Introduction

Welcome to Princeton, and welcome to FRS 105! I am very much looking forward to our seminar. We have a topic that is both rich and timely, and you and your classmates will bring a diverse set of talents and interests to the table. We should have some wonderful discussions.

This course has both a specific and a more general goal. The specific goal is to teach you something about constitutionalism, democracy, and courts. The more general goal is to enable you to participate in scholarly research about controversial questions of politics and morality. You should, in particular, become able to participate not simply as “consumers” or “users” of academic research, but as “producers” of it. For that reason, the reading assignments do not rely on “textbooks” that try to spoon-feed you pre-cooked, easily digested intellectual material. Instead, you are going to encounter the “raw materials” that engage professional scholars: for example, judicial opinions and arguments by other scholars. You will not be able to assume that the scholars are all correct, in the way you might do with a textbook—on the contrary, if you read carefully, you’ll find that the scholars disagree vigorously with one another.

Put differently, this course invites you to join me in my “laboratory” as a fellow scholar, just as courses offered by biologists and physicists might invite you to enter their scientific laboratories. Doing political theory yourself will, of course, be more challenging than simply reading a textbook. But I think you’ll also find it more stimulating and valuable, and perhaps even exciting, since you’ll have the chance to make intellectual discoveries that you can call your own.

Through this process, you will, by the end of the semester, come to know a fair bit of what lawyers call “constitutional doctrine”—that is, the body of Supreme Court decisions that enable us to predict which claims are likely to succeed in a court of law. “Constitutional doctrine” is not, however, the substantive focus of the seminar. The course is not designed to prepare you to become a successful constitutional lawyer. Instead, our project will be to understand the Supreme Court and the Constitution as political institutions in a democratic
political system. We will, in other words, be interested in what the Supreme Court ought to be doing and how other political actors (e.g., presidents, senators, governors, police officers, school board members, voters, and citizens) ought to respond to the Court’s decisions.

For that reason, much of our reading in the early weeks of the course will be theoretical or historical. That’s not because I think that Americans today must scrupulously honor old constitutional precedents, or because I think that Supreme Court Justices from bygone eras were wiser than the ones we have today—I don’t believe either of those things. Old cases are useful for different reasons. First, by reconstructing old debates about the Constitution, we can sometimes stimulate ourselves to rethink our positions about controversies (or, for that matter, uncontroversial practices) in American politics today. Second, constitutional principles and institutions have to be adaptable to changing circumstances. Studying the past helps mitigate the inevitable tendency to craft constitutional arguments to fit transient problems of our current political situation. Third, when we turn to recent constitutional thinkers, we will find that they often make their arguments with an eye toward the past—for example, judges today often worry about how best to avoid repeating the “errors of the Lochner Court” (which we will study in Week 6). Unless we have some grasp of what went on in the past, we will have a hard time understanding the concerns driving constitutional thinkers today.

On the other hand, because the historical context of the older cases is so different from our own, it may be hard at first to appreciate that the old cases raise theoretical questions relevant to current practice. To make the stakes more clear, our first meeting will discuss some more recent cases. The point will be to introduce many of the questions that we will explore in greater depth, and in a variety of settings, as the semester proceeds.

**Reading Assignments**

There is an assignment for our first meeting, and you should be sure to read it before coming. The assignment consists of this syllabus and the case of Newdown v. U.S. Congress, which has been sent to you as a PDF file (it is attached to hard-copy versions of this syllabus). You may not recognize the case by name, but I expect you’ll recognize the issue when you see it—the case was decided this past summer, and it pertains to the words “under God” in the Pledge of Allegiance.

This assignment, and assignments for all other weeks, appear at the conclusion to this syllabus, in the “List of Assignments.” The “List of Assignments” also includes questions to consider as you do the reading (including the reading for our first meeting). You should come to class prepared to discuss all these questions; I reserve the right to call on any student to introduce, or contribute to, the class discussion on any of the assigned questions.

In addition to specific reading assignments, you should also consult the Constitution on a regular basis. In particular, when a court (or a scholar) refers to the Constitution, you should read the relevant provision. You should also look at the Constitution to see whether it contains other relevant provisions (or whether it omits provisions that you might expect to find within it).
Finally, you should bring a copy of the Constitution with you to class each day — you can accomplish that by carrying the Murphy casebook, which reprints the Constitution at the back.

**Keeping Up With the Times**

In addition to doing the other required reading, you should read the New York Times regularly. During each of the past two years, major constitutional controversies arose during the semester, and one or two of our sessions were devoted to “breaking events” rather than to scheduled readings. I will occasionally bring news stories to the seminar’s attention for discussion, and I encourage you to do the same.

You’re not required to subscribe to The Times; if you prefer, you can read the paper online, or look for copies in the library and in common rooms. And obviously, you’ll not be able to read the paper every day—much less read all of it. Nevertheless, you should get in the habit of reading it regularly.

**Grading**

Written assignments for the class will consist of four very short papers (not more than three pages) to be completed over the course of the semester, followed by a longer paper (up to, but not more than, twenty pages) due at the end of the course. There will be a mandatory paper conference after the first short paper. There will not be any examination or quizzes.

Short papers are discussed below. The longer paper should analyze a constitutional case, or a scholarly article or book, or some other constitutional problem of interest to you. The paper will require some outside research, since your main topic should be a case, article, book, or problem that we did not discuss in class (of course, you may draw upon and refer to materials we have read, and, indeed, your paper will be much stronger if you use class materials to enrich discussion of your central topic). Your topic for the final paper should be chosen in consultation with me (in person or via e-mail) not later than December 10, 2002. The paper itself will be due on the Dean’s Date—which this year is January 14, 2003.

Your grade in the course will be determined on the basis of class participation; your short papers; and your long paper. Each will count for approximately 1/3 of your final class grade.

**Short Papers**

Writing a short paper is hard (it’s often easier to write a long paper—you don’t have to decide what to cut!). I want you to confront the discipline of writing concisely, so I’m going to put in place some rigid rules. I hope this doesn’t sound too harsh—but I’ve learned it’s much better to be clear up front than to create confusion or ambiguities that cause trouble later! So here we go ….
The short papers must not exceed three pages in length. This limit assumes approximately 250 words per page, including footnotes and anything else which appears on the page. If you exceed the page limit, or if you shrink the margins, or if you reduce the type-size below 12 points, or if you in any other way attempt to avoid the page limit, your grade will be reduced.

You must submit a short paper in Weeks 3, 5, 7 and 9. You may send these to me by e-mail or deliver them to my office. Your response must reach me no later that 5:00 p.m. on the MONDAY before our class is scheduled to meet. Papers that are late but are received by me before class are eligible for a grade no higher than “B.” Papers received after the commencement of class are eligible for a grade no higher than “C.” Papers received more than 48 hours after the due date will not be accepted, and an “F” will be recorded for the assignment. No “make-ups” will be permitted. The only exceptions to these rules are if (1) you have a note from a physician certifying that you had an illness that prevented you from completing the assignment, or (2) you provide written documentation of an unexpected death or life-threatening illness in your immediate family which prevented you from completing the assignment.

You have a great deal of freedom when choosing paper topics for your short papers. The only strict rule is that the topic must be relevant to the themes and materials assigned for that week. So, for example, the paper due in Week 7 must address the readings for Week 7—you may mention and discuss material from past weeks, but the topic itself should come from Week 7, not Week 6 (or Week 8). Subject only to that limitation, you may react to any part of the reading which interests you. You are free to choose topics on your own, or you may choose them from the questions that following the reading assignment in the “List of Assignments” (for the first paper, however, I strongly advise that you choose your topic from the list of discussion questions). Whichever way you proceed, I strongly recommend you focus upon specific passages in the reading—it’s often difficult to comment on a whole article in two or three pages. I also recommend you choose an idea you find both stimulating and respectable—it’s hard to write on an idea you find clearly wrong or self-evidently correct.

More generally, when writing your papers (short or long), you should keep in mind the following tips, guidelines, and rules:

1. You are not required or advised to do any outside research, and you will receive no additional credit for outside research. The required readings for the course provide more than ample material for citation and analysis.

2. The paper should be carefully written and grammatically precise. Your grade will be reduced for poor writing. If you are concerned about your writing, the University Writing Center may be of help to you.

3. The source for any quotation must be identified. Any citation form is acceptable, so long as it is clear and consistent.
4. Your paper should defend a clearly stated thesis. You should anticipate and respond to the strongest possible objections to the thesis. Your grade will be based principally upon the rigor and precision of your analysis; the extent to which you put the opposing position in its best possible light; and your ability to muster concrete detail in support of your position.

5. Avoid arguing a banal thesis. A paper devoted to the proposition that “Supreme Court Justices should write logically consistent opinions” is not interesting; the thesis is a truism. On the other hand, a paper which argues that “a Supreme Court opinion is good, regardless of its outcome, so long as it is logically consistent” is interesting, but perhaps not persuasive.

6. Define terms clearly. If you make reference to the concept of “democracy” or “the people,” you need to explain what you mean by those terms. If your definition is controversial, you need to defend it.

7. Cast the opposing side in its best possible light. You get no credit for insulting the other side, or for arguing against strawmen (on the contrary, your grade will be reduced). One way to find the best version of an opposing argument is to quote the exact language of a position you intend to criticize. Do not, however, search for vulnerable quotes. If an author has failed to put his or her position in the strongest possible form, you have an obligation to rehabilitate it before you criticize it.

8. Organize your paper clearly. Write an outline. Your paper should state its thesis early, and it should progress logically from beginning to end.

9. Beware of undocumented empirical claims. It is tempting to make claims such as, “the American public wants the Supreme Court to make its decisions on the basis of original intentions,” or “the framers believed that the press should be unfettered by censorship,” or “Brown v. Bd. of Education helped bring about the civil rights movement.” But all of these claims make sweeping statements of sociological or historical fact, and they are almost impossible to prove or disprove.

10. Use detail judiciously. In general, good writing is concrete writing. You can draw upon the readings for specific arguments for and against your thesis, and for examples that will illuminate and test your thesis. On the other hand, do not pepper your essay with unnecessary references to the readings. The point of the assignment is to craft a persuasive argument, not to prove that you can cite to lots of articles and cases.

11. Avoid unnecessary rhetorical flourishes. Sentences like “John Marshall, the father of judicial review, is revered as one of America’s greatest Supreme Court Justices,” add little to your argument, and they often involve an undocumented empirical claim. Again, the point of the assignment is to show your ability to produce an argument that is rigorous and deep, not to summarize history or praise its heroes.

**Required Texts**
Robert McCloskey, The American Supreme Court (University of Chicago Press, 2d ed. 1994). A compact history of the American Supreme Court. If you’re a history buff, and you think you’ve got the basic timeline down pat, you probably don’t need to read this book. On the other hand, it sure couldn’t hurt, and I recommend it to everybody as general background reading (if you aren’t a history book, it’s a “must” for the course).

William Strunk, Jr., E. B. White and Roger Angell, The Elements of Style (Allyn & Bacon 4th ed. 2000). This book is a jewel. If you read it in high school, you should read it again. If you haven’t read it at all, you should (and, if you appreciate language, you’ll find it a treat). When I was an undergraduate at Princeton, I re-read this book cover-to-cover each time I began an important paper. That’s overdoing it, of course—but ignoring the book would be worse.

Syllabus & List of Assignments

Week 1: September 17. Introduction: The Supreme Court & American Democracy

*How does the Supreme Court operate?
*What are the fundamental issues regarding the Supreme Court’s role?

1. Syllabus, FRS 105

You will probably find it difficult to read Newdown. There is a lot of technical legal material. Do not let that deter you: treat it as a puzzle or a mystery. See how much of the opinion you can decode. Note the places where, even after repeated reading and reflection, it defies interpretation—we can clarify them in class.

In any event, you should be able to understand the basic issues and at least part of what the United States Court of Appeals for the Ninth Circuit had to say about them. Prior to coming to class, think about the following questions:

1. What parts of the Constitution does the Court use or refer to? How does the Court interpret them? Is the Court’s interpretation persuasive? Why or why not?
2. Are there other relevant constitutional provisions that the Court should have mentioned or analyzed? What would they have added?
3. Is the case correctly decided? Why or why not?
4. Was it undemocratic for the Court to overrule Congress? Why or why not? If it is undemocratic, should that bother us?

**Week 2: September 24. Judicial Review and Its Alternatives**

1. Marbury v. Madison, in Murphy, 298-306
2. Tushnet, pp. ix-32

When reading the assignment, please consider the following questions:

1. Is the existence of a written constitution a necessary precondition for judicial review? Is it a sufficient precondition? (What is your own answer to these questions? What would Marshall’s answer be?)
2. Suppose a new country is drafting a written constitution. Would you advise them to address the issue of judicial review more explicitly than does the American constitution? If so, what should their constitution say?
3. What is the difference between “judicial review” and “judicial supremacy”? What does Finn mean when he says that “judicial supremacy is suitable, if anywhere, only to the Juridic Constitution”? (Finn, p. 59)
4. Does Finn’s argument provide any reason to reject judicial review (as opposed to judicial supremacy)?
5. What does Tushnet mean when he distinguishes between the “thick” and “thin” constitutions? What does his argument have to do with judicial supremacy and judicial review?

**Week 3: October 1. Reading the Constitution: Text and History. 1st SHORT PAPER DUE MONDAY, SEPTEMBER 30, 5:00 PM.**

1. “Incorporation of the Bill of Rights,” Murphy, pp. 133-135
2. Lee v. Weisman, Murphy, pp. 167-179
3. Murphy, “Alternative Political Systems,” in Barber, pp. 9-40
4. Eisgruber, pp. 1-45
5. Tushnet, pp. 33-53

When reading the assignment, please consider the following questions (and write your short paper on one of them!):

1. How do Kennedy, Souter and Scalia use “tradition” in Lee v. Weisman? What theories about the Constitution do their arguments presuppose? Which view do you find most powerful, and why?
2. On pp. 33-35, Professor Tushnet describes the “Saxbe fix.” Is the “fix” consistent with the Constitution?
3. What are the differences between “constitutional democracy” and “representative democracy” as Murphy defines those two concepts? Is “representative democracy” more democratic than “constitutional democracy”? What grounds does Murphy give for choosing between the two forms of democracy? Are those the correct grounds?

4. Is every country that has a written constitution a “constitutional democracy” in Murphy’s sense of that term? Is it possible for a country to be a “constitutional democracy” if it lacks a written constitution?

5. Is Eisgruber’s concept of “constitutional self-government” the same as Murphy’s concept of “constitutional democracy”? If not, how do they differ?

**Week 4: October 8. How (if at all) Did the Constitution Promote Justice Before the 14th Amendment?**

James Madison, Federalist 10, in Murphy, 1087-91  
*McCulloch v. Maryland*, in Murphy, 530-543  
*Dred Scott v. Sandford*, in Murphy, 195-206  
*Crandall v. Nevada*, in Murphy, 543-546  
Wayne Moore, “Constitutional Citizenship,” in Barber, pp. 238-260

When reading the assignment, please consider the following questions:

1. What is a “faction”? Is the National Rifle Association a “faction”? What about the Democratic Party? The ACLU? The Teamsters?
2. Is Madison’s solution to the problem of faction a satisfactory one? Why or why not?
3. What is the constitutional basis for the decision in *Crandall*? To what extent might the interpretive strategy in *Crandall* be used to protect other individual rights?
4. Does the theory behind *Crandall* supplement, implement, contradict, or have nothing to do with Madison’s theory about how to remedy the ills of faction?
5. In what ways, and to what extent, is Marshall’s opinion in *McCulloch* originalist? In what ways, and to what extent, is it non-originalist?

**Week 5: October 15. The Lincoln-Douglas Debates: What (exactly!) was Wrong with *Dred Scott*? 2nd PAPER DUE 5:00 PM OCTOBER 14.**

Angle, *Created Equal*, Introduction and pp. 32-42, 128-130, 140-144, 303-311, 325-335, and 362-402

When reading the assignment, please consider the following questions:

1. According to Professor Cass Sunstein of the University of Chicago, the *Dred Scott* decision should teach us that “the great issues of political morality—affirmative action, the right to die, homosexual rights—are mostly for political processes, not courts.” Do you agree? Does Lincoln’s argument against Douglas support Sunstein’s position?
2. Lincoln said of **Dred Scott** that he did not mean to “resist it” but that he would refuse “to obey it as a political rule.” (Angle, p. 36). Is that distinction coherent? Was Lincoln’s position consistent with the constitutional obligations of public officials in general? Would it imply, for example, that Southern Governors were acting permissibly when they opposed the Supreme Court’s ruling in **Brown v. Bd. of Education**?

3. According to Lincoln, when the founding fathers drafted the Constitution, they “put [slavery] where the public mind should rest in the belief that it was in the course of ultimate extinction.” (Angle, p. 384) What does that claim mean? What is Lincoln’s evidence for it? Was his claim correct?

4. Douglas took his stand on the “great principle which asserts the right of every people to form and regulate their domestic institutions to suit themselves, subject only to the Constitution of the United States.” (Angle, p. 368). What are the strengths and weaknesses of that principle, as Douglas applied it?

5. To what extent was Lincoln’s position in the debates racist? How should that affect our view of his argument (and of him)?

6. Tushnet writes that “Lincoln knew … ordinary people could be committed to the thin Constitution in ways they could never be committed to the thick Constitution.” (Tushnet, p. 12). Is he correct? Was Lincoln an advocate of what Tushnet calls “populist constitutional law”? Why or why not?

**Week 6: October 22. Economic Liberties: What (if anything!) was Wrong With **Lochner**?

- **Lochner v. New York**, in Murphy, 1110-1116
- **Meyer v. Nebraska**, in Murphy, 1247-1251
- **Pierce v. Society of Sisters**, in Murphy, 1251-1253
- Thayer, “The Origins and Scope of the American Doctrine ...,” in Murphy, 602-609
- **Adkins v. Children’s Hospital**, in Murphy, 1116-1123
- **West Coast Hotel v. Parrish**, in Murphy, 1123-1129
- **United States v. Carolene Products**, footnote 4, in Murphy, 609-622
- **Ferguson v. Skrupa**, in Murphy, 1129-1131

When reading the assignment, please consider the following questions:

1. Holmes dissented in both **Lochner** and **Meyer**. Is there a relationship between his positions in those two cases? What do you think of his view?

2. James Bradley Thayer argues that “[n]o doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows.” Murphy, p. 608. What is the basis for Thayer’s claim? What might he say about the Lincoln-Douglas debates?

3. According to Thayer, courts should only disregard an “[a]ct when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question.” Murphy, p. 605. What does Thayer mean by a “clear mistake”? Would Thayer’s rule be desirable?

4. What differences, if any, separate Thayer’s position from the one adopted by Holmes in
Lochner and Meyer?

5. Chief Justice Hughes wrote in West Coast Hotel that "There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers." (This paragraph is omitted from the edited version of the case in your book; it would have appeared on p. 1126 of the Murphy book, just before the concluding paragraph of the majority opinion). What did Hughes mean when he suggested that, absent a minimum wage law, the state would be providing a "subsidy" for "unconscionable employers" (after all, the state wasn't making any sort of payment to employers, was it?)? In your view, does this paragraph make the Court's opinion any more persuasive? Why or why not?

6. Footnote 4 of Carolene Products (Murphy, p. 617) is undoubtedly the most famous footnote in American constitutional history. It is, in essence, an effort to provide a theory of why the Court was wrong to intervene in Lochner but why the Court might nevertheless legitimately intervene in other major political controversies. What is the theory embodied in the footnote? Is the theory persuasive? Why or why not?

Fall Recess: October 26 to November 3: Enjoy!

Week 7: November 5. Rights, Democracy, and Judicial Review. 3rd PAPER DUE
MONDAY NOVEMBER 4 AT 5:00 PM

1. Minersville v. Gobitis, Murphy, pp. 1165-1174
2. West Virginia v. Barnette, Murphy, pp. 1174-1181
4. Bolling v. Sharpe, in Murphy, pp. 917-919
5. Brown v. Bd. of Education of Topeka, II, in Murphy, pp. 919-923
7. Eisgruber, pp. 46-78
8. Tushnet, pp. 54-71

When reading the cases, please consider the following questions:
1. What does Tushnet mean when he refers to the “judicial overhang”? Is he correct to think that it exists? How can we tell? Should the risk of the “judicial overhang” make us reluctant to embrace judicial review? Why or why not?

2. Why is Mikva skeptical about the capacity of Congress to interpret and enforce the Constitution? What is Tushnet’s answer? Who has the better of the argument? Why?

3. According to Justice Frankfurter, “One’s conception of the Constitution cannot be severed from one’s conception of a judge’s function in applying it.” (Murphy, p. 1179). What would Tushnet have to say about this proposition? What about John Marshall? What do you think?

4. According to Justice Frankfurter, “Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.” (Murphy, p. 1180). What does Frankfurter mean? Does his claim provide a sufficient ground for skepticism about the decision of the Barnette Court, or about judicial review more generally?

5. Do Tushnet’s arguments commit him to the view that Barnette and/or Brown were wrongly decided? Why or why not?

6. What theory of the Constitution does the Supreme Court invoke in Bolling? Is it defensible?

**Week 8: November 12. Reading the Constitution II: the Privacy Cases**

- Poe v. Ullman, in Murphy, 141-147
- Griswold v. Connecticut, in Murphy, 147-158
- Roe v. Wade, in Murphy, 1258-1271
- Bowers v. Hardwick, in Murphy, 1322-1337
- Casey v. Planned Parenthood, Parts I, II, and IV, plus excerpts from Scalia dissent; in Murphy, pp. 1281-1285; 1291-1294; and 1302-1304 (up until “Liberty finds no refuge…”)
- Eisgruber, pp. 79-108
- Tushnet, pp. 129-153

When reading the assignment, please consider the following questions:

1. Professor Jean Bethke Elshtain has claimed that “what we had in Roe was a disruption of citizen politics and the juridicalization and medicalization of the issue [in which] [t]hose opposed were cut out of the debate …” She says that Brown, by contrast, involved a “dialogue” between the Court and legislatures. Is she correct? Why or why not?

2. Is Roe any more or less a legitimate exercise of judicial review than was Lochner? Is it any more or less legitimate than (the far less famous and controversial) cases of Meyer, Pierce, Barnette, and Griswold?

3. Can Roe be defended as consistent with footnote four of Carolene Products?
4. Someone once joked that for the last thirty years, the job of any constitutional theory has been to explain why Lochner was wrong and Brown was right, and then to say what the Court should have done in Roe. Does that strike you as a reasonable “job description” for constitutional theory? Why or why not?

5. The Justices in Griswold, Roe, Bowers, and Casey use text and history in a wide variety of different ways. Which uses are the strongest and why?

6. According to Tushnet, “the question of whether judicial review benefits progressive and liberal causes more than it harms them seems rather difficult.” (p. 152). Should that conclusion matter to one’s assessment of whether judicial review is a defensible political institution? If so, how?

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Week 9: November 19. Reading the Constitution III: the Religion Cases 4TH PAPER DUE MONDAY NOVEMBER 18 AT 5:00 PM

1. Wisconsin v. Yoder, Murphy, pp. 1187-1193
2. Thomas v. Review Board, Murphy, pp. 1193-1199
3. Employment Division, Department of Human Resources v. Smith, pp. 1199-1212
5. Sanford Levinson, “Promoting Diversity in the Public Schools (Or, to What Extent Does the Establishment Clause of the First Amendment Hinder the Establishment of More Genuinely Multicultural Schools?)”, in Barber, pp. 193-222

When reading the assignment, please consider the following questions:

1. Agree or disagree with the following statement: “When we evaluate the legitimacy of judicial review, we should regard cases like Yoder and Barnette, which involve enumerated rights, very differently from cases like Roe, which do not.”

2. Suppose that, after Thomas is decided, another claimant (we might call him “Secular Thomas”) raises a similar claim. Secular Thomas is a committed pacifist, but he does not regard his beliefs as religious in character. Should he, too, enjoy constitutional protection? Why or why not? Does your answer assume any particular view about how text and history matter in constitutional interpretation?

3. To what extent is it permissible for state educational policy to inculcate specific norms? Must the state attempt to be neutral with regard to religion? If so, what does that mean? If not, what posture should the state adopt toward religion and religious believers? What would Macedo and Levinson say about these questions? Are their views persuasive? Why or why not?

4. In Smith, Justice Scalia writes, “It may fairly be said that leaving accommodation to the political process will place a t a relative disadvantage
those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of religious beliefs.” (Murphy, 1204). Is Justice Scalia’s position inconsistent with Carolene Products footnote 4? What would Tushnet have to say about Scalia’s view?

**Week 10: November 26. Judicial Review Revisited**

1. “Nullifying and Reaffirming Brown,” in Murphy, 371-379
2. *Casey v. Planned Parenthood*, Part III and excerpts from Rehnquist dissent, in Murphy, pp. 1285-1291, 1300-1302
3. *Katzenbach v. Morgan*, in Murphy, 327-336
4. The Religious Freedom Restoration Act of 1993, in Murphy, 1212-1215
5. Materials on Boerne, RLPA, and RLUIPA (to be distributed)
6. Tushnet, pp. 154-194

When reading the assignment, please consider the following questions:

1. In *Casey*, the Supreme Court claimed that Americans’ “belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.” Murphy, p. 1291. What does this claim mean? Is it correct?
2. Agree or disagree: “History venerates Abraham Lincoln, who opposed *Dred Scott*, and vilifies the Southern politicians who opposed *Brown*. But, in fact, the Southern politicians were espousing the same institutional theory that Lincoln had adopted. The beliefs of the Southern politicians may have been immoral. But, if they held those beliefs sincerely, they had every much the same right as Lincoln did to resist the Supreme Court.”
3. Under what circumstances does the exercise of congressional power under Section Five of the Fourteenth Amendment constitute a threat to the power that Marshall claimed for the Court in *Marbury*? Under what circumstances does it constitute a threat to the Court’s legitimate interpretive power (which might be broader, or narrower, than what Marshall claimed in *Marbury*)? More specifically, did the Religious Freedom Restoration Act involve a threat to the power claimed in *Marbury*?
4. According to Tushnet, “The courts might be **more** willing to regulate police activities if they could do so without invoking the Constitution. In this odd way, the existence of judicial review may actually **reduce** our protection against government overreaching.” (p. 165). What is Tushnet’s argument for this proposition? Is it persuasive? Does it provide a good reason to oppose judicial review?
5. Tushnet defends “populist constitutional law” as a way to create “the people of the United States as a people by providing a narrative that connects us to everyone who preceded us.” (p. 182). What does he mean by this argument? Is the argument persuasive?
THANKSGIVING BREAK: November 28 – December 1. Happy Thanksgiving!

**Week 11:** December 3. The Constitution in Crisis: Judicial Review and the Threat of Terrorism

Photocopied materials

**Week 12:** December 10. Topic and assignment TBA.

Photocopied materials.

Final Paper is Due on January 15, 2002.