
THE CONSTITUTION AND DISDAIN

Steven G Calabresi*

It is a puzzle that Professor Pamela Karlan could fault the Roberts Court for its disdain for Congress in a case where the Court upheld an act of Congress that a popular majority hates. Nevertheless, Professor Karlan's *Foreword* to the *Harvard Law Review's* Supreme Court 2011 Term issue is full of disdain itself — disdain for the Constitution and disdain for federalism as well.¹ Karlan seems to think the Supreme Court ought never to strike down as unconstitutional any acts of Congress except for federal laws that close down the political process or that violate minority rights. She claims that the Congress that passed the Obama health care law in 2010 spoke for the American people but that the twenty-six states that challenged the health care law did not.² Karlan does not mention the fact that the House of Representatives voted twice to repeal the health care law, first in 2011 and again in 2012,³ nor does she mention the fact that a majority of Americans opposed the law when it was first passed⁴ and that a majority of Americans continue to favor repeal of the health care law today.⁵ This essay will explain why Karlan is wrong about the Constitution, wrong about

* Professor of Law, Northwestern University; Visiting Professor of Political Science, Brown University; Joseph R. Weisberger Visiting Professor of Law, Roger Williams University. This article expands on arguments first made in Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373 (1998). Special thanks to Gary Lawson for his helpful comments and suggestions and to Jason Fried for his help as my research assistant. I would like to dedicate this essay to Supreme Court Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito, Jr.

¹ Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

² Twenty-six states signed a joint challenge to the health care law and two additional states, for a total of twenty-eight, challenged it on their own. See *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part and rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); see also *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011); Complaint, *Oklahoma ex rel. Pruitt v. Sebelius*, No. 6:11-CV-00030 (E.D. Okla. Jan. 21, 2011).

³ Repeal of Obamacare Act, H.R. 6079, 112th Cong. (2012); Repeal of Obamacare Act, H.R. 2, 112th Cong. (2011).

⁴ See, e.g., *55% Favor Repeal of Health Care Bill*, RASMUSSEN REPORTS (March 25th, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/march_2010/55_favor_repeal_of_health_care_bill.

⁵ See, e.g., *Health Care Law*, RASMUSSEN REPORTS (LAST VISITED NOV. 7, 2012), http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/health_care_law (reporting that 50% of Americans favored repeal as of November 6, 2012, while 44% opposed repeal).

the countermajoritarian difficulty, and wrong about the implications for federalism umpiring of John Hart Ely's theory of judicial review.⁶

First, Karlan simply does not understand the countermajoritarian difficulty. Individual rights cases like *Lochner v. New York*⁷ or *Roe v. Wade*⁸ raise a countermajoritarian difficulty, as Professor Alexander Bickel argued, because they forbid government at *both* the federal and state levels from doing something.⁹ This difficulty is inherent in almost all individual rights cases, including cases where the individual right is actually present in the text of the Constitution, as with the freedom of speech.

In federalism cases, however, the Supreme Court chooses *which* majority should govern with respect to an issue as between national majorities and state majorities. Judicial umpiring of federalism cases is thus not countermajoritarian. Suppose the Supreme Court had ruled that the federal health care law in *National Federation of Independent Business v. Sebelius*¹⁰ was unconstitutional on enumerated powers ground. Such a ruling would not have meant that similar state health care laws, like the one in Massachusetts, were unconstitutional. It would only have meant that Congress had exceeded the bounds of its limited and enumerated powers. When the Supreme Court polices federalism boundary lines, it is playing umpire between the national government and the states. The Court is choosing whether majorities at the national level or majorities in each of the fifty states have power to govern regarding a disputed issue. Playing umpire between the national government and the states is simply not countermajoritarian in any way, nor is it undemocratic. Instead, the Supreme Court is simply deciding which democratic majority — federal or state — our Constitution and history empowers to rule.

Imagine that decisions have to be made about: (1) zoning in Palo Alto, California; (2) raising pay for California state employees; and (3) entering into an immigration control agreement with Mexico. Our Constitution and history make it clear that these decisions should be made by: (1) the City of Palo Alto; (2) the state of California; and (3) the federal government. Now imagine that Congress tried to legislate with respect to zoning in Palo Alto and with respect to pay raises for California state employees while California tried to negotiate a new immigration control agreement with Mexico. Democratic rule would obviously be enhanced in this hypothetical if the courts treated as le-

⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

⁷ 198 U.S. 45 (1905).

⁸ 410 U.S. 113 (1973).

⁹ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962) (identifying and discussing the “countermajoritarian difficulty”).

¹⁰ 132 S. Ct. 2566 (2012).

gally binding only the majority decision which was made by the legally competent jurisdictional unit.¹¹

One cannot have a democracy until one has a “demos,” that is, a recognized group of people who have jurisdiction over a certain issue. Letting California negotiate an immigration control agreement with Mexico or letting the federal government legislate with respect to zoning in Palo Alto is undemocratic because our Constitution and history assign those powers to other entities. When the wrong democratic jurisdiction rules regarding an issue, the result is either imperial colonialism or minority rule.¹² We would think that a Congress that adopted a special zoning law for Palo Alto was imperialistic, was overcentralized, and was treating Palo Alto as a kind of colony. We would also think, however, that a state that negotiated an immigration control agreement with a foreign power was a minority that was intruding into a sphere that our Constitution reserves to the federal government. It would be undemocratic for Congress to legislate regarding zoning in Palo Alto or for California to legislate regarding agreements with Mexico even if either decision were made by a vote of the majority of the people. “Majority rule or democracy presupposes that one knows and respects the relevant jurisdictional lines. Accordingly, judicial enforcement of the jurisdictional lines of democratic government is potentially democracy enhancing.”¹³

The United States is the third most populous country in the world (after China and India), and it is the fourth largest country in the world territorially (after Russia, Canada, and China). Democracy can work on so large a scale only if there is a firm sense of jurisdictional boundary lines that keeps the national government from being an imperial tyrant and that keeps the states from taking actions unilaterally that all the other states have to in some way pay for. Judicially enforced federalism is thus critical for the U.S. Constitution to continue to work.

The need for an umpire to police federalism boundary lines actually explains the emergence of judicial review in the first place in the United States, in Canada, in Australia, in India, in Germany, and most recently in the European Union.¹⁴ Federations need to have an umpire who can mediate between the nation and its provinces or states.

¹¹ See Steven G. Calabresi & Lucy Bickford, *Federalism and Subsidiarity: Perspectives from Law*, NOMOS (forthcoming 2012), available at <http://ssrn.com/abstract=1902971> (arguing that the United States is so populous and so territorially large that it requires a system of judicially enforced federalism).

¹² *Id.*

¹³ Calabresi, *supra* note *, at 1391.

¹⁴ Steven G. Calabresi & Jasmine Owens, *The Origins of Judicial Review* (unpublished manuscript) (on file with author).

Judicial review usually starts out by providing such a federal judicial umpire, and it then expands to offer federal judicial policing of individual human rights violations.¹⁵ Karlan is thus not only wrong to oppose Supreme Court policing of federalism boundary lines. She is actually attacking the paradigmatic cases that themselves gave rise to judicial review in the first place!¹⁶

The Supreme Court also plays umpire in separation of powers cases where the Court chooses which majority should govern as between the national majority that elects the President and the very different national majority that elects the Senate and the House of Representatives over a six-year cycle in races that go on district by district and state by state. As Professor Willmoore Kendall argues, both of these “[t]wo [m]ajorities” are national majorities, but they often disagree about what makes for good public policy.¹⁷ When the Supreme Court plays umpire in a separation of powers dispute between the President and Congress, there is again no countermajoritarian difficulty. Supreme Court adjudication of separation of powers issues keeps Congress and the President within their assigned and respective spheres of governance. It thus perfects the Madisonian system of horizontally divided power.

Just as federalism umpiring led to judicial review in the United States, Canada, Australia, Germany, the European Union, and India so too has separation of powers umpiring led to judicial review in France.¹⁸ The French Constitutional Council was created solely for the purpose of umpiring between the President and Parliament, but it has expanded into a full-fledged constitutional court, which also protects individual human rights.¹⁹ Separation of powers umpiring, like federalism umpiring, strengthens judicial review because it is not countermajoritarian as is individual rights judicial review.

¹⁵ Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 805–06 (1995).

¹⁶ See, e.g., *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (finding that the Court must distinguish between national commerce and matters primarily of concern to the states); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 64 (1824) (finding that Congress’s powers do not “extend to the regulation of the internal commerce of any State”); *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government[,] it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.”); .

¹⁷ See Willmoore Kendall, *The Two Majorities*, 4 MIDWEST J. POL. SCI. 317, 318–23, 335–36 (1960).

¹⁸ Calabresi & Owens, *supra* note 14.

¹⁹ See generally JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 1–56 (1992); MARTIN A. ROGOFF, *FRENCH CONSTITUTIONAL LAW* 167–252 (2011); JOHN A. ROHR, *FOUNDING REPUBLICS IN FRANCE AND AMERICA* 138–77 (1995); ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 3–116 (1992).

Professor John Hart Ely praises the judicial umpiring of federalism boundary lines in his discussion of the second holding of *M'Culloch v. Maryland* in *Democracy and Distrust*.²⁰ Ely's theory of judicial review explicitly calls on the federal courts to police the political process — as the Warren Court rightly did in the one-person, one-vote cases — to make sure that political insiders are not rigging the game against outsiders.²¹ Ely also argues that the courts should protect minorities from majoritarian prejudice.²²

Judicial policing of federalism and separation of powers boundary lines is essential under the U.S. Constitution because that document divides and allocates power vertically and horizontally among different majorities. Ely calls for deference to majority rule, but the Constitution empowers different majorities to rule on pay raises for California state employees and to make agreements with Mexico to control immigration. Policing the American political process to enhance majority rule requires first that one assess which majority is entitled to rule on an issue, as between a national majority and majorities in the states.

Judicial umpires are required under Ely's theory of judicial review because we cannot trust the insiders in Congress to be the judges of the scope of their own power. No one should be the judge of his own cause, and putting Congress in charge of the limits on its own power is like asking a fox to guard a hen house. The federal courts should presume that acts of Congress are constitutional, but if Congress intrudes into the domain where the Constitution says the states rule or the President rules, the federal courts should intervene. Judicial enforcement of federalism is as legitimate as judicial enforcement of the one-person, one-vote rule because both types of enforcement perfect our Madisonian system of constitutionally divided and allocated powers.

The bottom line is that the reality of American constitutional democracy differs radically from Karlan's simplistic account of a democratic Congress squaring off against a life-tenured Supreme Court. The U.S. Constitution sets up a complex system whereby power is divided both horizontally among the three branches of the federal government and vertically between the federal government and the states. No single one of these institutions speaks exclusively for the American people, as Karlan seems to believe.

²⁰ See ELY, *supra* note 6, at 85–86. The second holding of *M'Culloch v. Maryland* was that because Congress had the power to create the Bank of the United States and had exercised that power, the state of Maryland was preempted by the Constitution from taxing the federal bank while not taxing similarly situated state banks. See *M'Culloch*, 17 U.S. (4 Wheat.) at 425–37.

²¹ See ELY, *supra* note 7, at 102–04.

²² See *id.* at 136–70.

At the federal level, the Constitution creates three elected institutions: the President, the Senate, and the House of Representatives, each of which is elected over a rolling six-year cycle in three elections held two years apart. All three of these institutions in some way speak for and represent a majority of the American people. In addition, thousands of state officers are also elected at different times over the six-year federal electoral cycle, and thirty-nine out of fifty states elect their governors only in non-presidential election years.²³ These state elected officials also reflect the popular will. Karlan thus is just plain wrong when she implies that only the Congress, which was elected along with President Obama, speaks for the people. The states also speak for the people, as does the majority of the House of Representatives, which was elected in 2010 and which voted to repeal the health care law in 2011 and again in 2012.

American constitutional democracy differs radically from most parliamentary democracies. For example, unlike the United Kingdom, Americans sample the popular will three times over six years in differently sized constituencies. In the United Kingdom, the popular will is sampled only once in each constituency, often only every four or five years. As a result, our constitutional system is substantially more democratic than is the U.K. system for much the same reasons that a long-term tracking poll is superior to one poll taken two weeks before Election Day. Taking multiple samples in multiple constituencies leads to better information about what the people really want. Enduring popular movements may sweep the six-year cycle of three biennial elections, as the New Dealers did when they won the elections of 1930, 1932, 1934, and 1936, but most popular movements die out fairly fast — as did the Obama movement, which crashed and burned in 2010.

Enduring popular movements get, as a prize, the ability to reshape the Supreme Court, because the Supreme Court does in fact follow the national election returns for Presidents and senators.²⁴ At any given point in time, the Supreme Court reflects the views held by Presidents and senators ten to fifteen years earlier. Karlan seems oblivious to the fact that the Supreme Court might itself be a lagging indicator of what the people used to think as opposed to what they think now. She thus attacks the Court as being inherently undemocratic when in fact it

²³ Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2621 (2006) (documenting the thirty-nine state governors that are always elected in non-presidential election years and the two additional state governors that are elected every two years — in both presidential and nonpresidential election years).

²⁴ See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 13–15 (2d ed. 2008); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–95 (1957).

merely checks and balances passions of the moment in light of earlier majority preferences.

Karlan's *Foreword* also overlooks the fact that most of the text of the Constitution is about the division and allocation of power either among the three branches of the federal government or between the federal government and the states. This fact is true of all of Article I, except for Sections 9 and 10; of all of Article II; of most of Articles III, IV and VI; and of all of Article V. The Bill of Rights itself was a federalism provision until the Fourteenth Amendment incorporated it against the states, which is why it started by forbidding Congress from interfering with state established churches and ended with the Tenth Amendment.

The Constitution literally devotes thousands of words to describing the separation of powers and federalism but only fifty-two words, in the second sentence of the Fourteenth Amendment, to the protection of individual rights from incursions by the states. Yet Karlan seems to think that the Supreme Court should spend 95% of its time enforcing the fifty-two words in the second sentence of the Fourteenth Amendment and no time at all enforcing federalism or separation of powers guarantees. This argument is itself at war with the text of the Constitution, and it is in an important sense unconstitutional.

Karlan criticizes the Roberts Court for its decision in *Citizens United v. FEC*²⁵ as well as for the health care case, but even she concedes that Ely had criticized campaign finance laws out of concern that "the Burger Court was balancing away freedom of speech that the Warren Court had protected more robustly."²⁶ The whole complaint about campaign finance laws is that they protect incumbents from well-financed challengers. It would thus be hard to imagine a more clear-cut case where Ely's theory of judicial review would be applicable than with campaign finance cases.

Karlan also complains for good measure about the Supreme Court's decision in *Bush v. Gore*,²⁷ but that case also seems like a paradigmatic example of the Supreme Court policing the federal political process. In *Bush v. Gore*, the Supreme Court stopped a state court lawsuit that was brought by the then-incumbent Vice President, in which Vice President Gore tried to get the state courts to count in his favor thousands of paper ballots, which state election officials had refused to count.²⁸ For twenty years prior to *Bush v. Gore*, law professors led by Ely had called on the Supreme Court to police the political

²⁵ 130 S. Ct. 876 (2010).

²⁶ Kathleen M. Sullivan & Pamela S. Karlan, *Foreword: The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 699 (2004) (discussing ELY, *supra* note 6, at 233 n.27).

²⁷ 531 U.S. 98 (2000).

²⁸ See *id.* at 100–03.

process as the Court had done in the one-person, one-vote cases. In *Bush v. Gore*, the legal academy got exactly what it had been asking for.²⁹

Karlan's criticisms of *National Federation of Independent Business v. Sebelius*, of *Citizens United v. FEC*, and of *Bush v. Gore* all fall short of the mark. All these decisions are almost compelled by Ely's theory of judicial review rather than being foreclosed by it. Moreover, there is no countermajoritarian difficulty when the Supreme Court plays umpire in a federalism or a separation of powers dispute. The countermajoritarian difficulty arises only in individual rights cases.

²⁹ Steven G. Calabresi, *A Political Question*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 129, 137–44 (Bruce Ackerman ed. 2002).