the Court severed this portion of the statute from the rest, and upheld the remainder.

Units 35-41. Separation of powers.

1. Our first case in this part of the course was Youngstown Sheet & Tube v. Sawyer (1952). In this case, we saw the Court per Justice Black emphasize that Congress makes the laws, not the President, particularly in the domestic arena. In discussing Youngstown, we saw the difference between Justice Black’s formalism and the more functional or historically-driven approaches of Justices Frankfurter and Jackson, who wrote separately. We put substantial emphasis in our discussion on Justice Jackson’s three “zones,” in the first of which the President and Congress are acting together, in the second of which Congress has essentially left the field to the President, and in the third of which the President and Congress are acting contrary to one another. According to Justice Jackson, the proper role for the Court depends on which zone is implicated. We saw more of this in Dames & Moore v. Regan (1981) and Hamdan v. Rumsfeld (2006). (Note: We do not read Dames & Moore and Hamdan every year.)
2. We then talked about foreign affairs, where the President enjoys substantial, almost plenary powers. This arises from a variety of textual and practical considerations. First, the President has express power to send and receive ambassadors to foreign countries. From this comes the power to recognize — or to refuse to recognize — the government of specific foreign countries as “legitimate.” The President is also commander-in-chief of the armed forces, which enables him or her to exert extraordinary influence on events overseas. Meanwhile, as a practical matter, foreign and military affairs often require an unusually high degree of secrecy, coherence, decisiveness and speedy resolution, all of which are easier for the executive to maintain than the legislature. As with any set of powers, of course, the President’s powers with respect to foreign affairs can be abused. The War Powers Resolution (1973) was a formal attempt by Congress to control some of these powers. A modus vivendi has also developed in D.C. whereby the administration will confer with select members of Congress in advance of military strikes. Our main case in this unit was United States v. Curtiss-Wright Export Corp. (1936), in which the Court held that Congress could delegate particularly broad discretion to the President in the area of foreign affairs, notwithstanding a non-delegation doctrine that was quite strong in the early to mid-1930s, because of the President’s substantial pre-existing authority in this area.

3. Next up was appointment and removal, with Morrison v. Olson (1988) in the spotlight. In Morrison, the Court upheld the Independent Counsel (“IC”) provisions of the Ethics in Government Act of 1978. In this case, the majority took the position that these provisions did not violate separation of powers, even though the IC could be removed only for cause, even though the IC performed a “purely executive” function, and even though the executive branch had limited control over the activities of the IC, because these provisions did not unduly interfere with the President’s ability to perform his or her constitutional duties. Among the factors the Court noted to support its holding were its conclusion that the IC herself was an “inferior officer” and the fact that Congress itself played no role in deciding whether the IC could be removed.

4. Before Morrison, Congress could make an official performing a “quasi-legislative” or “quasi-judicial” task removable only for cause, see, e.g., Humphrey’s Executor v. United States (1935) (Federal Trade Commissioner), but it could not give similar protection to a principal officer performing a purely executive function, see Myers v. United States (1926) (postmaster). In Morrison, the Court had to repudiate the “rigid categories” of these cases. Arguably, Edmund v. United States (1997) supersedes Morrison v. Olson, at least in part, in holding that an “inferior officer” is one “whose work is directed and supervised at some level by others,” which one probably could not say about the independent counsel in Morrison.

5. We then talked about INS v. Chadha (1983) and the legislative veto. We saw that, despite the possible utility of the legislative veto, the Court struck it down because it violated the “presentment” and “bicameralism” requirements of the Constitution. In discussing Chadha, we talked about the distinction between the formalism of Chief Justice Burger’s opinion for the Court and the functionalism of Justice White’s dissent.
6. In our next-to-last meeting, we took up legislative privilege and immunity. Under the Speech or Debate Clause of the Constitution, no member of Congress may “be questioned in any other Place” “for any Speech or Debate in either House.” We learned that this protection is quite broad, going beyond statements on the floor to statements in committee, as well as actual votes. In *Gravel v. United States* (1972), we learned that this protection even extends to aides. It does not, however, extend to decisions to publish material outside Congress, because such publication is, said the Court, “in no way essential to the deliberations of [the legislature].” From *United States v. Helstoski* (1979) we learned that the privilege does not extend to promises made to promote particular legislation in the future, although it does extend to evidence of actual votes. “[I]t is clear from the language of the Clause,” the Court wrote, “that protection extends only to an act that has already been performed.”

7. We concluded the course with a discussion of executive privilege. In *United States v. Nixon* (1974) (*The Tapes Case*), we saw the Court recognize that there can be executive privilege, even though the Constitution doesn’t talk about it *per se*, but that President Nixon could not assert it in that case because his “undifferentiated claim” of executive privilege was less weighty than a “demonstrated, specific need for evidence in a pending criminal trial.” Had he made a specific claim that the items being sought included sensitive information about national security, etc., he might have prevailed.

**In general.** At various points in the course, we talked about different methods of interpreting the Constitution. These methods include (but are not limited to):

1. approaches that rely principally on text;
2. approaches that emphasize *original intentions* (*i.e.*, the intentions of the people who wrote the document, such as James Madison);
3. approaches that emphasize *original public meaning* (*i.e.*, how the general public would have understood the document at the time of its ratification);
4. approaches that emphasize the document’s underlying *structure* (often relevant in the context of federalism, separation of powers, and the rights of individuals against the government);
5. approaches that emphasize *precedent*;
6. approaches that emphasize *prudence*, *exigency* or *practical logic*; and
7. and approaches that emphasize “widely shared cultural norms,” to use Professor Calvin Massey’s phrase.
As you can imagine, people mix these approaches, using one here and one there. You might ask yourself which method you prefer, and why. You might also ask yourself if you use this method in all contexts, or only in some. If only in some, you might then ask yourself if you can justify using one method in some contexts but another in others.