

**THE PEOPLE AND THE JUDGES:  
CONSTITUTIONAL POLITICS AND JUDICIAL REVIEW IN AMERICAN HISTORY**

What has been the role of the people themselves in developing constitutional rules? To what degree are constitutional issues legal and to what degree political? What is the relationship between constitutional politics and constitutional law? We will read and critique works that draw conclusions about these questions based on American constitutional history.

**Week One (March 3, 2008)—Popular Constitutionalism, Judicial Supremacy, and American Constitutionalism**

Please read excerpted versions of *Marbury v. Madison*, *Cooper v. Aaron*, and *City of Boerne v. Flores*. Most constitutional history casebooks have excerpts from all three. Excerpts from *Marbury* and *Cooper v. Aaron* may be found in Michael Les Benedict, *Sources in American Constitutional History* (Lexington, Mass.: D.C. Heath, 1996). *Documents of American Constitutional and Legal History*, ed. Melvin I. Urofsky and Paul Finkelman, 3d ed. (N.Y.: Oxford University Press, 2008) has excerpts from all three. You may also be able to find excerpts online—certainly of *Marbury*. I did not find excerpts of the others by googling. Of course, you can find the cases in their entirety online. Attend especially to the discussions of judicial authority.

Christopher L. Eisgruber, “Judicial Supremacy and Constitutional Distortion,” in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change*, ed. Sotirios Barber and Robert P. George (Princeton, N.J.: Princeton University Press, 2001): 70-90.

Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 3-226 (through chapter 8).

Larry D. Kramer, “Popular Constitutionalism, Circa 2004,” *California Law Review* 92 (July 2004), 959-1011. This is an expanded, more complete version of the ninth, and last, chapter of Kramer’s book.

**Week Two (March 10, 2008)—“Dualist” Constitutionalism: Cabining Popular Constitutionalism and Constitutional Politics**

Bruce Ackerman, “Constitutional Politics/Constitutional Law,” *Yale Law Journal* 99 (December 1989): 453-547. Read 461-71, an early articulation of Ackerman’s “dualist project.”

Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass.: Harvard University Press, 1998).

Ackerman, "Constitutional Politics/Constitutional Law," 515-47—Ackerman's discussion of the implications of his theory for judicial interpretation.

### **Week Three (March 17, 2008)—Popular Constitutionalism and Constitutional Politics in American History: Examples**

Gerald Leonard, "Party as a 'Political Safeguard of Federalism'" Martin Van Buren and the Constitutional Theory of Party Politics," *Rutgers Law Review* 54 (Fall 2001): 221-81.

Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (Lawrence: University Press of Kansas, 2007).

Wayne D. Moore, "Toward Constitutional Citizenship: Unofficial Commitments," in Moore, *Constitutional Rights and Powers of the People* (Princeton, N.J.: Princeton University Press, 1996), 37-65. Also published as "Constitutional Citizenship" in *Constitutional Politics*, 238-260.

Jim Pope, "Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1958," *Law and History Review* 24 (Spring 2006): 45-113.

### **Week Four (March 24, 2008)—Legislative and Executive Constitutionalism, and Judicial Review**

Rebecca Zietlow, *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights* (New York: New York University Press, 2006).

Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999), 6-14, 54-71, 95-128, 177-94.

Owen Fiss, "Between Supremacy and Exclusivity," *Syracuse Law Review* 57 (2007): 187-208.

### **Week Five (March 31, 2008)—Constitutional Politics and Judicial Review**

Howard Gillman, "How Political Parties Can Use the Courts to Advance their Political Agendas: Federal Courts in the United States, 1875-1891," *American Political Science Review* 96 (September 2002): 511- 24.

Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87 (October 2001): 1045-1109.

Jack M. Balkin and Sanford Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *Fordham Law Review* 75 (November 2006): 489-531.

**Week Six (April 7, 2008)—Popular Constitutionalism, Constitutional Politics, and the Courts**

Keith E. Whittington, “Give ‘The People’ What they Want?” *Chicago-Kent Law Review* 81 (2006): 911-22.

Robert Post, “The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,” *Harvard Law Review* 117 (November 2003): 4-112.

Robert Post and Reva Segal, “Popular Constitutionalism, Departmentalism, and Judicial Supremacy,” *California Law Review* 92 (July 2004): 1027-43.

Edward Chemerinsky, “In Defense of Judicial Review: A Reply to Professor Kramer,” *California Law Review* 92 (July 2004): 1013-25.