The Politics of Law
LDSP 390/02
PLSC 379/05
Spring 2004

Tuesday: 4:00-6:40pm
Jepson Hall 106

Professor Gary L. McDowell
Jepson Hall 135
Office Hours: Wednesday 5:30-6:30
and by appointment

I may not know much about law but I do know that
one can put the fear of God in judges.
– Theodore Roosevelt

The politics of law, especially the politics surrounding the question of how judges interpret the written Constitution and the laws made pursuant to it, has been a part of the American legal tradition from the beginning. Thomas Jefferson, for example, complained of what he saw as the “base prostitution of law to party passions” and argued that in the hands of the great Chief Justice John Marshall the Constitution was “nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice.” Nearly two centuries later President Ronald Reagan would campaign on the promise to appoint to the federal judiciary people who would act like judges and “not like a bunch of sociology majors.” Yet however constant the politics of law and judging were through much of the history of the American republic, something changed in the second Reagan administration with his nomination in 1987 of Judge Robert H. Bork to the Supreme Court of the United States. The refusal of the Senate to confirm Bork’s nomination set in motion a new politics of law and judging that continues to plague both liberals and conservatives, both Democrats and Republicans. This course will examine this new politics of law historically, theoretically, and institutionally.

Attendance and participation are expected and will be reflected as part of the final grade (15%). There will also be a final examination (35%), one short paper on a topic to be assigned (15%), and a major research paper on a topic to be agreed (35%).

Participation will be calculated on quality, not simply quantity. It is expected that all
the readings for a given date will be done in advance of that class meeting and everyone will be prepared to discuss the assigned materials.

The short paper assignment will be distributed in class on February 17th; the paper will be due in class on March 2nd. Late papers will be penalized one letter grade per day, including weekends.

The topic for the research paper must be approved in advance. A one-page, double-spaced proposal, accompanied by a preliminary bibliography will be due in class on March 23rd. The paper is due in class on April 20th. As with the short paper assignment, late research papers will be penalized one letter grade per day, including weekends.

Required Texts:

- Henry J. Abraham, *Justices, Presidents, and Senators*
- Robert H. Bork, *The Tempting of America*
- Arthur Hogue, *Origins of the Common Law*
- Ralph Ketcham, ed., *The Anti-Federalist Papers*
- Clinton Rossiter, ed., *The Federalist Papers*
- Antonin Scalia, *A Matter of Interpretation*
- James Stoner, *Common Law and Liberal Theory*

Reserved Texts:

- Raoul Berger, *Government by Judiciary*
- Ethan Bronner, *Battle for Justice*
- Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland*
- Eugene W. Hickok and Gary L. McDowell, *Justice vs. Law*
- John Locke, *Two Treatises of Government*
- John Locke, *Essay Concerning Human Understanding*
- Gary L. McDowell, *Equity and the Constitution*
- Gary L. McDowell, *Curbing the Courts*
- Keith Whittington, *Constitutional Interpretation*
- Christopher Wolfe, *The Rise of Modern Judicial Review*

Cases and Law Reviews:

The assigned court cases are most easily found at [http://www.findlaw.com](http://www.findlaw.com) or at lexis-nexis. Law review articles assigned below can be found most conveniently at [http://www.heinonline.org](http://www.heinonline.org). You can also use any
I. The Current Battleground: The Bork Nomination and Beyond
(January 13, 20)

*Griswold v. Connecticut,* 381 U.S. 479 (1965)
*Roe v. Wade,* 410 U.S. 113 (1973)


Ethan Bronner, *Battle for Justice,* chapters 2, 5, 6 and “Conclusion”

Gary L. McDowell, *Curbing the Courts,* chapter 5.


II. Foundations of American Law: Ancient Antecedents
(January 27)

*Aristotle,* *The Rhetoric,* I.13-14

*Cicero,* *The Republic,* III.xxii

*Cicero,* *The Laws,* I.v-xv; I.xviii; II.iv-vi

Justinian, *The Institutes,* “Dedication”; I.1-3
(January 27)

Arthur Hogue, Origins of the Common Law, chapters 1-3; 6-9
(Recommended: chapters 4-5; 10)

The Constitutions of Clarendon (1164)

The Assize of Clarendon (1164)

The Treatise Commonly Called ‘Glanvill’ (c. 1188), “Prologue”

Magna Carta (1215)


Christopher St. Germain, Doctor and Student (1528), chapters 1-17

Sir Edward Coke, The Reports:.
   Fuller’s Case, 12 Co. Rep. 41 (1607)
   Prohibitions of the King, 12 Co. Rep. 63 (1608)
   Dr. Bonham’s Case, 8 Co. Rep. 107a (1616)

IV. Foundations of American Law: The Enlightenment
(February 3)

Thomas Hobbes, The Elements of Law (1640), Part II, chapter 10

Thomas Hobbes, Leviathan (1651), chapters 4, 26, 46

John Locke, Second Treatise of Government (1690), chapters 2, 7-10, 18

John Locke, Essay Concerning Human Understanding (1690), Book III, Chapter 10

Thomas Rutherford, Institutes of Natural Law (1754), Book II, Chapter 7

Sir William Blackstone, Commentaries on the Laws of England (1765),
“Introduction”; Section 2, “Of the Nature of Laws in General”

John Trenchard and Thomas Gordon, Cato’s Letters, No. 42, 26 August 1721
James Stoner, *Common Law and Liberal Theory*


**V. Foundations of American Law: The American Founding**
(February 10, 17)

The Declaration of Independence

The Articles of Confederation


The Struggle for Ratification: Anti-Federalists and Federalists

*The Letters of the Federal Farmer* (Ketcham, ed. *Anti-Federalist Papers*), pp. 256-269

*The Essays of Brutus* (Ketcham, ed., *Anti-Federalist Papers*), pp. 269-280; 293-309


**VI. Politics and Law in American Constitutional History**

**A. The Early Years of Judicial Review**
(February 24)

*Calder v. Bull*, 3 Dallas 386 (1798)

*Marbury v. Madison*, 1 Cranch 137 (1803)
McCulloch v. Maryland, 4 Wheaton 316 (1819)

Barron v. Baltimore, 7 Peters 243 (1833)


Henry J. Abraham, Justices, Presidents, and Senators, chapter 5

B. The Crisis of the House Divided and Constitutional Transformation
(March 2)

Dred Scott v. Sandford, 19 Howard 393 (1857)

Abraham Lincoln, “Speech on Dred Scott,” 26 June 1857

Abraham Lincoln, “Cooper Institute Address,” 27 February 1860

Thirteenth, Fourteenth, and Fifteenth Amendments

The Civil Rights Cases, 109 U.S. 3 (1883)

Abraham, Justices, Presidents, and Senators, chapters 6-7

C. The Transformation of “Due Process of Law”
(March 16)

Lochner v. New York, 198 U.S. 45 (1905)

Muller v. Oregon, 208 U.S. 412 (1908)

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)


Eugene Hickok and Gary L. McDowell, Justice vs. Law, chapter 4.


Abraham, Justices, Presidents, and Senators, chapters 8-9
D. Incorporating the Bill of Rights and the Rise of Fundamental Rights 
(March 23)

*Barron v. Baltimore*, 7 Peters 243 (1833)

*Gitlow v. New York*, 268 U.S. 652 (1925)


*United States v. Carolene Products Co.*, 304 U.S. 144 (1938)

*Buck v. Bell*, 274 U.S. 200 (1927)

*Skinner v. Oklahoma*, 316 U.S. 535 (1942)


E. The Revolution in Rights and the Rise of Moral Judging 
(March 30, April 6)


*Gideon v. Wainwright*, 372 U.S. 335 (1963)

*Griswold v. Connecticut*, 381 U.S. 479 (1965)


Gary L. McDowell, *Curbing the Courts*, chapter 1.

Abraham, *Justices, Presidents, and Senators*, chapters 10-12

Recommended:
VII. Politics and Law: The Debate over Original Intention
(April 13, 20)


Justice William Brennan, speech before the Text and Teaching Symposium, Georgetown University, 12 October 1985


