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Pamela S. Karlan  
*Stanford Law School*

Daniel R. Ortiz  
*University of Virginia, School of Law*

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# Constitutional Elitism? Some Skepticism About Dogmatic Assertions

Pamela S. Karlan\*  
Daniel R. Ortiz\*\*

Does constitutional law represent the dogma of the educated elite? Although one of our co-panelists takes this question as a springboard for broad argument about contemporary “culture wars,”<sup>1</sup> we prefer to take the question on its own terms. That seems, frankly, more interesting. But what are those terms exactly? Upon reflection, all three of the question’s key terms—“dogma,” “educated elite,” and “constitutional law”—pose interpretive troubles. Luckily, they are fruitful ones. In this brief essay, we will try to show that, in an important sense, the question we were charged with discussing is trivially true and uninteresting. We feel, therefore, it is the wrong question to ask. Instead, heeding the original question’s critical thrust, we suggest a different, comparative question, one which ultimately leads us to defend constitutional law as a general practice. In the end, we believe, democracy requires a robust form of it.

## I. DOGMA?

Let’s start by looking closely at the term “dogma.” What does it convey? To some, it undoubtedly suggests that constitutional law is a knee-jerk and smug practice, one that rests on inadequately justified assumptions. To others, it may suggest that constitutional law is intolerant, illiberal, and authoritarian. To some, it probably suggests both. Of which of these types of dogmatism, if either, is constitutional law guilty?

At one deep level the answer has to be both. Like nearly every other interesting social practice, constitutional law rests at some point on assumptions running so deep that they can only be asserted, not justified.<sup>2</sup> Indeed, to the extent we do justify them, we do so only by resorting to other cultural beliefs and practices, which in turn hang on still other beliefs and practices, perhaps including the very ones we

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\* Professor of Law, Stanford Law School.

\*\* John Allan Love Professor and Richard and Elizabeth Merrill Research Professor, University of Virginia School of Law.

We delivered an earlier version of this essay at the meeting of the Constitutional Law Section at the AALS Annual Meeting on January 9, 1998.

1. Jeremy Rabkin, *Partisan in the Culture Wars*, 30 MCGEORGE L. REV. 105 (1998) (discussing Justice Scalia’s view that the Supreme Court mediates the American culture wars in favor of the liberal position).

2. For a general philosophical discussion of this position, see RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 361 (1979).

originally set out to justify.<sup>3</sup> Ultimately, the field of cultural belief and practice rests largely on itself with little, if anything, outside validating its major parts. In this sense, constitutional law simply cannot be deeply self-critical. But that is less a criticism than an inevitability.

Similarly, like all our central cultural practices, constitutional law does not tolerate some outcomes. Any meaningful social practice has to reject certain values. Otherwise, it would have no commitments to stand on and nowhere to go. Ultimately, any *completely* open practice would be vacuous, just as, in real life, any *completely* open mind would have to be empty.<sup>4</sup> Consider for a moment one of our most central political practices: democracy. It is very open. It allows people to express a wide range of opinions and to implement many different visions of the good. Yet, it certainly excludes much that some people are deeply committed to—dictatorship of the proletariat and theocracy, to give just two examples.

But practices can be smug and intolerant to different degrees and in different ways. Some may invite internal criticism, some may reject it, and some may be more open to competing commitments than may others. Democracy, for example, permits greater questioning of its own merit and of the merit of various public policies than do most forms of theocracy. The more interesting question, then, is not whether constitutional law is dogmatic—it surely is—but whether it is more dogmatic than its major competitor: politics. Is constitutional law less self-critical and tolerant than politics?

On this point, we are officially agnostic, though, frankly, we do have some suspicions. For one thing, it is not, as many seem to assume, self-evident that constitutional law is more self-satisfied and intolerant than politics. Indeed, self-questioning and openness are characteristics we typically celebrate in judicial

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3. A simple, linguistic example of this phenomenon occurs in *Roth v. United States*, 354 U.S. 476 (1957), one of the Supreme Court's leading obscenity cases. In that case, the Court held that obscene speech totally escaped First Amendment protection. The question then became, of course, which examples of sexually explicit speech were obscene and which were not. The Court drew the line, in part, as follows: "[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.* at 487. "Prurient" became the key term. In a footnote, the Court, relying on Webster's, defined it as follows: "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd." *Id.* at n.20 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged 2d ed. 1949)).

But many of these descriptions, like "[i]tching; longing; uneasy with desire or longing," would apply equally well to non-obscene depictions of sex. Others, like "morbid," would not seem to be required, for healthy but vivid explicitness will do. To the extent the definition works, it must rest on terms like "lascivious" and "lewd." But what do these terms mean? The same dictionary defines "lascivious" as "wanton; lewd; lustful," WEBSTER'S NEW INTERNATIONAL DICTIONARY 1395 (Unabridged 2d ed. 1949), and "lewd" as "lustful; libidinous; lascivious; unchaste," *id.* at 1423. The key legal term, in other words, is defined by reference to other terms that largely rely on each other for their meaning. No matter where we turn, one set of social practices underwrites another.

4. See Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 743 (1991) (implying that openmindedness in decisionmaking could actually promote improper choices).

opinions.<sup>5</sup> It is also not clear to us that constitutional law rests on less well-justified assumptions than does politics. For one thing, politics does not have to justify its outcomes substantively. It often does, of course, but in the end democratic procedure, not the merits, legitimizes political outcomes. One of the wonderful things about our politics is that voters can make stupid, but legitimate, decisions.<sup>6</sup> Finally, we don't see that constitutional law is less tolerant than politics. Politics may, of course, permit some outcomes that constitutional law would not, but many of those outcomes are themselves intolerant. It is somewhat ironic that decisions protecting individual choice from legislative regulation most often provoke the charge of intolerance. In these cases, judicial intolerance means rejecting legislative regulation which is itself intolerant of some individual choices. Which type of intolerance should count more?

At the deepest level, once we get beyond the indisputable fact that courts rely on the Constitution to strike down some politically enacted measures, it is far less clear that "constitutional law" and "popular democracy" are inevitably conflicting practices. Our history shows that broadly inclusive, majoritarian popular democracy is *itself* in large part the product of constitutional law. To us, there is considerable irony in the fact that Alexander Bickel's *The Least Dangerous Branch*, which coined the phrase "counter-majoritarian difficulty,"<sup>7</sup> was published in 1962, the very year when the Supreme Court launched the Reapportionment Revolution.<sup>8</sup> For much of American history, the franchise itself was dramatically restricted by practices such as literacy tests,<sup>9</sup> poll taxes,<sup>10</sup> and other restrictive registration requirements.<sup>11</sup> Moreover, the apportionment schemes that produced congressional delegations and state legislatures were structurally counter-majoritarian; that is, they deliberately gave disproportionate power to numerical minorities such as rural

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5. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25-26 (1962) (opining that "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government").

6. See J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 *GEO. WASH. L. REV.* 1, 4-5 (1981) (illustrating that voters may make poor choices but that judges should not use that as a premise for judicial oversight).

7. BICKEL, *supra* note 5, at 16-17.

8. See *Baker v. Carr*, 369 U.S. 186 (1962) (holding that challenges to reapportionment plans are justiciable). For a further development of this irony, see Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in *Reason and Passion: Justice Brennan's Enduring Legacy* 207, 208-11, 218-19 (E. Joshua Rosenkranz & Bernard Schwartz eds. 1997), and Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 *VA. L. REV.* 1, 12-14 (1991).

9. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (discussing the discriminatory use of literacy tests).

10. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating, as a denial of equal protection, an annual \$1.50 poll tax imposed by Virginia on all residents over 21).

11. For more extensive discussion of restrictions on the franchise, see, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 21-102 (1998).

voters in Tennessee or upstate voters in New York.<sup>12</sup> The Supreme Court—in an act that the dissenters passionately castigated as the dogmatic imposition of the majority’s own political philosophy<sup>13</sup>—imposed the requirement of one person, one vote, which forms a key starting point for majority rule.<sup>14</sup> It is only because the Constitution gives Congress the power to enforce guarantees of due process and equal protection against the states,<sup>15</sup> and their existing “democratic” arrangements, which the national political culture continued the work of imposing more inclusive politics from the top down, through passage of the Voting Rights Act of 1965<sup>16</sup> and the National Voter Registration Act of 1993.<sup>17</sup>

Even today, political outcomes are only imperfect evidence of majoritarian choice. In an important sense, our vision of elections is especially dogmatic. Americans seem quite smug and unself-critical about a basic piece of our election system, the use of winner-take-all single-member districts to elect legislators.<sup>18</sup> But the result of this practice—which few other Western democracies and virtually none of the emerging democracies use as much as we do<sup>19</sup>—is that an appallingly high percentage of American voters cast wasted votes, that is, votes that do not contribute to the actual election of a candidate.<sup>20</sup> Vote wastage contributes to a sense of voter frustration, as many citizens come to believe that their votes don’t really count.<sup>21</sup> Moreover, because the wastage is often not random—it is the intended consequence of gerrymandering—the election results may provide a skewed picture of popular sentiment. In this light, the 1994 Republican Revolution seems quite overblown. It turns out that fewer than twenty percent of eligible voters voted for winning Republican candidates, and roughly a third of all votes cast were

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12. See, e.g., *Baker*, 369 U.S. at 193-96 (explaining that because of population growth in non-rural areas, the preexisting apportionment of votes did not accurately reflect the population distribution of the state).

13. See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 748-50 (1964) (Stewart, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 590-91, 614-22 (1964) (Harlan, J., dissenting); *Baker*, 369 U.S. at 299-300 (Frankfurter, J., dissenting).

14. Guinier & Karlan, *supra* note 8, at 218-19.

15. U.S. CONST. amend. XIV, § 5.

16. 42 U.S.C.A. §§ 1973-1973aa-6 (West 1994 & Supp. 1998).

17. 42 U.S.C.A. §§ 1973gg-1973gg-10 (West 1994 & Supp. 1998).

18. See Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 103 n.87 (quoting the observation that “[w]ith confidence born of continental isolation, Americans have come to assume that their institutions . . . are the prototype’ for all democratic systems” and then describing the wide variety of alternatives to the American system) (quoting Richard Rose, *A Model Democracy?*, in *LESSONS FROM AMERICA: AN EXPLORATION* 131 (Richard Rose, ed. 1974)).

19. See, e.g., ISSACHAROFF, KARLAN & PILDES, *supra* note 11, at 714, 717-18 (noting that only 4 of the 36 large nations with high human rights ratings do not use proportional representation in at least some of their national elections).

20. See CENTER FOR VOTING AND DEMOCRACY, *DUBIOUS DEMOCRACY: 1994 ELECTIONS: U.S. HOUSE OF REPRESENTATIVES 7* (1995) [hereinafter *DUBIOUS DEMOCRACY*] (reporting that 37.6% of the votes cast in the 1994 congressional elections were wasted).

21. *Id.* at 1-2.

“wasted.”<sup>22</sup> And given that only slightly more than one-third of all eligible voters even bothered to cast a ballot, perhaps we should be even more skeptical of a claim that constitutional law is a singularly dogmatic practice.

## II. ELITISM?

The second key term in the question, “educated elite,” proves just as troubling. To some, the term will merely suggest that constitutional law is the work product of educated people. To others, it will suggest a more critical point: that it is the work product of people who are out of touch with and contemptuous of the common person. To still others, it will suggest that constitutional law reflects an antidemocratic and condescending intellectualism.

Like the charge of dogmatism, the charge of educational elitism is trivially true in one sense. Constitutional law does represent the work product of highly educated people. The judges, attorneys, and law clerks who most deeply shape constitutional law have received more schooling than most people. And, as a group, the Founders were certainly highly educated. That much is uncontroversial. As before, then, the more interesting question is a comparative one: are constitutional law’s shapers more educated and more elite than the people who shape politics? Again, we’re agnostic. The political elite is itself well-educated and the people who directly shape the largest body of our law—regulatory law—are certainly well-educated too.

If it has any bite, the charge of educational elitism must mean that the educated people who shape constitutional law are more out of touch with the common person than are the educated people who shape other types of law. Is that true?

Here, too, our experience should caution us in assuming that political outcomes are themselves exempt from charges of elitism. Consider just the simple question of participation itself. As we have already noted, most people do not vote.<sup>23</sup> Of more salience for the present discussion, voting tends to be directly correlated with income and education.<sup>24</sup> Thus, to the extent that political outcomes reflect the electorate, they too are likely to reflect the sentiments of a more educated and more elite group than the people as a whole.

Our system of campaigns and campaign finance may further skew political influence toward the wealthy. Modern campaigns require money, and lots of it, to

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22. According to *Dubious Democracy*, voter turnout in the 1994 congressional elections was 37.6% and Republicans received 51.3% of the votes cast and 52.9% of the seats filled. *Id.* at 7.

23. See HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 88 (4th ed. 1994) (reporting census figures on voter participation showing that only in presidential election years do a majority of eligible citizens claim to have voted); see also Pamela S. Karlan, *Nor By Money But By Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1455 n.1 (1994) (discussing reasons why the census surveys may actually overestimate voter turnout).

24. See RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 13-36 (1980).

communicate messages to the voters.<sup>25</sup> Thus, groups with money are more likely to have effective access both to voters before the election and to politicians afterwards. In the political arena, the First Amendment seems to operate entirely as a negative liberty.<sup>26</sup> By contrast, there are several features of the judicial system that at least dampen somewhat the effects of pre-existing wealth distributions. Litigants, unlike politicians, can proceed *in forma pauperis*.<sup>27</sup> Criminal defendants must be given lawyers.<sup>28</sup> And on a more prosaic level, the Supreme Court gives both sides the same amount of time to present their argument to the justices regardless of disparities in wealth. We don't mean to be naively optimistic—despite the Supreme Court's protestations to the contrary,<sup>29</sup> the amount of money people have is often a pretty good indicator of how much justice they can obtain.<sup>30</sup> But we do see the ability of the elite to get its way in the political system as a reason not to assume that constitutional law is a more hospitable playing field than ordinary politics.

Our history, in fact, suggests that economic elites are quite capable of achieving their ends through ordinary politics. At the turn of the last century, for example, the planter aristocracy in the South pursued a strategy of divide-and-conquer that fractured the populist coalition of blacks and poor whites.<sup>31</sup> Today, we may be witnessing a similar creation of so-called “wedge” issues that drive apart groups who might otherwise make economic common cause.<sup>32</sup>

Again, once we get beyond a few high-profile examples trumpeted by social conservatives, it turns out that many of the most expansive areas of judicial intervention serve the interests of citizens at the *bottom* of the social, economic, and political orders rather than at the top. The criminal procedure revolution provides a particularly powerful example. Prior to the Warren Court, what sort of people were being stopped and searched by police for no reason or invidious reasons; arrested without probable cause; railroaded through the system without lawyers; or

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25. See, e.g., ISSACHAROFF, KARLAN & PILDES, *supra* note 11, at 658-59 (showing the dramatic increase in campaign spending in the past generation). For overviews of campaign finance, see, for example, *Buckley STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* (1998); *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* (Anthony Corrado et al. eds. 1997).

26. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 209 (1993) (explaining that the First Amendment acts as a negative liberty to free individuals from government intrusions of their free speech rights).

27. See 28 U.S.C.A. § 1915 (West 1994) (permitting the filing of *in forma pauperis* complaints).

28. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

29. See *Douglas*, 372 U.S. at 355 (“[T]here can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has.”) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

30. See Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626 (1991).

31. For more extensive discussions of this point, see, for example, J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

32. For one recent account of this process, see THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991). See also Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 320-22 (1997) (discussing the relationship between this problem and voting rights).

being tried before unrepresentative, improperly instructed juries? Not the members of the educated elite. For the most part, members of the educated elite—unless they were also members of some other marginalized group, such as blacks or gays—did not need constitutional protections: the political system in which they exercised a fair degree of power was responsive to their demands for respectful treatment and due process. As we have already suggested, it is no accident that the brutalities of the criminal justice system fell most heavily on groups that were also excluded, either formally or practically, from democratic politics.

### III. CONSTITUTIONAL LAW?

We all assume we know our field of inquiry, but what does “constitutional law” mean in the question we were given? Is the question meant to attack only particular methods of constitutional interpretation? In other words, does the question envision constitutional law narrowly as just nonoriginalist interpretation, or, more narrowly still, as just one form of nonoriginalism—say, fundamental values as opposed to natural law or process theory? Or does the question aim at larger targets, perhaps at all forms of judicial review or at the very idea of constitutionalism itself? We find this last prospect most interesting. For, in one sense, constitutionalism is necessarily elitist. Its bite lies in its counter-majoritarianism. Even if we could identify and straightforwardly apply a “Founders’ Constitution,” for example, we would open ourselves up to charges of both dogmatism and elitism. Not only that, we’d be guilty!<sup>33</sup> Perhaps, then, the panel’s question in the end turns back onto itself. Does the critique it implicitly contains ultimately devour all constitutionalism? That is no reason, of course, not to ask the question—just a caution to those who wish that their wishes may come true.

Recent experience suggests yet another cautionary point. Constitutional law is not just—and on the state level, perhaps not even primarily<sup>34</sup>—something judges do. It is also something that the people themselves do. So Proposition 209 in California—which bars all popularly elected government bodies in California from engaging in race- or gender-conscious affirmative action<sup>35</sup>—is constitutional law. Amendment 2 in Colorado—which placed extraordinary obstacles in the path of

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33. That is because the Founders represented one group of elites at the Founding and because their own results—the rules in the Constitution—at least partly reflect their own unexamined beliefs and prejudices.

34. For recent discussions of the initiative process, in which state constitutions are amended by popular vote, see, for example, David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13 (1995); Peter Schrag, *Take the Initiative, Please: Referendum Madness in California*, 28 AM. PROSPECT 61 (1996).

35. See CAL. CONST. art. I, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

attaining civil rights for gays and lesbians<sup>36</sup>—was constitutional law. To say that constitutional law is the product of the educated elite is to talk about only one kind of constitutional law produced by one kind of people in one kind of system. When the Constitution of Colorado dictates one thing while the Constitution of the United States demands another, we cannot answer the question of what each constitution means, and which constitution should prevail, by claiming that one is the product of democratic deliberation and the other the product of dogmatic elitism. Rather, we must confront substantive issues head on. That means recognizing that the antidote to elitist dogma is not unquestioning populism but rather careful and open-minded thought about what the Constitution and democratic self-government require.

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36. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996). For a discussion of the barriers to political participation imposed by Amendment 2, see Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 *HOUS. L. REV.* 289 (1997).