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.


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

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


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


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


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


