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# The Tea Party and the Constitution

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## THE TEA PARTY AND THE CONSTITUTION

Christopher W. Schmidt\*

### ABSTRACT

*This Article considers the Tea Party as a constitutional movement. I explore the Tea Party's ambitious effort to transform the role of the Constitution in American life, examining both the substance of the Tea Party's constitutional claims and the tactics movement leaders have embraced for advancing these claims. No major social movement in modern American history has so explicitly tied its reform agenda to the Constitution. From the time when the Tea Party burst onto the American political scene in early 2009, its supporters claimed in no uncertain terms that much recent federal government action overstepped constitutionally defined limitations. A belief that the Constitution establishes clear boundaries on federal power is at the core of the Tea Party's constitutional vision.*

*Yet the most distinctive—and I believe ultimately the most significant—aspect of the Tea Party's constitutional vision is not necessarily the specifics of its constitutional claims (these ideas have long been common currency in conservative and libertarian circles), but the distinctly non-judicial and participatory approach the Tea Party has taken to its project of constitutional reform. The Tea Party offers a powerful case study what a recent generation of scholarship has identified as “popular constitutionalism.” Its constitutional agenda has little role for the courts. Tea Party activists have been strikingly successful in locating arenas of constitutional activism that do not depend upon the formal apparatus of the law, such as judges, lawyers, and complex legal doctrine. Rather than litigation, the Tea Party has pursued an agenda of constitutional practice focused on educational outreach and political mobilization. After describing the key elements of Tea Party constitutionalism, with a focus on the extrajudicial mechanisms through which the Tea Party has advanced its constitutional agenda, I conclude with an assessment of the possible impact of the Tea Party on constitutional law and practice, as well as its implications for future scholarship on popular constitutional mobilization.*

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We are dedicated to educating, motivating, and activating our fellow citizens, using the power of the values, ideals, and tenets of our Founding Fathers.

— Hartford Tea Party Patriots, Mission Statement<sup>1</sup>

## INTRODUCTION

Just about everyone in the United States professes to love the Constitution. But the Tea Party *really* loves the Constitution. To an extent that sets it apart from any major social movement of recent memory, the Tea Party has turned to the nation’s founding document as the foundation stone of a campaign designed to right the direction of a country believed to have gone astray. Whereas the usual pattern in modern American history has been for the Constitution only to intrude upon the popular consciousness in response to some clearly “constitutional” event—most typically a controversial Supreme

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<sup>1</sup> Hartford Tea Party Patriots, Our Mission, [http://www.thehartfordteapartypatriots.com/index.php?module=pagemaster&PAGE\\_user\\_op=view\\_page&PAGE\\_id=5&MMN\\_position=7:7](http://www.thehartfordteapartypatriots.com/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=5&MMN_position=7:7).

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Court opinion, occasionally something rarer like a presidential impeachment—today we are in the midst of a national debate over the meaning of the Constitution instigated by a grassroots social movement. Regardless of what one thinks of the Tea Party's politics or its claims about the Constitution, the movement's success in changing the role the Constitution plays in American political discourse should be recognized as one of its most significant achievements. In this Article I dissect the Tea Party as a constitutional movement, examining the ways in which this movement has used the Constitution and demands of constitutional fidelity as a tool of social and political mobilization.

The Tea Party contains a welter of oftentimes conflicting agendas, some quite pedestrian, others the disturbing offspring of right-wing conspiracists. Within this confusing constellation of ideas and viewpoints, however, there is a relatively stable ideological core to the Tea Party, a core particularly evident when one focuses on the vision of the Constitution regularly professed by movement leaders, activists, and supporters. The central tenets of Tea Party constitutionalism can be distilled down to four basic assumptions. One, the solutions to the problems facing the United States today can be found in the words of the Constitution and the insights of its framers. Two, the meaning of the Constitution and the lessons of history are not obscure; in fact, they are readily accessible to American citizens who take the time to educate themselves. Three, all Americans, not just lawyers and judges, have a responsibility to understand the Constitution and to act faithfully toward it. And four, the overarching purpose of the Constitution is to ensure that the role of government, and particularly the federal government, is a limited one; only by following constitutionally defined constraints on government can individual liberties be preserved. When we strip away the layers of cacophonous provocations and political bluster that has come to characterize the Tea Party (particularly as reported in the media), there is a certain coherence and logic to the Tea Party's constitutional project.<sup>2</sup> For many, the Tea Party has provided a compelling vision of the role of the Constitution in modern American life. Whether one agrees with this vision or not, it should be taken seriously.

A central assumption of this Article is that Tea Party constitutionalism is more than just a collection of controversial claims about the meaning of the Constitution and the intentions of the Founders. One of my goals is to emphasize a distinction between the substantive claims the Tea Party has made about the meaning of the Constitution and the processes by which the Tea Party has sought to make these claims authoritative in American life and politics. Most of the attention given to the Tea Party's constitutional project by the media and legal scholars has focused on the particulars of the constitutional claims that have emerged from the movement. Many are indeed attention-grabbing

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<sup>2</sup> In this Article I do not take on the difficult and important question of how to actually define the Tea Party. While there are nationally oriented Tea Party organizations, such as FreedomWorks and the Tea Party Patriots, the Tea Party has no central organizational apparatus. In order to engage with the Tea Party's constitutional agenda, I focus on the positions and actions taken by people who, for the most part, explicitly align themselves with the Tea Party movement. What I have identified as the central tenets of Tea Party constitutionalism are almost uniformly present in the mission statements of local Tea Party groups and in the published manifestos by Tea Party leaders.

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claims, calling for radical breaks in judicial doctrine and constitutional traditions, and often drawing on tendentious (or simply creative) accounts of the Founding Era and the Constitution's original meaning. In this way, the Tea Party Constitution has offered an inviting target for criticism and often ridicule. Yet, if one is interested in the ways in which constitutional claims—including ones that initially appear improbable, misguided, even crazy—are developed, mobilized, and eventually gain some level of resonance, then it is necessary to give attention to the quite uncontroversial ways in which the Tea Party has pursued its constitution claims. The central concern of this Article is constitutional *practice*. As Lawrence G. Sager has written in discussing this concept of constitutional practice, “What makes a constitution interesting is what a people do with it.”<sup>3</sup> I am interested in what the Tea Party is *doing* with the Constitution—not just what its members are saying about the Constitution, but where they are making their constitutional claims, to whom, and to what effect.

The Tea Party has created a constitutional movement centered on grassroots educational efforts, community mobilization and political engagement, with constitutional litigation playing a distinctly secondary role. While the Tea Party Constitution very likely will influence the way the courts interpret the Constitution,<sup>4</sup> the preferred battleground for the Tea Party's project of constitutional reconstruction is popular mobilization, aimed primarily at educating and mobilizing ordinary citizens and influencing the political process. To understand the Tea Party's constitutional project, we must give attention not only to the content of the Tea Party Constitution, but also the predominantly extrajudicial pathways the Tea Party has chosen for giving practical effect to its reading of the Constitution.

In recent years, legal scholars have become increasingly interested in the ways in which constitutional text and principles function in extrajudicial contexts. One prominent strand of this scholarship is “popular constitutionalism.” At its most basic level, popular constitutionalism involves the study of constitutional claim-making by people who lack any formal governing authority. (More normatively oriented variants of popular constitutionalism also make arguments about how courts should respond to this kind of extra-official claim-making.) As scholars in this area have shown, non-elites, whose voices may be amplified through social movement mobilization, regularly interpret the meaning of the Constitution, and they often do so in ways that are in direct opposition to judicially defined constitutional doctrine. The ways in which these claims take shape and their influence is at the heart of the scholarly project of popular constitutionalism.

The still-unfolding Tea Party movement offers a valuable case study of popular constitutionalism. In fact, I would argue that the Tea Party, a movement that is both self-consciously focused on extrajudicial constitutional interpretation and largely working outside the sphere of the courts, is perhaps the strongest demonstration of the dynamics of popular constitutionalism in recent memory. Yet herein lies something of a challenge

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<sup>3</sup> LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE* 1 (2004).

<sup>4</sup> I discuss this possibility in the context of litigation challenging the constitutionality of the federal health care law in Part IV, *infra*.

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to recent proponents of popular constitutionalism. Its most enthusiastic proponents in the legal academy envision popular engagement with the Constitution as an antidote to a Supreme Court that, for reasons having to do with both ideology and institutional limitations, has often acted as a brake on progressive reforms favored by the elected branches and by popular movements. Popular constitutionalism is thus assumed to offer an attractive oppositional force to a judiciary that had been trending to the right in recent years. The working assumption here is that popular constitutionalism is particularly well suited to the kinds of constitutional claims favored by progressives; or, at worst, that it provides a generic vehicle into which all shapes and sizes of constitution claims can be placed. This Article challenges this assumption. The Tea Party demonstrates that popular constitutional mobilization is better suited to advocating certain kinds of constitutional claims over others.

One of the reasons for the striking success of the Tea Party as a constitutional movement has been the highly functional “fit” between the substance of its constitutional claims and the methods by which it has sought to turn these claims into constitutional interpretations that resonate beyond the circle of Tea Party true believers. Put simply, the movement’s conception of the Constitution has proven well suited to its chosen tactics of constitutional mobilization. The belief that constitutional principles are largely self evident and readily discoverable in the document’s text, the hagiographical approach to the Founders, the populist-inflected suspicion of centralized power and embrace of a powerful but ill-defined concept of individual liberty—all of this provides a constitutional platform ready made for popular organization and activism. If confined to the sphere of constitutional litigation, this kind of energized populist rhetoric would much more quickly show its limitations. Yet in the arena of popular constitutional mobilization, the Tea Party’s constitutional vision has proven quite effective. In short, the substance of the Tea Party Constitution lends itself to the processes of popular constitutional mobilization.

This article proceeds in six Parts. Part I offers an overview of the concept of popular constitutionalism as it has been articulated in the scholarly literature. Part II presents the basic framework for considering the Tea Party as a popular constitutional movement. Here I present the basic assumptions driving the Tea Party’s constitutional vision, including a skepticism toward the courts and a commitment to more individualistic approaches to the Constitution; a belief in the need to restore a lost understanding of the Constitution; and a textualist and originalist approach to constitutional interpretation.

The next three Parts present the mechanisms by which the Tea Party has sought to inject its constitutional vision into popular consciousness and political practice. Part III looks at Tea Party’s promotion of constitutional commitment on the part of the American citizenry through educational outreach efforts. Part IV looks at state level activism, which includes lobbying for state “sovereignty” and nullification measures, as well as rallying support for possible amendments to the Constitution. Part V looks at national electoral politics, particularly the 2010 congressional elections, which provided the Tea Party a platform for pursuing its constitutional vision through the electoral process.

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I then offer in Part VI some thoughts about the possible consequences of the Tea Party's constitutional project. While the most lasting effects of this movement will likely be felt in political and constitutional practice outside the courts, there may very well also be doctrinal implications. As an example of its possible effects on the courts, I consider the Tea Party's role in the pending constitutional challenge to the federal health care bill. I also consider the implications of the Tea Party for the future direction of scholarship on popular constitutionalism.

### *A Brief Digression: Popular Constitutionalism, Sincerity, and a Personal Disclosure*

As the Tea Party is such a sharply divisive topic, even the most diligent efforts at impartial evaluation inevitably giving rise to suppositions about an author's intentions, biases, and political leanings. So, at this point, it might be worth squarely addressing this issue. In this brief digression, I seek to make explicit some of the assumptions underlying this study and my own position on the matters at hand.

First there is the question of the sincerity of the Tea Party's constitutional project. I generally have chosen to take the express statements of Tea Party constitutionalists at their word. To be sure, there is plenty of convenient or opportunistic reasoning in the Tea Party's constitutionalism. Interpretative methods that are framed as neutral conveniently and consistently arrive at conclusions favored by conservatives. Certain pathways to constitutional reform are superior to others, based on foundational democratic principles—until they are not. But this kind of opportunism is not distinct to the Tea Party, and if we are going to take popular constitutionalism seriously as a coherent phenomenon of constitutional development, as I believe we should, then we simply cannot demand the kind of logical coherence and consistency that we might expect from a judge or a legal scholar. Hypocrisy and inconsistency in constitutional meaning-making should be identified, but it should not be used as an excuse to dismiss the significance or underlying coherence of the Tea Party's constitutional project. Furthermore, in an effort to identify a coherent core to the Tea Party's constitutional vision, I have sometimes chosen to frame Tea Party's constitutionalism in a somewhat generous light. I give more weight to the more articulate proponents of the constitutional values that the Tea Party favors and relatively less attention to those whose constitutional claims are less coherent or more on the fringes of what I have defined as the Tea Party's core constitutional beliefs.

The reason the Tea Party has proven so successful in promoting its constitutional vision is hardly because of the accuracy or subtlety of its legal or historical claims. Tea Party constitutionalism, like all successful reform movements, moves because of factors that have more to do with ideology, belief, and the creation of shared memory than reasoned argumentation and scholarly method. All of this is elementary to students of social movements. But when a social movement starts to make claims on the meaning of the Constitution and the lessons of history, scholars feel the responsibility to stamp out falsehoods and over-simplifications. Ridding the public sphere of misconceptions is of

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course a critical role for trained experts. Indeed, I would say that legal scholars and historians have a professional responsibility to correct inaccurate claims about our history and the nation's founding document. This is not the task of this Article, however. Not only has it already been done,<sup>5</sup> but these corrective critiques have tended to dominate the discussion in ways that have hindered a fuller engagement and understanding of the phenomenon of the Tea Party. This article is an effort to offer a different perspective on the Tea Party as a constitutional movement, one that seeks not to bury or elevate Tea Party constitutionalism, but to better understand what it is and what it has achieved.

Finally, a brief statement of personal disclosure. I deeply disagree with just about everything the Tea Party has to say about the meaning of the Constitution. On certain questions of constitutional interpretation, I believe the Tea Party arrives at conclusions that are in direct variance with the hard-earned lessons of over two centuries of constitutional experience. I find the marginalization of the Fourteenth Amendment in the Tea Party Constitution particularly problematic, as a matter of constitutional interpretation (even assuming, as Tea Partiers do, a methodology of textualism and originalism) and as a matter of basic moral sensibility. Yet—and here is the central tension of this topic for me—I am actually quite sympathetic to many of the ways in which the Tea Party has pursued its constitutional claims. The Tea Party is attempting to change the way the nation understands the Constitution and its relationship to political life. It is doing so not through constitutional litigation or legal treatises, but through injecting a new sense of constitutional consciousness into the American citizenry and by demanding that elected officials be held accountable to constitutional principles. There is something appropriately democratic about a strategy for constitutional change that prioritizes public debate about constitutional principles over courtroom arguments and doctrinal exegesis. This is the way we as a nation should engage with our Constitution.

To be sure, some of the Tea Party's tactics in pursuing its constitutional project are, in my view, anything but admirable. The movement contains a powerful strain of anti-intellectualism; it has a tendency to turn historical inquiry into a fundamentalist project of reductionist hero workshop; it feeds on innuendo, hyperbole, demagoguery, conspiracy theories, and often blatant falsehoods. None of these tendencies does much to add to the quality of political or constitutional discourse in our nation, and it certainly does not contribute to historical understanding. These elements of the Tea Party movement should be exposed and challenged—and, in some cases, simply condemned as outside the boundaries of acceptable public discourse. Nonetheless, these unsavory elements of the Tea Party do not define the entire enterprise.

There is, as I hope to show in the following pages, more to the Tea Party than the caricatured portrait that has too often dominated media coverage. The Tea Party has demonstrated that a populist form of constitutional discourse can be a powerful, perhaps transformative force in American constitutional development. Its critics would do well not only to challenge the Tea Party on the merits of its constitutional claims, but also to

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<sup>5</sup> The majority of writing on the Tea Party falls within the debunking genre. The standout contribution in this field is JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010).



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learn from the Tea Party the potential (as well as the limitations) of popular constitutionalism today.

### I. THE TEA PARTY AND THE CONCEPT OF POPULAR CONSTITUTIONALISM

In my effort to make sense of the Tea Party as a constitutional movement, I draw on the insights of a recent generation of scholarship on popular constitutionalism.<sup>6</sup> The greatest contribution of this scholarship has been to find a language through which we can discuss constitutional development that does not focus exclusively on courts and constitutional doctrine. The basic gist of popular constitutionalism is simple: scholars should take more seriously what the people say about the Constitution.<sup>7</sup> Moreover, this scholarship has shown that we should be particularly attentive when popular conceptions of the Constitution are in tension with judicial conceptions. For in these situations we often find the seeds of constitutional development as well as potential challenges to the democratic legitimacy of the courts and the Constitution.<sup>8</sup>

The Tea Party is a quintessential example of popular constitutionalism, as that concept has been developed in the scholarly literature in recent years. Indeed, I would argue that in the Tea Party movement we see an instance of popular constitutionalism in a particularly pure form. Tea Party activists have mobilized a grassroots movement, and they have done so in large part based on their ability to rally supporters around a reverence for and distinctive vision of the Constitution. They have sought to promulgate this vision through not only generic references to broad constitutional principles, but also through notably specific discussion about the text and the history of the Constitution. And for all this obsession with the Constitution, the Tea Party pays remarkably little attention to the courts and judicial doctrine. All of this adds up to as close to a textbook example of popular constitutionalism as we have seen in modern American history.

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<sup>6</sup> In this large field of literature, the most prominent works include LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 191-92 (1999); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006). For the most recent scholarly overview of the field, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053-64 (2010).

<sup>7</sup> More normative versions of popular constitution take this point one step further, arguing that courts should take more seriously, and in some cases defer, to the constitutionally views of extrajudicial actors, including the people themselves. See, e.g., KRAMER, *supra* note 6.

<sup>8</sup> “Public engagement with the meaning of the Constitution is what has enabled our founding document to retain its democratic authority through changing times.” GOODWIN LIU, PAMELA S. KARLAN, & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 3 (2009). This legitimating theme is most thoroughly developed in the work of Robert Post and Reva Siegel. See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

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Although the concept of popular constitutionalism has been notoriously resistant to definition,<sup>9</sup> a working definition can be framed around two basic requirements: a popular constitutional movement should be *popular*, and it should be *constitutional*. “Popular” in this sense does not mean that the movement necessarily has widespread support. Rather, it is a measure of the relative autonomy the movement has from the courts and constitutional doctrine. Considered this way, popular constitutionalism is the antithesis of judicial supremacy. One might place constitutional movements on a spectrum. A movement that aggressively asserts its independence from the constraints of constitution law would score high on the “popular” scale; a movement whose central goal is to convince, through litigation, the Supreme Court to change its reading of the Constitution would score relatively low.

The “constitutional” component of a popular constitutional movement refers to the extent to which a movement makes a self-conscious move to differentiate its interpretations of the Constitution from claims that are based on policy preferences. Thus, for purposes of defining a popular constitutional movement, an extrajudicial constitutional claim must include some effort to distinguish constitutionality from political advisability—it must at least recognize the possibility that there is a difference between the decision of what makes good policy and the measure of a given policy’s constitutional status.<sup>10</sup> In its most basic sense, this involves a recognition, among movement activists, of a distinction between the realm of law and that of politics. Kramer has written that “popular constitutionalism is not mere politics, but in is in fact a legal concept that treats the Constitution as ‘law’ in its proper sense.”<sup>11</sup> The extent of this constraint is less important than a basic assumption “that applying law differs from doing politics because it includes constraints that do no exist in the political domain.”<sup>12</sup>

On both these measures—autonomy from the courts and a recognition of the distinct nature of constitutional claim-making—the Tea Party scores quite well. In short, the Tea Party should be recognized as an exemplar of the concept of popular constitutionalism.

In his seminal study of popular constitutionalism, *The People Themselves*, Larry Kramer lamented “the all-but-complete disappearance of public challenges to the Justice’s supremacy over constitutional law,” and he chided the current generation for being “so passive about their role as republican citizens.”<sup>13</sup> Kramer concludes his book

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<sup>9</sup> Or, put another way, scholars of popular constitutionalism has been unable to put forth a clear definition of the concept. On the definitional challenges, see Pozen, *supra* note 6, at 2053-54.

<sup>10</sup> The requirement here is a formal one. I am not concerned about the sincerity of the act of constitutional interpretation, i.e., whether a constitutional analysis is really being driven by a preferred policy outcome. Rather, I am looking to see if participants in a popular movement recognize that there is a difference, in at least a formal sense, between constitutional interpretation and policy formation.

<sup>11</sup> Larry D. Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 699 (2006).

<sup>12</sup> *Id.* at 699-700.

<sup>13</sup> KRAMER, *supra* note 6, at 228.

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with a rousing call for popular constitutional mobilization. Those who insist upon deference to the Supreme Court's supremacy over constitutional interpretation are "today's aristocrats," and they must be challenged.<sup>14</sup> Kramer continues (in a line that would fit quite comfortably in a Tea Party manifesto):

The question Americans must ask themselves is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibilities of self-government.... The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves.<sup>15</sup>

This is basically what the Tea Party has done. In its simultaneous engagement with the Constitution and dismissal of judicially defined constitutional law, the Tea Party movement, has, to a greater extent than any major movement in modern American history, achieved the ideal model of popular constitutionalism that Kramer and others have called for.

### II. THE TEA PARTY AS A CONSTITUTIONAL MOVEMENT

Figures associated with the Tea Party have regularly made news with their contrarian statements about the meaning of the Constitution. Whether it be Rand Paul questioning the constitutionality of the Civil Rights Act of 1964 or Joe Miller doing the same with regard to federal minimum wage laws or Christine O'Donnell challenging the idea of the separation of church and state (just to cite episodes from the campaigns of three Tea Party-backed Senate candidates), the Tea Party has gained attention—and a good deal of criticism—by introducing into the public discussion claims about the Constitution previously confined to the libertarian and conservative fringes. Yet, despite attaching itself to views of the Constitution that when taken on their own are quite radical and often decidedly unpopular, the Tea Party has been strikingly influential as a constitutional movement. Because of the Tea Party, the American people and their elected representatives are talking about the text and the history of the Constitution more than they had before. Because of the Tea Party, the center of gravity on certain constitutional questions has shifted in the direction of the Tea Party's limited government reading of the Constitution. (The increasing seriousness of constitutional challenges to the health care bill, discussed further in Part VI, is the clearest example of this.) This then raises one of the central puzzles about the Tea Party: why has this movement been able to attach itself to such a radical vision of the Constitution, yet still make considerable headway in mobilizing its followers and attracting support for its project of constitutional reform? I believe the answer to this puzzle lies less in the substance of the Tea Party's constitutional claims than in the mechanisms by which the movement has sought to inject its constitutional claims into popular consciousness and political practice.

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<sup>14</sup> *Id.* at 247.

<sup>15</sup> *Id.*

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Creating a popular constitutional movement is no easy task. The Constitution is a document largely written in a style that is dated and legalistic, much of which is confusing or just downright obscure. It is also a document whose meaning the American people and their elected representatives in recent generations have largely delegated to the courts.<sup>16</sup> Any social movement that attempts to place the Constitution at the center of its reform agenda faces a basic challenge: to locate ways in which movement participants can actively participate in debates about the meaning of the Constitution and its role in American life. For this reason, it is important to consider those aspects of the Tea Party movement that have addressed the challenges inherent in popular constitutional engagement.

The Tea Party's constitutional vision is designed to be mobilized. The core elements of the Tea Party Constitution are relatively easily grasped and they readily lend themselves to translation into tangible political action. Tea Party constitutionalism challenges its adherents to do more than just passively accept its basic tenets. There is, as observers and participants in the movement regularly note, something about Tea Party constitutionalism that is akin to a fundamentalist religious revivalism, with the text of the Constitution serving the role of scripture.<sup>17</sup> Tea Party leaders encourage supporters to internalize the core principles of the Tea Party Constitution, and then to act to ensure that these principles are acknowledged and accepted by others, particularly those in power. Judges are just one potential target of constitutional conversion, and a rather distant one at that. Much more feasible targets on which to build a grassroots reform movement are the American citizenry and elected officials. Part grassroots social movement, part religious revival, part political campaign, the Tea Party has committed itself to a distinctively democratic and populist pathway to making its constitutional vision a lived reality.

### A. *The Protestant Constitution*

In *Constitutional Faith*,<sup>18</sup> his now classic study of American attitudes toward the their founding document, Sanford Levinson provides a framework that helps to illuminate what is distinctive about the Tea Party's constitutional vision, as well as to offer some historical perspective on the movement. He describes a basic divide between "protestant" and "catholic" approaches to constitutional interpretation.<sup>19</sup> Each category includes two independent variables, one relating to the source base of constitutional

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<sup>16</sup> See KRAMER, *supra* note 6, at 230-33; Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886 (2008).

<sup>17</sup> See, e.g., KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* 8 (2010) ("Many described their Tea Party work—recruiting more people into the movement, teaching others about the Constitution—with near religious zeal."); Samuel F. Freedman, *Tea Party Rooted in Religious Fervor for Constitution*, N.Y. TIMES, Nov. 5, 2010 ("Rather than viewing the Tea Party as a political phenomenon ... one might better understand it through the prism of religion. Seen through such a frame, the Constitution is the Tea Party's bible, and that holy book is embraced as an inerrant text.").

<sup>18</sup> SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27-30 (1988).

<sup>19</sup> *Id.* at 27-30.

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interpretation, the other to the location of interpretive authority.<sup>20</sup> The “protestant” constitutionalist believes that the written text of the Constitution is the exclusive basis of interpretation and that individual or community readings of the Constitution are legitimate acts of constitutional interpretation.<sup>21</sup> A “catholic” approach basically reverses each of these elements. It places unwritten traditions alongside the written text as legitimate sources for constitutional interpretation, while limiting ultimate authority to interpret the Constitution to a single official institution, the Supreme Court.<sup>22</sup>

Different figures in American constitutional history have combined different elements of Levinson’s schema. One could, for example, be a committed textualist (i.e., protestant on the question of “Constitution-identity”), while also being committed to the finality of the Supreme Court’s interpretations of the Constitution (i.e., catholic on the question of authoritative constitutional interpretation). Justices Hugo Black and Antonin Scalia fit into this “protestant-catholic” categorization.<sup>23</sup> In contrast, Justices Felix Frankfurter and John Marshall Harlan tend toward a “catholic-catholic” model, emphasizing the importance of extra-textual traditions, while accepting the Court as the necessary and final arbiter of constitutional meaning. The abolitionist Frederick Douglas, on the other hand, in his effort to refute constitutionally based defenses of slavery, adopted a “protestant-protestant” posture. Douglass described the Constitution as “a plainly written document, not in Hebrew or Greek, but in English,” and emphasized that a “plain reading” of the text gave no support to the institution of slavery, regardless of what the Supreme Court, in decisions such as *Dred Scott*, said on the subject.<sup>24</sup>

Variants of protestant constitutionalism have echoed throughout American history. Generations of American leaders have urged citizens to treat the Constitution as a truly public document—as an articulation of the essentials of our governing system understandable by the people themselves, not as an obscure legal text accessible only to judges and lawyers versed in the nuances of law. Thomas Jefferson, in his first inaugural address, described the Constitution as “the text of civil instruction—the touchstone by which to try the services of those we trust.”<sup>25</sup> His arch-enemy, Chief Justice John Marshall, also emphasized that the Constitution was written to be “understood by the public.”<sup>26</sup> Both Presidents Roosevelt emphasized that the Constitution was a layman’s rather than a lawyer’s document.<sup>27</sup> The Constitution “was written to be understood by

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 31-33

<sup>24</sup> *Id.* at 31.

<sup>25</sup> Thomas Jefferson, Inaugural Address, Mar. 4, 1801.

<sup>26</sup> *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

<sup>27</sup> Franklin D. Roosevelt, Address on Constitution Day, Sept. 17, 1937 (“The Constitution of the United States was a layman’s document, not a lawyer’s contract.”); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 179 (2009) (quoting Theodore Roosevelt) (“It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs.”).

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the voters,” explained Justice Owen J. Roberts; “its words and phrases were used in their normal and ordinary as distinguished from [their] technical meaning.”<sup>28</sup>

Adopting Levinson’s typology, we can see that the Tea Party movement is proudly and thoroughly protestant in its posture toward the Constitution. It fits comfortably into a “protestant-protestant” grouping. As I discuss in more detail below, its adherents believe the true meaning of the Constitution is provided first and foremost by the text of the Constitution, with any possible ambiguities resolved by turning to the intentions of the Framers—intentions that, by Tea Party lights, are also clear and knowable.

The Tea Party also rejects hierarchical assumptions about authoritative constitutional interpretation in favor of more individualistic or community-based, decentralized approaches. Tea Party constitutionalism is premised on a commitment to citizen empowerment. “Because YOU are the Government” reads the motto of the Independence Caucus, a Utah-based group that has circulated a list of questions designed to be given to potential candidates for public office that tests their commitment to conservative constitutionalism.<sup>29</sup> Virginia Attorney General Ken Cuccinelli, who is leading one of the litigation efforts against the health care bill, told a Tea Party rally, “It’s time for people like you all to step up and draw the lines that our Founding Fathers thought they drew very clearly.”<sup>30</sup> “Millions of Americans,” writes Angelo Codevilla in his 2010 Tea Party polemic, “are now reasserting our right to obey the Constitution to which officials swear allegiance upon taking office, rather than to obey any official.”<sup>31</sup> A foundational premise of Tea Party constitutionalism is that individual citizens can read the document for themselves, come to conclusions about constitutional meaning based on this reading, and act upon these convictions.

### *B. The Courts and the Tea Party*

One of the most notable aspects of Tea Party constitutionalism is the relatively minor place the Tea Party allows for the courts in discussing constitutional issues. The preferred battleground for the Tea Party’s project of constitutional reconstruction is not the courts. Although the Tea Party has their preferred justices, and although Tea Partiers would surely be perfectly happy to see the Supreme Court strike down the federal health care law, the Tea Party’s attitude toward the judiciary tends to reside somewhere between animosity and apathy. Court opinions and judicial appointments simply have not been a major part of the constitutional debate sparked by the Tea Party movement.

The relative inattention to the courts reflects a general sense among Tea Party supporters that the Supreme Court is simply not on their side. Angelo Codevilla treats the

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<sup>28</sup> *United States v. Sprague*, 282 U.S. 716, 731 (1931).

<sup>29</sup> Independence Caucus, <http://www.ourcaucus.com/>.

<sup>30</sup> Quoted in Bradford Plumer, *The Revisionaries*, NEW REPUBLIC, Sept. 23, 2010, at 16.

<sup>31</sup> ANGELO M. CODEVILLA, *THE RULING CLASS: HOW THEY CORRUPTED AMERICA AND WHAT WE CAN DO ABOUT IT* xvii (2010).

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Supreme Court as an apparatus of the “Ruling Class.” The Court, like the rest of elite society, Codevilla writes, has a “[d]isregard for the text of laws, for the dictionary definition of words and the intentions of those who wrote them.”<sup>32</sup> Courts enforce a “Constitution imagined by the judge and supported by the ruling class.”<sup>33</sup> “[T]wo generations of Supreme Court rulings” have taken away “localities’ traditional powers over schools, including standards, curriculum, and prayer” as well as “traditional police powers over behavior in public places.”<sup>34</sup> Randy Barnett, a law professor at Georgetown who has become something of a legal mastermind for the Tea Party, has pushed for a “Federalism Amendment” to the Constitution, which he justifies as a way bypass around a federal judicial system that “long ago adopted a virtually unlimited construction of Congressional power.”<sup>35</sup>

Although local Tea Party groups typically have little or nothing to say about the Supreme Court, some have explicitly attacked the judiciary. For example, the Hartford Tea Party Patriots issued a “Tea Party Declaration of Independence” that included the following proclamation: “We reject the claims of an un-elected Federal Judiciary to violate the separation of powers by demanding its decisions be enforced by the other coequal branches of government, regardless of how unconstitutional the other branches of government may think those decisions are.” “If we allow the Supreme Court to be the final arbiter in this, we are not a Republic — we are an oligarchy,” said an Idaho citizen who testified in favor of proposed state law that would effectively nullify implementation of federal health care policy within the state. “Our founding fathers would be disgusted with us, if we were to allow that to happen.”<sup>36</sup>

### C. Constitutional Decline and Revival

The Tea Party movement is pervaded by efforts to resurrect a particular vision of the nation’s early history—from the name “Tea Party,” harkening back to the anti-tax revolt in Boston Harbor in 1773; to the stock rhetoric of the movement, filled with references to the Revolutionary and Founding periods; to the Revolutionary flags and costumes that are often seen at Tea Party events. Those who created the nation, Tea Partiers believe, had special insight into the nature of government and the importance of protecting individual liberty. Through the force of their insight, they created a system of government that achieved an ideal balance between necessary governing power and personal freedom. They left for posterity the Declaration of Independence and the Constitution, works of genius, perhaps even divine inspiration, that have allowed

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<sup>32</sup> *Id.* at 42.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> *Id.* at 71.

<sup>35</sup> Randy E. Barnett, *The Case for a Federalism Amendment*, WALL ST. J., Apr. 23, 2009, <http://online.wsj.com/article/SB124044199838345461.html> [hereinafter Barnett, *Case for Federalism*].

<sup>36</sup> John Miller, *Hundreds go to Idaho hearing on nullification bill* (AP), BLOOMBERG, <http://www.bloomberg.com/news/2011-02-09/hundreds-go-to-idaho-hearing-on-nullification-bill.html>.

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subsequent generations of Americans to take their own measure, to see how well they have protected the essentials of the founding covenant. When the nation strays off course, these documents, accessible to all and plain in their meaning, offer guidance for returning the nation to its first principles.

This idealizing vision of the past and of the essential character of the American nation is coupled in the Tea Party mindset with a deep sense of disillusionment with the contemporary situation. A dominant theme of Tea Party ideology is a sense that contemporary society is in decline. According to Codevilla, over the course of the twentieth century the United States government has been taken over by elites, “[e]ach succeeding generation ... less competent than its predecessor.”<sup>37</sup> As a result, government over the past century has “generally made life worse” for the American people.<sup>38</sup> The Tea Party’s sense of social and political decline is evident in opinion polls. While the economic downturn has caused marked increases in pessimism toward the direction of the country, among Tea Party supporters this pessimism is near unanimous.<sup>39</sup> The nation, according to Sarah Palin’s apocalyptic assessment, is on a “road to ruin.”<sup>40</sup> “The Tea Party is bound by a deep sense of betrayal,” wrote a *Washington Post* reporter after spending a weekend in the fall of 2010 traveling with a group bound for Glenn Beck’s “Restoring Honor” rally on the Washington Mall.<sup>41</sup>

For the Tea Party, the Constitution plays a central role in assessing the ills that infect modern America. The federal government’s abandonment of the governing vision of the original Constitution demonstrates the extent of decline, while demands for increased fidelity to constitutional principles constitute the central pathway for stemming the decline. As W. Cleon Skousen, the late ultra-conservative conspiracy theorist whose work has become widely influential in the Tea Party,<sup>42</sup> warned in his 1985 guidebook to the Constitution: “Our ship of state is far out to sea and is being tossed about in stormy waters, which the Founders felt could have been avoided if we had stayed within sight of

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<sup>37</sup> CODEVILLA, *supra* note 31, at 15.

<sup>38</sup> *Id.* at xix.

<sup>39</sup> A New York Times/CBS poll conducted in April 2010 found that among Tea Party supporters 92% of respondents agreed with the statement that “things in this country ... have pretty seriously gotten off on the wrong track.” ZERNIKE, *supra* note 17, at 199. Among all people polled, 59% agreed with this statement. *Id.* See also Susan Page & Naomi Jagoda, *What is the Tea Party? A Growing State of Mind*, USA TODAY, July 1, 2010, [http://www.usatoday.com/news/politics/2010-07-01-tea-party\\_N.htm](http://www.usatoday.com/news/politics/2010-07-01-tea-party_N.htm) (reporting similar polling numbers).

<sup>40</sup> *Palin: America out of step with Reagan’s values*, Associated Press, Feb. 5, 2011.

<sup>41</sup> Bill Donahue, *Tea Party Road Trip: What the Movement Wants—and Why*, WASH. POST, Oct. 24, 2010.

<sup>42</sup> Skousen had a long history of involvement with fringe right-wing causes. An active member of the John Birch Society, a devout Mormon, and an obsessive anticommunist, he was so extreme in his political beliefs that eventually his own church and most mainstream conservatives distanced themselves from him. His posthumous breakthrough with the Tea Party movement came when Glenn Beck began promoting his work. On Skousen’s influential role in the Tea Party, see generally Sean Wilentz, *Confounding Fathers: The Tea Party’s Cold War Roots*, NEW YORKER, Oct. 18, 2010; Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG., Nov. 26, 2010, at 34.



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our original moorings.”<sup>43</sup> One hears among Tea Partiers and their allies a constant refrain of metaphors of stability to describe the Constitution and the ideals of the Founders. It is a “mooring,” an “anchor”; it is the nation’s “bedrock.”<sup>44</sup> In the words of Tea Party favorite Senator Rand Paul of Kentucky, “belief in self-reliance, limited government and the Constitution hold the keys to fixing our problems and getting our nation back on track.”<sup>45</sup>

As indicated by this belief in the Constitution as a homing beacon for a nation that has lost its course, the flip-side of the narrative of constitutional declension is the narrative of constitutional revival. “First and foremost,” proclaim FreedomWorks’ leaders Dick Arme y and Matt Kibbe, “the Tea Party movement is concerned with recovering constitutional principles in government.”<sup>46</sup> The rhetoric of constitutional revivalism has sounded particularly clearly from those figures in the Tea Party movement who have sought to inject a more explicit sense of spiritualism into the discussion. Consider, for example, the following accounts by two leading figures of the Tea Party movement. One was offered by Christine O’Donnell, the Republican nominee for the U.S. Senate from Delaware. When Barack Obama was elected, she explained:

The conservative movement was told to curl up in a fetal position and just stay there for the next eight years, thank you very much. Well, how things have changed. During those dark days when common sense patriotic Americans were looking for some silver lining, they stumbled upon the Constitution.... the Constitution is making a comeback. It's simply unprecedented in my lifetime. I think it's a little like the chosen people of Israel and the Hebrew scriptures, who cycle through periods of blessing and suffering and then return to the divine principles in their darker days. It's almost as if we're in a season of constitutional repentance. When our country's on the wrong track, we search back to our first covenant, our founding documents, and the bold and inspired values on which they were based. Those American values enshrined in the Declaration provide the real answer.<sup>47</sup>

The other story of constitutional revivalism comes from Fox News celebrity host Glenn Beck. Beck, characteristically, offered a distinctly personalized account:

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<sup>43</sup> W. CLEON SKOUSEN, *THE MAKING OF AMERICA: THE MEANING AND SUBSTANCE OF THE CONSTITUTION* 11 (1985).

<sup>44</sup> See, e.g., Charles Krauthammer, *Constitutionalism*, WASH. POST, Jan. 7, 2011 (“In choosing to focus on a majestic document that bears both study and recitation, the reformed conservatism of the Obama era has found itself not just a symbol but an anchor.”); Seth Stern, *Republicans Turn to Constitutionalism to Rein in Authority*, CQ WEEKLY, Jan. 10, 2011, at 110 (quoting Frank Anderson, campaign volunteer for Tea Party-backed congressman Jason Chaffetz of Utah).

<sup>45</sup> Rand Paul, *Rand Paul, libertarian? Not quite*, USA TODAY, Aug. 9, 2010.

<sup>46</sup> DICK ARMEY & MATT KIBBE, *GIVE US LIBERTY: A TEA PARTY MANIFESTO* 66 (2010).

<sup>47</sup> Speech at 2010 Values Voter Summit in Washington, D.C., Sept. 16, 2010, available at <http://www.palinpromotions.com/blog/2010/09/18/christine-odonnells-awesome-speech-at-the-values-voters-summit/>.

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[D]uring parts of 1997 and 1998 I experienced one of the most difficult periods of my life.... I began to see the massive problems that we—as a nation and as a people—were facing.... Then one day in the spring, I was walking down the Avenue of the Americas in Manhattan and the answer came to me. It was so dramatic that it made me stop in the middle of the sidewalk and laugh out loud.... The questions that we face were foreseen by the greatest group of Americans to ever live; our Founding Fathers. They knew we would be grappling with issues like the ones we face today at some point, so they designed a ship that could withstand even the mightiest storm. They also knew that we would eventually lose our way and that we would need a beacon to lead our way back.<sup>48</sup>

As these excerpts show, religion—and particularly the evangelical and fundamentalist strains of within Christianity—is a key element of Tea Party constitutionalism. There is some tension between the tropes of religious revivalism often found in Tea Party statements about the role of the Constitution and the efforts of movement leaders to sideline the contentious social issues, including religion, that have largely defined modern conservatism. The Tea Party has had considerable success in focusing on the issues of constitutionally limited government and fiscal responsibility and, for the most part, putting to the side debates over religion, as well as gay rights and abortion.<sup>49</sup> Yet religion, like other social conservative commitments, is never far from the surface of the Tea Party movement. Much of this has to do with the basic demographics of the Tea Party: its members are more religious than the general population.<sup>50</sup> One survey found that Tea Party supporters were considerably more likely

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<sup>48</sup> Beck, *Foreword*, in W. CLEON SKOUSEN, *THE 5000 YEAR LEAP: 28 GREAT IDEAS THAT CHANGED THE WORLD* 6 (1981; 2009) [hereinafter SKOUSEN, *5000 YEAR LEAP*].

<sup>49</sup> Amy Gardner, *Gauging the Scope of the Tea Party Movement in America*, WASH. POST, Oct. 24, 2010 (concluding, after a survey of local Tea Party groups, that “[s]ocial issues, such as same-sex marriage and abortion rights, did not register as concerns”); ZERNIKE, *supra* note 17, at 42, 70, 143-44. Michael Patrick Leahy, a leading Tea Party organizer, wrote:

The Tea Party movement has rejected the discussion of social issues as an unwanted distraction that will hurt the movement’s ability to accomplish its constitutional and fiscal objectives.... I know this because I helped start the movement, and I have participated in hundreds of conferences calls where this position has been deliberated and confirmed—both publicly and privately—innumerable times.... The social issues that motivated the *Moral Majority* in the 1970s and 1980s, and the *Christian Coalition* in the 1990s, are considered secondary to the preservation of the republic.

Michael Patrick Leahy, *Bruce Bartlett’s Intellectually Dishonest Smear of the Tea Party Movement*, AM. THINKER, June 10, 2010, [http://www.americanthinker.com/2010/06/bruce\\_bartletts\\_intellectually.html](http://www.americanthinker.com/2010/06/bruce_bartletts_intellectually.html).

<sup>50</sup> See, e.g., *The Tea Party and Religion*, Pew Forum on Religion & Public Life, Feb. 23, 2011, <http://www.pewforum.org/Politics-and-Elections/Tea-Party-and-Religion.aspx#rtn1> (Tea Party supporters are considerably more likely to reference religion as a basis for their conservative commitments); John B. Judis, *Tea Minus Zero*, NEW REPUBLIC, May 27, 2010, (citing polling that found “[63] percent [of Tea Party supporters] are in favor of public school students learning that ‘the Book of Genesis in the Bible explains how God created the world’”; and ‘62 percent think that “the only way to Heaven is through Jesus Christ”’).

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than the general populace to believe in the literal truth of the Bible.<sup>51</sup> So even if the Tea Party has successfully been able to shift the focus from religion and other potentially divisive social issues, the movement's constitutional project is still drawing on the tropes of evangelical religion in ways that seem to resonate with many Tea Party supporters. It is one of the key elements of religious fundamentalism, faith in the sanctity of a foundational text, to which I now turn.

### *D. The Power of Text*

The Tea Party's commitment to textualism as a method of constitutional interpretation is closely related to the narratives about constitutional decline and revival. The kinds of stories one tells about the nature of the Constitution and the role it has (or should have) in American life is intertwined with beliefs about how the Constitution should be read. In other words, assumptions about the function of constitutionalism inform one's methodological commitments. With regard to the Tea Party's constitutional project, narratives of constitutional decline and revival provide a rationale for embracing textualism and originalism as the appropriate modes of constitutional interpretation.

If one believes, as Tea Party supporters overwhelmingly do, that government and society is heading in the wrong direction, then the idea of returning to the wisdom of some past moment makes sense. It is probably safe to say that originalists as a general matter have a higher opinion of the achievement of the Founding Era and a lower opinion of constitutional developments of the twentieth century than do non-originalists. Just to cite the most obvious example, Justice Scalia regularly justifies his originalist commitments by noting that societies decline and become corrupt. The "whole purpose" of the Constitution, he has said, "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."<sup>52</sup> Justice Thomas has also expressed strikingly pessimistic views of the trend of modern society.<sup>53</sup> Holding tight to constitutional commitments made generations, even centuries earlier is a way of fighting against decline—of fighting against the direction of modern society and government.

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<sup>51</sup> Constitutional Attitudes Survey, Cross Tabs – Tea Party Movement, Sept. 15, 2010, *available at* [http://www.law.columbia.edu/fac/Nathaniel\\_Persily](http://www.law.columbia.edu/fac/Nathaniel_Persily).

<sup>52</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40-41 (1997).

<sup>53</sup> *See, e.g.*, Clarence Thomas, *How to Read the Constitution*, WALL ST. J., Oct. 20, 2008, at A19 ("Today, we live in a far different environment [from previous generations]. My generation, the self-indulgent 'me' generation, has had a profound effect on much around us. Rarely do we hear a message of sacrifice—unless it is a justification for more taxation and transfers of wealth to others. Nor do we hear from leaders or politicians the message that there is something larger and more important than the government providing for all of our needs and wants—large and small. The message today seems more like: Ask not what you can do for yourselves or your country, but what your country must do for you.").

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This fundamentalist principle, translated into the populist rhetoric of a social movement, is at the heart of the Tea Party's constitutional vision.

While textualism and originalism are distinguishable as methodologies of constitutional interpretation, the version of textualism that one finds in the Tea Party tends to conflate the two. The reason the words of the document must be elevated above all else—above subsequent interpretations of the text, even by the highest court in the land; above established political practice; above settled societal assumptions about the Constitution—is because these words are the product of a particular moment of insight and inspiration. By taking the words seriously, by reading them according to their plain meaning, one is expressing fidelity not only to a document, but to a generation of past Americans who, quite simply, knew more about the principles of liberty and power than any generation since. In this way, textualism and originalism join as a common project, both reinforced by the more general assumption that we are a society in decline, with the Constitution providing a beacon of redemption.

Beyond reinforcing the value of expressing fidelity to the principles of 1787, a commitment to textualism serves an additional role for the Tea Party: it is a powerful tool for constitutional mobilization. Textualism, perhaps more than any other method of constitutional interpretation, has a distinctive common-sense appeal. It is easy to explain to non-lawyers. As Dick Arney, former House Majority leader and now Chairman of FreedomWorks, likes to tell audiences: “If you don't understand the Constitution, I'll buy you a dictionary.”<sup>54</sup> Codevilla echoes this sentiment: all that is needed to understand the meaning of the Constitution is “the dictionary and grammar book.”<sup>55</sup> A popular Tea Party bumper sticker reads: “I have this crazy idea that the Constitution *actually means something*.”<sup>56</sup> The idea that complex methods of constitutional interpretation are just ways in which experts obscure the meaning of the Constitution fits comfortably with the anti-elite, populist sensibility of the Tea Party.

From the perspective of creating a popular constitution movement, even more valuable is the fact that this kind of common-sense textualism<sup>57</sup> is easily *performed*. It is readily turned into various forms of action, into constitutional practice. If one believes that the text of the Constitution contains the essence of constitutional meaning, then the act of constitution education can begin (and perhaps even end) with a reading of a document that is not particularly long and that, for the most part, is readable to modern Americans. The act of passing out pocket Constitutions, the act of reading the text of the Constitution aloud in small groups or in public settings, even on the floor of Congress—all of these ostensibly symbolic acts contain a deeper significance if grounded in a belief that the text of the document and its underlying meaning are one and the same.

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<sup>54</sup> ZERNIKE, *supra* note 17, at 67.

<sup>55</sup> CODEVILLA, *supra* note 31, at 44.

<sup>56</sup>

Liberty

Stickers,

[http://www.libertystickers.com/product/I\\_have\\_crazy\\_idea\\_the\\_constitution\\_MB/](http://www.libertystickers.com/product/I_have_crazy_idea_the_constitution_MB/).

<sup>57</sup> I.e., textualism coupled with a belief in the self-evident nature of constitutional meaning.

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As a foundation for popular mobilization, common-sense textualism provides a framework for a de-centralized, participation-based constitutionalism. “It is, most often, as text that the Constitution is the object of social movement mobilization,” writes Reva Siegal. “Text matters in our tradition because it is the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims on the Constitution’s meaning.”<sup>58</sup> The Tea Party offers a clear example of how text-centered approaches to constitutional interpretation can be a powerful basis for popular constitutional organization and activism.

### *E. Populist Originalism*

One of the defining characteristics of Tea Party constitutionalism is its enthusiastic embrace of originalism as its preferred methods of constitutional interpretation. “The Conservative,” writes radio show host Mark Levin in his 2009 best-seller, *Liberty and Tyranny*, “is an *originalist*, for he believes that much like a contract, the Constitution sets forth certain terms and conditions for governing that hold the same meaning today as they did yesterday and should tomorrow. It connects one generation to the next by restraining the present generation from societal experimentation and government excess. There really is no other standard by which the Constitution can be interpreted without abandoning its underlying principles altogether.”<sup>59</sup> In various forms, this basic defense of originalism echoes throughout the Tea Party movement. The Constitution “meant one thing when it was written, and it still means the same thing.” declared a speaker at an April 2009 Tea Party rally in Athens, Texas. “It’s up to us to light a fire under our fellow citizens.”<sup>60</sup>

The rise of populist originalism—that is, originalism as a mode of constitutional interpretation practiced by nonjudicial actors—is particularly noteworthy since the primary grounds on which originalism has been promoted (mostly by conservative constitutional scholars and judges) has been the way it constrains judicial discretion.<sup>61</sup> “For the last quarter-century,” writes Jamal Greene, “originalism has been the idiom of judicial restraint in the United States.”<sup>62</sup> Conservative talk radio star Rush Limbaugh has

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<sup>58</sup> Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001) (emphasis removed).

<sup>59</sup> MARK R. LEVIN, *LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO* 50 (2009).

<sup>60</sup> Lauren Ricks, *Anyone for T.E.A.?: 300 gather at county courthouse to protest more taxes*, ATHENS DAILY REV. (Athens, TX), Apr. 16, 2009. “I came because I want our country restored to our founding principles,” explained an attendee at the rally. *Id.*

<sup>61</sup> See, e.g., Eric A. Posner, *Why Originalism Is So Popular*, NEW REPUBLIC, Jan. 14, 2011 (“[S]uperficially, originalism seems simple, commonsense, and nonpartisan: an antidote to the politicization of the judiciary and the judicial appointments process.... So the Court seems politicized to people on both sides of the political spectrum, and originalism increasingly presents itself as an attractive, neutral-seeming method for getting the Court back on track.”); Jeffrey Rosen, *If Scalia Had His Way*, N.Y. TIMES, Jan. 9, 2011, at WK 1.

<sup>62</sup> Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 1 (2009) [hereinafter Greene, *Origins*]; see also Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 658, 680-81 (2009)

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embraced originalism as “[t]he only antidote to ... judicial activism.”<sup>63</sup> Originalism, according to its most prominent proponent, Justice Scalia, is the “lesser evil”<sup>64</sup> because it provides grounds for constitutional interpretation that restrains *judges*.

The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statute) essentially lawyers work—requiring close examination of the text, judicial precedent, and so forth. But if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in light of ‘evolving standards of a maturing society’—well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it.<sup>65</sup>

This leads Scalia to discuss the nomination process for judges and the dangers of making the process overly politicized. There is, of course, another conclusion that could be drawn from Scalia’s warning about the need to recognize the limitations of “lawyers work”: that when those who are not lawyer or judges stake out claims on the meaning of the Constitution, these kinds of concerns no longer not apply. Yet, for the Tea Party, they still do.

As Max Lerner wrote in 1937, populist worship of the Founding Fathers and the Constitution has been particularly powerful during times of uncertainty and concern over the direction of the nation. The Constitution serves as a “safe haven” for those who fear the United States is failing to live up to its founding ideals. Lerner’s description is worth quoting because it well describes the Tea Party’s approach to the Constitution, while also illuminating the historical tradition into which it fits.

Here was the document into which the Founding Fathers had poured their wisdom as into a vessel; the Fathers themselves grew ever larger in stature as they receded from view; the era in which they lived and fought became a golden age; in that age there had been a fresh dawn for the world, and its men were giants against the sky; what they had fought for was abstracted from its living context and became a set of “principles,” eternally true and universally applicable.... The Golden Age had become a political instrument.<sup>66</sup>

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(describing Attorney General Edwin Meese’s defense of originalism as essential to constraining the judiciary) [hereinafter Greene, *Selling*].

<sup>63</sup> Quoted in Greene, *Origins*, supra note 62, at 11.

<sup>64</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>65</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46-47 (1997).

<sup>66</sup> Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1299 (1937); see also Edward S. Corwin, *The Constitution as Instrument and Symbol*, 30 AM. POL. SCI. REV. 1071, 1072 (1936) (“American constitutional symbolism looks ...

to the past and links hands with conceptions which long antedate the rise of science and its belief in a predictable, manageable causation. Its consecration of an already established order of things

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The idea of the Founding Era as a “Golden Age” is central to the Tea Party’s constitutional project. Frequent references to “the Founders” has become something of a tic for many leading Tea Party figures. Discussions of policy and principle seemingly invariably end up at some point referencing the Founders as support. Newly elected U.S. Senator from Utah Mike Lee said he would refuse to vote for any legislation unless he could “imagine myself explaining to James Madison with a straight face why what I was doing was consistent with the text and history of the Constitution ....”<sup>67</sup> The National Center for Constitutional Studies offers courses designed to teach “where the founding Fathers got their ideas for sound government and how a return to these ideas can solve our nations problems today.”<sup>68</sup>

And then there is Glenn Beck. Perhaps no major figure of the Tea Party has done more to insist that the Founders must be at the forefront of contemporary policy discussions than Beck. “In order to restore our country,” he has said, “we have to restore the men who founded it on certain principles to the rightful place in our national psyche.”<sup>69</sup> Beck has called for a “Refounding.”<sup>70</sup> The Beck-inspired “9-12 Project” has identified nine principles for its followers, each supported with a quotation from Jefferson or Washington.<sup>71</sup> The group also calls on its followers to meet regularly with family and neighbors to “[d]iscuss the importance of what the Founders designed for America.”<sup>72</sup> “When you read these guys [the Founders], it’s alive,” Beck once said on his show. “It’s like, you know, reading the scriptures. It’s like reading the Bible. It is alive today. And it only comes alive when you need it.”<sup>73</sup>

This last point—that the Founders and the Constitution they drafted is “alive today” is central to Tea Party ideology. For the Tea Party, the past is anything but a foreign country.<sup>74</sup> The Founders—their ideas, their personalities—are present with us

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harks back to primitive man’s terror of a chaotic universe, and his struggle toward security and significance behind a slowly erected barrier of custom, magic, fetish, tabu.”)

<sup>67</sup> Address by Senator-Elect Michael S. Lee, Federalist Society, 2010 National Lawyers Convention, Nov. 19, 2010, available at [http://www.fed-soc.org/publications/pubid.2020/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.2020/pub_detail.asp) [hereinafter Lee Address].

<sup>68</sup> <http://www.nccsstore.com/American-Government-US-Constitution-Part-1/productinfo/AMGOV1/>.

<sup>69</sup> LEPORE, *supra* note 5, at 156 (quoting Glenn Beck, The Glenn Beck Show, Fox News, New York, April 30, 2010).

<sup>70</sup> Glenn Beck, The Plan, The 912 Project, <http://www.the912project.com/glenn-beck-reveals-the-plan-in-open-letter/>.

<sup>71</sup> 9 Principles, 12 Values, The 912 Project, <http://www.the912project.com/the-912-2/>.

<sup>72</sup> Mission Statement, The 912 Project, <http://www.the912project.com/2009/03/24/mission-statement-2/>.

<sup>73</sup> LEPORE, *supra* note 5, at 157 (quoting Glenn Beck, The Glenn Beck Show, Fox News, New York, May 7, 2010).

<sup>74</sup> L.P. HARTLEY, THE GO-BETWEEN (1953) (opening with the sentence: “The past is a foreign country: they do things differently there”). This point is a central theme of Jill Lepore’s recent book on the Tea Party. LEPORE, *supra* note 5. See, e.g., *id.* at 137 (“In the far right, where originalism has slipped into fundamentalism, where historical scholarship is taken for conspiracy

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today. Their portraits, their words, even their modern avatars (in the form of historical re-enactors) are regularly found at Tea Party events. The Founders are also generally portrayed as comfortable companions. They are not only admirable and likable, but they also tend to agree with the Tea Party.<sup>75</sup>

Another common Tea Party assumption that further fuels its followers' commitment to originalism is the idea that the Founders were remarkable not only for the force of their ideas, but also for their general agreement upon these ideas. "One of the most amazing aspects of the American story," wrote Skousen, "is that, while the nation's Founders came from widely divergent backgrounds, their fundamental beliefs were virtually identical."<sup>76</sup>

It is worth noting that the populist originalism that the Tea Party practices varies in key aspects from originalism as it is currently practiced in the courts and by legal scholars. Tea Party populist originalism focuses on the Founding Fathers. It focused primarily on a handful of larger-than-life figures who played central roles in creating the new nation. Tea Party originalism thus tends to be an inquiry into the original *intent* of the Constitution's framers. This places Tea Party originalism somewhat in tension with the mode of original inquiry now dominant in the courts and in the academy, *public meaning* originalism, which focuses on how people at the time of framing and ratification would have understood the meaning of the words in the Constitution. (In practice, it is hard to find much difference in the outcomes of those who follow an original meaning versus an original intent approach,<sup>77</sup> although the difference is critical to proponents of originalism.) Take, for example, the mission statement of the Tea Party Patriots, a national umbrella organization of the movement: "We, the members of The Tea Party Patriots, are inspired by our founding documents and regard the Constitution of the United States to be the supreme law of the land. We believe that it is possible to know the original intent of the government our founders set forth, and stand in support of that intent."<sup>78</sup> The Republican Party's Pledge to America, issued during the 2010 mid-term elections and clearly reflecting the influence of the Tea Party on the party platform and rhetoric, includes a commitment "to honor the Constitution as constructed by its framers and honor the original intent of those precepts that have been consistently ignored—particularly the Tenth Amendment ...."<sup>79</sup>

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and the founding of the United States has become a religion, it's not the past that's a foreign country. It's the present.").

<sup>75</sup> See, e.g., Adam Nagourney, *Tea Party Choice Scrambles in Taking on Reid in Nevada*, N.Y. TIMES, Aug. 17, 2010, at A1 (Sharron Angle, in response to Harry Reid's criticism that she was too conservative, suggested that "they probably said that about Thomas Jefferson and George Washington and Benjamin Franklin. And truly, when you look at the Constitution and our founding fathers and their writings ... you might draw those conclusions: That they were conservative. They were fiscally conservative and socially conservative.").

<sup>76</sup> SKOUSEN, *MAKING OF AMERICA*, *supra* note 43, at 10

<sup>77</sup> Greene, *Origins*, *supra* note 62, at 10.

<sup>78</sup> Tea Party Patriots, Mission Statement, <http://www.teapartypatriots.org/mission.aspx>.

<sup>79</sup> A Pledge to American: The 2010 Republican Agenda, <http://pledge.gop.gov/>.



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The standard critiques of originalism have also been applied toward the Tea Party's history of the Founding. Tea Party critics note that the historical record is just not as simple and coherent as Tea Partiers—and originalists—like to believe. While one might certainly look to the past for guidance on present-day questions, history rarely yields singular, definitive answers. The Founding Era was a complex period, the Founders diverse, argumentative, often inconsistent in their own beliefs.<sup>80</sup> The clarity and guidance that Tea Partiers demand of the Founding generation is not history; it is, as Harvard historian Jill Lepore puts it, “antihistory” in which “time is an illusion. Either we’re there, two hundred years ago, or they’re here, among us.”<sup>81</sup>

The ahistorical critique is a powerful one. It can be readily aimed not only at many popular historical accounts of the Founding Era, but also to originalism as a methodology of constitutional interpretation. This critique depends upon an assumption that the proper role of history is to stand on its own, without necessarily saying something directly about today's concerns. This is the basic premise of historical inquiry as a field of professional scholarship. Under this approach, the primary goal of the historian is to understand historical material on its own terms, by a thorough grounding in contemporary sources. Any “lessons” to be learned from history must emerge from the historical moment itself; they must demonstrate that past actors were concerned with issues that happen to still resonate today. To demand of the past that it respond to our current concerns is to not take the past on its own terms.

Yet the kinds of historical inquiry practiced by those whose primary concern is to locate a basis for legitimating a claim in the here and now—which is, in essence, the project of both Tea Party historical inquiry and originalists in the judiciary and legal academy—is fundamentally different from professional historical inquiry. As Gordon Wood has recently written in reference to the Tea Party's historical exercises, what they are practicing is not history, as this field of inquiry is generally understood, but the creation of a popular historical consciousness, of collective memory.<sup>82</sup> Practitioners of history regularly refute, often quite conclusively, claims of memory (as well as various historical claims of judges and lawyers). Indeed, such refutations are a professional responsibility. Yet these corrections rarely make much of a dent in the edifice of memory, at least not on their own. That is because the purpose of memory is not to be correct, but to create a compelling vision of the past that says something about the

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<sup>80</sup> See, e.g., Ron Chernow, *The Founding Fathers Versus the Tea Party*, N.Y. TIMES, Sept. 23, 2010, at A29; Joseph Ellis, *Immaculate Misconception and the Supreme Court*, WASH. POST, May 7, 2010.

<sup>81</sup> LEPORE, *supra* note 5, at 8; see also *id.* at 15-16 (“Antihistory has no patience for ambiguity, self-doubt, and introspection.... To say that we are there, or the Founding Fathers are here, or that we have forsaken them or they’re rolling over in their graves because of the latest, breaking political development ... is to subscribe to a set of assumptions about the relationship between the past and the present stricter, even, than the strictest form of constitutional originalism, a set of assumptions that, conflating originalism, evangelicalism, and heritage tourism, amounts to a variety of fundamentalism.”)

<sup>82</sup> Gordon S. Wood, *No Thanks for the Memories*, N.Y. REV. BKS., Jan. 13, 2011, at 40-42 (reviewing LEPORE, *supra* note 5).

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present.<sup>83</sup> For the Tea Party, the production of memory is as much about current identity as it is about the past. Whereas historical inquiry is based on an arms-length skepticism, a withholding of judgment until the historical material has something to say, for memory, in the words of Bernard Bailyn, the “relation to the past is an embrace. It is not a critical, skeptical reconstruction of what happened. It is the spontaneous, unquestioned experience of the past.... [I]t is ultimately emotional, not intellectual.”<sup>84</sup>

Populist originalism is not historical inquiry. It is, instead, the creation of a founding mythology. It is the creation of stories that help to inform contemporary practice. For participants in the Tea Party movement, these stories have proven quite compelling. Whether they are true or not, as measured by the best practices of historical inquiry, is almost beside the point.<sup>85</sup>

### III. EDUCATIONAL OUTREACH

Perhaps more than any major social movement in modern American history, Tea Party followers take to heart Franklin Roosevelt’s call on the nation, in his 1937 fireside chat, to treat the Constitution “[I]like the Bible” and “read [it] again and again.”<sup>86</sup> Touting the value of educating Americans about their Constitution is, of course, nothing new. Speaking on the fiftieth anniversary of the Constitution, John Quincy Adams urged his audience to “[t]each the [Constitution’s] principles, teach them to your children, speak of them when sitting in your home, speak of them when walking by the way, when lying down and when rising up, write them upon the doorplate of your home and upon your gates.”<sup>87</sup> Warren Burger, who retired from the bench in order to coordinate the Constitution’s bicentennial celebration, repeated these words in a speech in 1987.<sup>88</sup> Yet while this kind of constitutional celebrationism has a long history, it is nonetheless notable that a social movement would so fully internalize, through both rhetoric and action, this “protestant” approach to the Constitution.

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<sup>83</sup> Cf. Daniel Levin, *Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory*, 29 LAW & SOC. INQUIRY 105, 106, 112 (2004) (defining “heritage” as “the representation of the past as a useful source of contemporary moral instruction”).

<sup>84</sup> *Id.* at 42.

<sup>85</sup> Levin, *supra* note 83, at 112 (“Heritage presents itself as authentic, rather than true ....”). Much the same could be said about originalism. Whether it is good history or bad history or something else is ultimately beside the point. Originalism’s persuasive power has not relied upon the strength of its historical claims, as measure by accepted standards of historical inquiry. See, e.g., Robert Post & Reva Siegel, *Originalism as Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (“The current ascendancy of originalism does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement.”); Greene, *Selling*, *supra* note 62.

<sup>86</sup> Franklin D. Roosevelt, *Fireside Chat*, Mar. 9, 1937, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15381>.

<sup>87</sup> Quoted in LEVINSON, *supra* note 18, at 12.

<sup>88</sup> *Id.*

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“We need to talk about and learn about the Constitution daily,” said Jeff Luecke, a Tea Party organizer from Dubuque, Iowa, expressing a commonplace sentiment among the Tea Party faithful.<sup>89</sup> Glenn Beck regularly rails against the lack of schooling about the Constitution,<sup>90</sup> and he has called on his listeners to act as a “constitutional watchdog for America.”<sup>91</sup> “Only citizens’ understanding of and commitment to law can possibly reverse the patent disregard for the Constitution and statutes that has permeated American life,” writes Codeville.<sup>92</sup> One Tea Party-affiliated campaign—called “Save the Constitution—Read It!”—has as its mission to “encourage patriots everywhere to do two things: 1. Commit to reading the Constitution and review it often; 2. Encourage others to read the Constitution.”<sup>93</sup> The campaign promotes a six-point constitutional commitment plan:

1. Commit to reading the Constitution today and reviewing it often.
2. Make a goal and write it down.
3. Mark your calendar to review the Constitution on the 17th of each month.
4. Tell a friend about your goal.
5. Better yet, read it with a friend.
6. Place pocket Constitutions in your car or near your favorite chair.<sup>94</sup>

“You Can’t Defend What You Don’t Know!” announces an advertisement for ConstitutionalBootCamp.com, which promotes a course designed to turn one into “a truly Empowered Patriot & Defender of our Constitution.”<sup>95</sup> The Plymouth Rock Foundation, founded in 1970 to emphasize the nation’s Christian heritage, promotes a study-group approach to spreading the constitutional gospel. “[W]e publish materials, where you can study the Constitution line by line, from its original intent, and what was meant by the founders,” the group’s executive director explained. “You can study in small groups.... [W]e need to reeducate ourselves, because the present education system won’t.”<sup>96</sup> The Tea Party Patriots sells an “Official Tea Party Patriots’ Coloring & Activity Book” for children. “Inspired by the principles of Freedom and Liberty immortalized in the United States Constitution,” according to the website, “[t]he book includes a simple and fun emphasis on fundamental freedoms and is part of a long term effort to educate the next generation of children on the basics of American liberty.”<sup>97</sup>

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<sup>89</sup> Philip Rucker & Krissah Thompson, *Two new rules will give Constitution a starring role in GOP-controlled House*, WASH. POST, Dec. 30, 2010.

<sup>90</sup> Plumer, *supra* note 30, at 16.

<sup>91</sup> Ian Millhiser, *Rally ‘Round the True Constitution’*, AMER. PROSPECT, Aug. 25, 2009.

<sup>92</sup> *Id.* at 84.

<sup>93</sup> [www.saveitreadit.org](http://www.saveitreadit.org). The campaign was developed by a group called “As a Mom...A Sisterhood of Mommy Patriots.” See [www.asamom.org](http://www.asamom.org).

<sup>94</sup> [www.saveitreadit.org](http://www.saveitreadit.org).

<sup>95</sup> <http://files.meetup.com/1413559/Bootcamp> Flyer.pdf;  
<http://www.ConstitutionalBootCamp.com>

<sup>96</sup> LEPORE, *supra* note 5, at 5.

<sup>97</sup> <http://www.teapartypatriots.org/ColoringBook.aspx>.

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Tea Party activists regularly compared their constitution classes to Catholic catechism<sup>98</sup> or Bible study.<sup>99</sup> They often proudly carry copies of the Constitution, and pocket copies are regularly distributed at Tea Party events.<sup>100</sup> Book-length Tea Party polemics often include the text of the Constitution as an appendix, sometimes supplemented with other documents from the Founding Era.<sup>101</sup> A group called Let Freedom Ring holds public readings of the Constitution.<sup>102</sup> Tea Party groups in Tennessee converged on the state capitol as the 2011 legislative session was about to begin with two primary demands: a state law that would give individuals the ability to opt out of national health care requirements, and more teaching about American history and the Constitution in the public schools.<sup>103</sup> Some Tea Party groups have requested opportunities to go into schools to talk about the Constitution.<sup>104</sup>

An organization that has been particularly influential in defining and promoting the Tea Party's constitutional vision is the Skousen-founded National Center for Constitutional Studies (NCCS). Now based in Arizona, NCCS is known for workshops on the Constitution it holds around the country, at which it promotes Skousen's writings.<sup>105</sup> (Skousen's was explicit that his intent in *The 5000 Year Leap* and *The Making of America* was to write easily accessible books on the genius of the Founders and their accomplishments.<sup>106</sup>) NCCS also sells "study courses" on the Constitution, complete with textbooks, quizzes, and lectures on DVD, all designed increase public knowledge of the Founding Era and to promulgate Skousen's particular views of the Constitution.<sup>107</sup> PowerThink Publishing, the publisher of Skousen's books, offers a

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<sup>98</sup> ZERNIKE, *supra* note 17, at 79.

<sup>99</sup> Philip Rucker & Krissah Thompson, *Two new rules will give Constitution a starring role in GOP-controlled House*, WASH. POST, Dec. 30, 2010. (describing a Beth Mizell, a local Tea Party organizer, comparing weekend classes on the Constitution to a church Bible study); Jill Lepore, *The Commandments: The Constitution and Its Worshipers*, NEW YORKER, Jan. 17, 2011, at 76 ("Many people are now reading [the Constitution], with earnestness and dedication, often in reading groups modeled on Bible study groups.").

<sup>100</sup> ZERNIKE, *supra* note 17, at 67; Plumer, *supra* note 30, at 17; Bill Donahue, *Tea Party Road Trip: What the Movement Wants—and Why*, WASH. POST, Oct. 24, 2010; Mara Liason, *Tea Party: It's Not Just Taxes, It's the Constitution*, NPR, July 14, 2010.

<sup>101</sup> See, e.g., CODEVILLA, *supra* note 31, at 88-138 (reprinting the Declaration of Independence and the Constitution); THOMAS E. WOODS, NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 267-80 (2010) (Constitution).

<sup>102</sup> Plumer, *supra* note 30, at 16.

<sup>103</sup> Cara Kumari, *Tea Partiers Tell Lawmakers To Deliver*, WSMV-TV (Nashville), Jan. 12, 2011, <http://www.wsmv.com/politics/26471655/detail.html>.

<sup>104</sup> Plumer, *supra* note 30, at 16.

<sup>105</sup> National Center for Constitutional Studies, <http://www.nccs.net/>. First-hand accounts of these seminars can be found in Garret Epps, *Stealing the Constitution*, NATION, Jan. 20, 2011; Rosen, *Radical Constitutionalism*, *supra* note 42; ZERNIKE, *supra* note 17, at 64-66; Stephanie Mencimer, *One Nation Under Beck*, MOTHER JONES (May/June 2010).

<sup>106</sup> SKOUSEN, 5000 YEAR LEAP, *supra* note 48, at iv; SKOUSEN, MAKING OF AMERICA, *supra* note 43, at 1, 11-12.

<sup>107</sup> <http://www.nccsstore.com/American-Government-US-Constitution-Part-1/productinfo/AMGOV1/>.

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computer disk titled “U.S. Constitution Coach Kit,” which includes some 60,000 documents from American history.<sup>108</sup>

NCCS pocket Constitutions are often handed out at Tea Party rallies. On its website, the NCCS urges people to “[g]ive your family and friends a copy of this pocket Constitution and personally invite them to read and study the Constitution.”<sup>109</sup> The NCCS promotes this text of its pocket Constitution as especially authentic, having “been proofed word for word against the original Constitution housed in the Archives in Washington, D.C. It is identical in spelling, capitalization and punctuation.”<sup>110</sup> The front cover has a picture of George Washington, extending a quill to the reader, “inviting each of us to pledge our support for and commitment to The Constitution of the United States by maintaining and promoting its standard of liberty for ourselves and our posterity.”<sup>111</sup> The booklet’s back cover includes a pledge, calling on its owner to “affirm that I have read or will read out U.S. Constitution and pledge to maintain and promote its standard of liberty for myself and for my posterity.”<sup>112</sup> The pledge is followed by a line on which one can sign, underneath which is the signature of George Washington, who is identified as the “Witness” to the pledge.<sup>113</sup>

This belief that the cause of conservatism can be advanced through family and community-based educational projects extends beyond constitutional education. It has become a central tenet of the modern populist conservative movement. Conservative commentator Mark Levin, in his attack on what he sees as a dominant liberal elite (“Statists,” in his terminology), proclaims, “We, the people, are a vast army of educators and communicators.”<sup>114</sup> The central locus of the educational project is the family: “Parents and grandparents by the millions can counteract the Statist’s indoctrination of their children and grandchildren in government schools and by other Statist institutions simply by conferring their knowledge, beliefs, and ideals on them over the dinner table, in the car, or at bedtime.”<sup>115</sup> Glenn Beck and others on the populist Right have been urging parents and grandparents to take over the education of their children.<sup>116</sup> And beyond the family, one’s community can also be a place in which these lessons are shared. As Levin instructs his readers, “When the occasion arises in conversation with neighbors, friends, coworkers and others, take the time to explain conservative principles and their value to the individual, family and society generally.”<sup>117</sup>

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<sup>108</sup> <http://www.powerthinkpublishing.com>.

<sup>109</sup> National Center for Constitutional Studies, [http://www.nccs.net/pocket\\_constitution.html](http://www.nccs.net/pocket_constitution.html).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> LEVIN, *supra* note 59, at 4.

<sup>115</sup> *Id.*

<sup>116</sup> [Beck citation needed]; CODEVILLA, *supra* note 31, at 72 (“The home-school movement, for which the internet became the great facilitator, involves not only each family educating its own children, but also extensive and growing social, intellectual, and spiritual contact among like-minded persons.”)

<sup>117</sup> LEVIN, *supra* note 59, at 4.

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Community and family educational outreach efforts are constitutional mobilization on the most human scale. They do not attract the attention of political campaigns, legislative battles, or judicial opinions. Yet they are critical to the cultivation of a popular constitutional consciousness in potential movement participants. Tea Party activists have promoted the act of sitting down with the text of the Constitution, alone or in small groups, as in and of itself an act of constitutional engagement. Taking up the text is an act of commitment, an act of citizenship. Yet it is also a platform for additional involvement. For many Tea Party leaders, the reading of our founding text is but a springboard to further activism. The engaged citizen should be stirred from a constitutional commitment to involvement in constitutional politics. It is to these political forms of constitutional engagement that I now turn.

### IV. STATE-LEVEL CONSTITUTIONAL MOBILIZATION

The second area of Tea Party constitutional activism I will consider take place at the state level. It involves, most notably, efforts to get state legislatures to pass resolutions asserting their authority to oppose, perhaps even refuse to enforce, certain federal laws that they deem to be passed in violation of the Constitution. Responding to state-level opposition to health care, these “sovereignty resolutions” or “Tenth Amendment” resolutions have been debated in many states and have actually passed in several. The other state-level strategy involves the effort to mobilize support for various proposed constitutional amendments. Fidelity to basic constitutional principles of limited governance, Tea Party constitutionalists argue, may require changes in the text of the Constitution through the Article V amendment process. Even if none of the Tea Party’s proposed amendments are likely to gain the supermajorities in Congress necessary for formal proposal or the state supermajorities necessary for ratification, they provide another valuable platform from which the Tea Party can promote its vision of the Constitution.

#### *A. Tenth Amendment Remedies: Sovereignty Resolutions and Nullification*

One of the most controversial elements of the Tea Party’s constitutional project has been a revitalization of the idea of states rights and even the possibility of state nullification of federal policy. The logic of state resistance to federal policy, when that policy is believed to be unconstitutional, fits comfortably within the parameters of the Tea Party’s larger constitutional project. State-level mobilization is focused primarily on policing the constitutional limits of federal authority. Its advocates reject the idea that the Supreme Court—or any institution of the federal government, for that matter—has final interpretative authority over the meaning of the Constitution.<sup>118</sup> The textual foundation for the Tea Party’s state-level mobilization is the Tenth Amendment, an amendment that has long been used as a rallying cry for small-government activists. (Participants in the contemporary states rights movement often identify themselves as “Tenthers.”)

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<sup>118</sup> See, e.g., WOODS, *supra* note 101, at 3 (“The central point behind nullification is that the federal government cannot be permitted to hold a monopoly on constitutional interpretation.”).

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But the Tea Party's embrace of these state-level projects of resistance to federal policy is significant not only because of the way they align with the movement's constitutional vision, but also because they provide an arena for constitutionally driven political mobilization that offers near-term, feasible targets and the possibility of occasional victories. "We didn't get involved just to scream and shout; we actually have things that we'd like to accomplish," explained a local Tea Party activist in Tennessee who came to his state's capital to demand that the legislature attend to the Tea Party's concerns.<sup>119</sup> For citizens in many parts of the nation, the possibility of having their state legislature pass a resolution insisting upon more federal respect for state sovereignty or a law refusing to implement federal health care policy is far more realistic goal than the more obvious alternatives, such as convincing Congress to repeal or the Supreme Court to strike down constitutionally suspect laws. Even if these campaigns are often dismissed as merely symbolic, the states nonetheless provide a powerful forum for ongoing popular mobilization of the Tea Party's constitutional agenda.

Although critics of the Tea Party's efforts to rally support for sovereignty and nullification are regularly challenged their actions as themselves violations of the Constitution and a recipe for anarchy,<sup>120</sup> the idea that the resources, organizational capacity, and loyalties of the state could be used to resist unconstitutional federal action in fact has deep historical roots. (This is a point regularly made by Tea Partiers.<sup>121</sup>) James Madison described the basic dynamic in *Federalist 46*. When faced with a federal law that transcends the limits of constitutional authority, states retained considerable ability of opposition:

The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.<sup>122</sup>

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<sup>119</sup> Cara Kumari, *Tea Partiers Tell Lawmakers To Deliver*, WSMV-TV (Nashville), Jan. 12, 2011, <http://www.wsmv.com/politics/26471655/detail.html>.

<sup>120</sup> Sean Wilentz, *States of Anarchy*, NEW REPUBLIC, Apr. 29, 2010, at 5.

<sup>121</sup> See, e.g., WOODS, *supra* note 101.

<sup>122</sup> James Madison, *Federalist*, No. 46, Jan. 29, 1788, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch8s30.html>.

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Madison and Thomas Jefferson famously sought to rally the states in opposition to the Alien and Sedition Acts of 1798. Support for their efforts were limited to Virginia and Kentucky—the “signals of general alarm” went largely unheeded in this case—yet they left behind seminal statements of the principle of states as monitors of federal constitutional limits that echoed throughout American history.<sup>123</sup> Present-day advocates of sovereignty and nullification resolutions like to refer to their movement as embracing the “Spirit of ’98.”<sup>124</sup> The subsequent history of state-level mobilization against federal authority on constitutional grounds was dominated by efforts of southern states to protect slavery, an effort refuted on the battle fields of the Civil War, then efforts by southern states to protect Jim Crow. For many Tea Party critics, state-level mobilization against the federal government is inextricably linked to the defense of white supremacy, and the Tea Party’s efforts to revitalize the idea of nullification are just another misguided effort to resuscitate something that has rightly been discredited.<sup>125</sup> Defenders of various state-level Tenth Amendment remedies counter that the defense of white supremacy is only one part of the story, and that many other causes have been furthered by this route, including northern opposition to enforcing the Fugitive Slave Law in the 1850s and, more recently, efforts to legalize medicinal marijuana.<sup>126</sup> According to a brochure circulated by the Tenth Amendment Center (a Los Angeles-based group that has been at the forefront of the nullification movement): “Nullification has a long history in the American tradition and has been invoked in support of free speech, in opposition to war and fugitive slave laws, and more. These principles are currently being invoked in states around the country in response to unconstitutional Federal laws—left, right, and center.”<sup>127</sup>

The Tea Party’s promotion of state-level resistance to federal authority began in a rather haphazard, even farcical manner, but has since developed into a standard element of its larger constitutional project. Texas governor Rick Perry gained headlines when, at a Tea Party rally in the spring of 2009, he went so far as to suggest secession as a possible remedy for an overreaching federal government.<sup>128</sup> As talk of Texas seceding from the union died down, a basic pattern of Tea Party mobilization in the state legislatures developed. The first step was a round of generic “state sovereignty”

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<sup>123</sup> Virginia Resolutions of 1798 (Madison); Kentucky Resolutions of 1798 and 1799 (Jefferson).

<sup>124</sup> See, e.g., WOODS, *supra* note 101, at ch. 3.

<sup>125</sup> See, e.g., Wilentz, *supra* note 120, at 5 (“Each time [nullification] reared its head, it was crushed as an assault on democratic government and the nation itself .... The issue has been decided time and again, no least by the deaths of more than 618,000 Americans on Civil War battlefields.... [T]he new nullifiers would have us repudiate the sacrifices of American history—and subvert the constitutional pillars of American nationhood.... The current rage for nullification is nothing less than another restatement, in a different context, of musty neo-Confederate dogma.”)

<sup>126</sup> See, e.g., WOODS, *supra* note 101, *passim*

<sup>127</sup> Nullifying Federal Mandates, Tenth Amendment Center, <http://www.tenthamendmentcenter.com/wp-content/uploads/documents/talkingpoints/Nullification-Brochure.pdf>.

<sup>128</sup> W. Gardner Selby & Jason Embry, *Perry Stands by Secession Comments*, STATESMAN (Austin, Texas), Apr. 17, 2009, <http://www.statesman.com/news/content/region/legislature/stories/04/17/0417gop.html>.



resolutions. A popular model resolution has been promoted by the Tenth Amendment Center: the non-binding “10th Amendment Resolution.”<sup>129</sup> It includes some rather prosaic Tea Partyesque rhetoric—a statement that sovereignty residing in the people, not the government; the text of the Tenth Amendment; a reference to unnamed federal “powers, too numerous to list for the purposes of this resolution,” that “infringe on the sovereignty of the people of this state” and may be unconstitutional.<sup>130</sup> It also includes some stronger language—a demand that the federal government “cease and desist any and all activities outside the scope of their constitutionally-delegated powers”; a resolution to form a committee “to recommend and propose legislation which would have the effect of nullifying specific federal laws and regulations”; a call for the creation of a “committee of correspondence” to rally support for these principles in other states.<sup>131</sup>

The next step of the Tea Party’s state-level constitutional project has been the passage of state laws aimed at nullifying specific federal regulatory policies. The primary target here has been the health care law, although federal policies relating to the regulation of guns and medical marijuana have also been challenged through nullification resolutions. Even before passage of the federal health care bill in early 2010, local Tea Party groups were calling upon their state legislatures to take a stand against the looming possibility of a national health care program. A January 2010 rally in Missouri saw numerous state officials expressing support for an amendment to the state constitution prohibiting enforcement of the individual mandate.<sup>132</sup> After the health care bill was signed into law, several states passed statutes expressing opposition to the law; some even went so far as to refuse to enforce the law. Virginia was the first to do so, passing its nullification law on March 4, 2010.<sup>133</sup> At this time, thirty-six other states were considering similar legislation.<sup>134</sup> These nullification resolutions were based on a template being circulated by the American Legislative Exchange Council (ALEC), titled the “Freedom of Choice in Healthcare Act.”<sup>135</sup> By the end of 2010, the model legislation had been introduced or announced in forty-two states; six states (Virginia, Idaho, Arizona, Georgia, Louisiana, Missouri), had passed versions of the bill; and two (Arizona and Oklahoma) had passed the bill as a constitutional amendment.<sup>136</sup> In early 2011,

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<sup>129</sup> 10th Amendment Resolution, [www.tenthamendmentcenter.com/10th-amendment-resolution/](http://www.tenthamendmentcenter.com/10th-amendment-resolution/).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> WOODS, *supra* note 101, at 122.

<sup>133</sup> 2010 Va. Acts ch. 106, adding § 38.2-3430.1.1 to the Virginia Code (“No resident of this Commonwealth ... shall be required to obtain or maintain a policy of individual insurance coverage ....”) VA. CODE ANN. § 38.2-3430.1.1 (2010).

<sup>134</sup> Chelsey Ledue, *Virginia is the first state to pass national healthcare nullification law*, HEALTHCARE FINANCE NEWS, Mar. 5, 2010, <http://www.healthcarefinancenews.com/news/virginia-first-state-pass-national-healthcare-nullification-law>.

<sup>135</sup> ALEC’s Freedom of Choice in Health Care Act, American Legislative Exchange Council, <http://www.alec.org/AM/Template.cfm?Section=FOCA&Template=/CM/HTMLDisplay.cfm&ContentID=15323>.

<sup>136</sup> *Id.*; see also David Lightman, *All Over Map on Health Care*, CHI. TRIBUNE, Feb. 22, 2011, at 4.

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Tennessee passed a law that would allow residents to choose to opt-out of the health care mandate.<sup>137</sup>

When it comes to opposing the constitutionality of federal policy, nullification laws have obvious attractions from a movement mobilization perspective. “Nullification Begins With You,” explains a Tenth Amendment Center brochure designed to promote its “Nullify Now Tour.”<sup>138</sup>

Nullification is not something that requires any decision, statement or action from any branch of the federal government. Nullification is not the result of obtaining a favorable court ruling.... Nullification is not the petitioning of the federal government to start doing or to stop doing anything. Nullification doesn’t depend on any Federal law being repealed. Nullification does not require permission from any person or institution outside of one’s own State.<sup>139</sup>

One of the constant challenges of constitutional mobilization is keeping a sense of purpose and forward momentum to the cause. Constitutional change can be so slow, the realization of constitutional goals often seem impossibly distant. Lobbying state legislatures to stand up for their Tenth Amendment rights has proven a particularly effective way in which the Tea Party addressed this challenge.

### *B. Article V Remedies: Amending the Constitution*

The Tea Party takes seriously the possibility of amending the Constitution. Tea Partiers have rallied around various proposed changes to the Constitution, transforming ideas that had previously only been discussed in isolated conservative circles into issues for public debate. Critics see this as hypocritical. Why would a movement that claims to revere the sanctity of the text of the Constitution and the stability provided by unchanging constitutional principles be so enthusiastic about rewriting certain parts of the document? “[T]he self-proclaimed party of conservatism has become a constitutional graffiti movement,” wrote one skeptic after surveying the latest round of Tea Party proposed amendments.<sup>140</sup> Tea Party supporters defend their call for more serious consideration of the amendment process as outlined in Article V of the Constitution by framing their

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<sup>137</sup> *State House Passes Health Freedom Act*, CHATTANOOGAN, Mar. 7, 2011, [http://www.chattanooga.com/articles/article\\_196197.asp](http://www.chattanooga.com/articles/article_196197.asp).

The newest state-level tactic being pursued is the creation of an interstate compact that, if it received congressional approval, would exempt member states from participation in the national health care program. See Fred Barnes, *Nullifying Obamacare*, WEEKLY STANDARD, Jan. 3, 2011; The Compact, Health Care Compact, <http://www.healthcarecompact.org/compact>.

<sup>138</sup> Nullifying Federal Mandates, *supra* note 127; [www.nullifynow.com](http://www.nullifynow.com).

<sup>139</sup> *Id.*

<sup>140</sup> Robert Schlesinger, *The GOP, Tea Party Declare War on the Constitution*, USNEWS.COM, Sept. 8, 2010, <http://politics.usnews.com/opinion/articles/2010/09/08/the-gop-tea-party-declare-war-on-the-constitution.html>; see also Timothy Egan, *Backward, Into the Future*, N.Y. TIMES (online), June 6, 2010, <http://opinionator.blogs.nytimes.com/2010/06/06/backward-into-the-future/#more-51533> (“The Constitution is supposed to be second only to the Bible as the sacred text of Tea Party Republicans, but some of them must think it was written in pencil.”)

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proposed changes as a part of a project of restoration rather than transformation. As Republican House member Paul Broun of Georgia put it, “We need to do a lot of tweaking to make the Constitution as it was originally intended, instead of some perverse idea of what the Constitution says and does.”<sup>141</sup> Some of the proposed constitutional revisions, such as repealing the Sixteenth and Seventeenth Amendments (providing, respectively, for a federal income tax and the direct election of senators), are easily justified as in line with the larger Tea Party project of revitalizing lost constitutional principles.<sup>142</sup> Tea Party groups have also rallied behind a proposal called the “Repeal Amendment,” which is intended to empower the states so as to, according to its advocates, return the state-federal balance back to its proper constitutional foundations. In this way, Tea Partiers have portrayed their proposed amendments as acts of fidelity to the Constitution of 1787.

As Tea Partiers regularly point to the Progressive Era as the beginning of the end of constitutional governance in the United States, it is perhaps not surprising that they would seek to undo some of the signature constitutional amendments of that period. One target has been the Sixteenth Amendment, which was ratified in 1913 and gave Congress the power to directly tax income. Libertarians have long argued that the most effective way to limit the size of the federal government would be to limit its revenue-raising capacity. Congressman Ron Paul, who has become a kind of godfather of the Tea Party,<sup>143</sup> has long called for repeal of the Sixteenth Amendment,<sup>144</sup> and his son, Rand Paul, now U.S. Senator from Kentucky, has also called for its repeal.<sup>145</sup> “Giving the government direct access to the paychecks of the people is like the fox guarding the henhouse,” declared Tim Bridgewater, a Tea Party-backed candidate for the Senate from Utah.<sup>146</sup> “This single change,” Randy Barnett has written about the effort to repeal the income tax power, “would strike at the heart of unlimited federal power and end the costly and intrusive tax code.”<sup>147</sup>

Another Progressive Era target of the Tea Party is the Seventeenth Amendment, under which members of the Senate are selected through state-wide elections rather than being appointed by state legislatures, as required in the Constitution of 1787. Local Tea Party groups were able to elevate this idea, which had previously only lurked around the fringes of the states-rights wing of the conservative movement, into a significant

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<sup>141</sup> Ben Evans, *Republicans Hot, Cold On Constitution*, HUFFINGTON POST, Aug. 23, 2010, [http://www.huffingtonpost.com/2010/08/23/republicans-hot-cold-on-c\\_n\\_690745.html](http://www.huffingtonpost.com/2010/08/23/republicans-hot-cold-on-c_n_690745.html).

<sup>142</sup> The movement for repeal of the birthright citizenship provision of the Fourteenth Amendment, which has received considerable support from Tea Party groups, might also be understood along these lines. This issue received a flurry of attention during the summer of 2010, but has since receded from the forefront of the Tea Party agenda.

<sup>143</sup> See Joshua Green, *The Tea Party's Brain*, ATLANTIC, Nov. 1, 2010.

<sup>144</sup> *Id.*

<sup>145</sup> RAND PAUL, *THE TEA PARTY GOES TO WASHINGTON* 231-32 (2011).

<sup>146</sup> Tim Bridgewater, *Frequently Asked Questions*, <http://timbridgewater.com/issues-2/faqs/>.

<sup>147</sup> Barnett, *Case for Federalism*, *supra* note 35; see also Randy Barnett & William J. Howell, *The Case for a 'Repeal Amendment'*, WALL ST. J., Sept. 16, 2010 (the Sixteenth Amendment “enabled Congress to evade the constitutional limits placed on its own power by effectively bribing states”).

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discussion point during the 2010 election cycle.<sup>148</sup> And because the Tea Party was a major force, these scattered voices were taken seriously and picked up by more mainstream conservative figures. Conservative commentator Tony Blankley approvingly summarized the basic argument for the repeal of the Seventeenth Amendment: “[T]he best way to revive the 10th Amendment is to repeal the 17th Amendment.... The most efficient method of regaining the original constitutional balance is to return to the original constitutional structure. If senators were again selected by state legislatures, the longevity of Senate careers would be tethered to their vigilant defense of their state's interest—rather than to the interest of Washington forces of influence.”<sup>149</sup> Even if this was an utterly unrealistic proposal for amending the Constitution, it offered another opportunity for Tea Partiers and their allies to draw attention to the constitutional developments of the past century, particularly the declining role of the state-level politics and the steady growth of national-level interest groups.

The Tea Party has also backed the “Repeal Amendment.” Georgetown law professor Randy Barnett launched this campaign in an opinion piece in the *Wall Street Journal* in April 2009.<sup>150</sup> Barnett proposed what he called a “Federalism Amendment,” which was in fact a collection of changes he thought would resuscitate foundational constitutional principles. Rather than going the tradition Article V route of having Congress propose amendments and then send them to states for ratification, Barnett proposes that the states call a constitutional convention, whose proposals would then require the requisite four-fifths of the states for ratification. The proposal included: explicitly limiting Congress to its enumerated powers; limiting the reach of the Commerce power by effectively returning Commerce Clause doctrine to its pre-New Deal status (jettisoning the substantial effects and instrumentalities justifications); repealing the Sixteenth Amendment; and requiring that Courts use “original public meaning” to interpret the Constitution.<sup>151</sup> This was, according to Barnett, “a concrete and practical proposal by which we can restore our lost Constitution.”<sup>152</sup>

A month after his *Journal* piece, Barnett, writing on Forbes.com, expanded his proposal into a “Bill of Federalism”—“10 amendments devised to restore the balance between state and federal power as well as the original meaning of the Constitution.”<sup>153</sup> They are “primarily designed to reverse Supreme Court rulings that have improperly

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<sup>148</sup> Plumer, *supra* note 30, at 16.

<sup>149</sup> Tony Blankley, *Repeal the 17th Amendment*, RASMUSSEN REPORT, Jan. 27, 2010, [http://www.rasmussenreports.com/public\\_content/political\\_commentary/commentary\\_by\\_tony\\_blankley/repeal\\_the\\_17th\\_amendment](http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_tony_blankley/repeal_the_17th_amendment).

A different, more conspiratorial argument has been pursued by The Texas Tea Party. Its “Project 17” is designed to challenge the constitutional status of the Seventeenth Amendment because, the organization claims, it failed to secure the necessary number of states to secure ratification. The Texas Tea Party, Project 17, <http://www.texasteaparty.org/project17.html>.

<sup>150</sup> Barnett, *Case for Federalism*, *supra* note 35.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Randy E. Barnett, *A Bill of Federalism*, FORBES.COM, May 20, 2009, <http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett.html>.

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expanded federal power.”<sup>154</sup> Barnett explained that the campaign for a Bill of Federalism would have two primary goals. One was to “become the rallying cry of Tea Parties and other citizen groups across the nation.”<sup>155</sup> It could “provide an organizing document for candidates seeking state and federal office.”<sup>156</sup> The other was to change constitutional law. “I fully expect that the Supreme Court would try to forestall its adoption by moving toward the original meaning of the Constitution ....”<sup>157</sup>

Following Barnett’s publication of his proposed Federalism Amendment, Tea Party groups in Virginia contacted him and then pressed their state leaders to embrace the proposal.<sup>158</sup> In September 2010, William J. Howell, speaker of the Virginia House of Delegates, co-authored an op-ed in the *Wall Street Journal* in which they explained and defended a “Repeal Amendment,” which would allow a supermajority of states to overturn federal law.<sup>159</sup> Without this option, Barnett and Howell wrote, the only mechanisms states have to challenge federal law was to either challenge the law in federal court or to attempt to overturn the law through the Article V amendment process. The Repeal Amendment, they argued, offers a more functional way of limiting federal power and protecting basic constitutional principles.<sup>160</sup> “In short,” they conclude, “the amendment provides a new political check on the threat to American liberties posed by a runaway federal government. And checking abuses of power is what the written Constitution is all about.”<sup>161</sup>

Following the November 2010 elections, the repeal amendment gained momentum. Virginia Attorney General Kenneth T. Cuccinelli II wrote to state attorneys

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* The provisions of the Bill of Federalism Bill include: limitations on congressional taxing and commerce power; prohibition of unfunded mandates on states; limits on the treaty power; explicit recognition of campaign contributions as protected free speech; a repeal amendment (requiring three-fourths of the states); term limits for members of Congress; a balanced budget amendment; an individual liberty amendment, defined to include, inter alia, “the enjoying, defending and preserving of their life and liberty, acquiring, possessing and protecting real and personal property, making binding contracts of their choosing, and pursuing their happiness and safety” and protected through the due process clause; a requirement that the Constitution be interpreted by a methodology of original meaning. The entire text of the Bill of Federalism can be found at [http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett\\_2.html](http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett_2.html).

<sup>158</sup> Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES, Dec. 20, 2010, at A13.

<sup>159</sup> Barnett & Howell, *supra* note 147. The text of the proposed amendment reads as follows: “Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.” *Id.*

<sup>160</sup> *Id.* Barnett and Howell also differentiate their proposal from nullification: Nullification demands a constitutional justification by the states. Repeal can be based on policy grounds. *Id.*

<sup>161</sup> *Id.*

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general around the country urging them to support a constitutional amendment that would allow a super-majority (two-thirds) of the states to overturn federal legislation.<sup>162</sup> By the end of the year, legislative leaders in twelve states had expressed support for the amendment.<sup>163</sup> In Congress, the repeal amendment was introduced by Representative Bob Bishop of Utah, founder of the House Republican “10th Amendment Task Force”—whose mission is to “[d]isperse power from Washington and restore the Constitutional balance of power through liberty-enhancing federalism.”<sup>164</sup> The repeal amendment, Bishop explained, “will provide citizens, through their elected state representatives, with a powerful tool to check an overzealous and power-hungry federal government.... [I]t is an arrow in the quiver of states and a solid first step that can be taken to begin restoring the balance of power our Founding Fathers intended when they drafted the Constitution.”<sup>165</sup> Eric Cantor, the new House Majority Leader, has expressed support as well. The amendment, he said, “would provide a check on the ever-expanding federal government, protect against Congressional overreach and get the government working for the people again, not the other way around.”<sup>166</sup>

The enthusiasm for amending the Constitution seems to be gaining traction in all corners of movement conservatism, not just among self-identified Tea Party activists. One of the major discussion points of the November 2010 meeting of the Federalist Society was the need for various constitutional amendments.<sup>167</sup>

### V. NATIONAL ELECTORAL POLITICS

The most widely recognized achievements of the Tea Party movement, at least in its first two years of existence, occurred in the sphere of national electoral politics. The 2010 congressional elections became a critical target for the burgeoning movement. While many critics assumed (or hoped) that the Tea Party would dissipate after the major stimulus bills had been passed and after health care was signed into law, the movement only gained strength through 2010, largely because its activists turned their attention to

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<sup>162</sup> Zernike, *Proposed Amendment*, *supra* note 158.

<sup>163</sup> *Id.* (Florida, Georgia, Indiana, Iowa, Minnesota, Missouri, Montana, New Jersey, South Carolina, Texas, Utah, and Virginia).

<sup>164</sup> H.J. Res. \_\_\_, 111th Cong., 2d Sess. (Nov. 30, 2010), available at [http://robbishop.house.gov/UploadedFiles/constitutional\\_amendment.pdf](http://robbishop.house.gov/UploadedFiles/constitutional_amendment.pdf).

Earlier in the year, Bishop, along with fellow Utah House member Jason Chaffetz, introduced a bill titled the “Utah Laboratory of Democracy Act of 2010.” It would “exempt the State of Utah from Federal programs in the areas of education, transportation, and Medicaid so that the State of Utah can undertake innovative methods to manage these government programs using Utah’s portion of Federal revenues for these programs, and for other purposes.” H.R. 5238, 111th Cong., 2d Sess. (May 10, 2010), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h5238ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h5238ih.txt.pdf).

<sup>165</sup> *Rep. Rob Bishop Proposes New Constitutional Amendment*, Press Release, Nov. 30, 2010, <http://robbishop.house.gov/10thAmendment/News/DocumentSingle.aspx?DocumentID=215929>.

<sup>166</sup> Dana Milbank, *A Strange Way to Honor the Founding Fathers*, WASH. POST, Dec. 1, 2010.

<sup>167</sup> Robert Barnes, *Scholars Debate Whether Time Is Right for Amending the Constitution*, WASH. POST, Nov. 28, 2010.

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the upcoming midterm elections. The influence of the Tea Party only seemed to grow as the election process unfolded, from various high-profile Tea Party victories in the Republican primaries through the eventual election of numerous Tea Party-backed candidates to Congress by year's end. Exit polls showed that four out of ten voters in the November 2010 elections expressed support for the Tea Party. Most significantly for purposes of this Article, the movement's focus on the congressional elections provided another forum from which to engage the nation about the Tea Party's constitutional vision. One of the Tea Party's goals was to transform the elections into a debate over the appropriate scope of congressional power under the Constitution.

In terms of advancing its constitutional agenda, the basic Tea Party game plan in the 2010 elections was simple: insist on making the Constitution a central topic in the election campaigns, force candidates to discuss their constitutional commitments, and refuse to vote for anyone who does not embrace Tea Party constitutional beliefs. So we find a Tea Party-organized candidate forum for a House seat in a district outside of Philadelphia at which candidates were grilled about their views on the Tenth Amendment ("It's my favorite amendment in the Constitution," enthused one hopeful) and the possibility of state nullification of the federal health care requirements.<sup>168</sup> The most valued label for politicians hoping to gain the support of Tea Party followers is "constitutional conservative." This is what Rand Paul, who embraced the Tea Party all the way to one of Kentucky's Senate seats, likes to call himself;<sup>169</sup> it was also the label Sarah Palin bestowed upon her favored candidates.<sup>170</sup> Sometimes Tea Party faithful reduce the label simply to "constitutionalist."<sup>171</sup>

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<sup>168</sup> Kate Zernike, *In Power Push, Movement Sees Base in G.O.P.*, N.Y. TIMES, Jan. 15, 2010, at A1.

<sup>169</sup> Rand Paul, *Rand Paul, libertarian? Not quite*, USA TODAY, Aug. 9, 2010; see also, RAND PAUL, *THE TEA PARTY GOES TO WASHINGTON* ch. 6 (2011) (chapter titled "Constitutional Conservatism").

<sup>170</sup> See, e.g., Sarah Palin, *Competition's Good! Joe Miller for Alaska*, FACEBOOK, June 2, 2010, [http://www.facebook.com/note.php?note\\_id=395277003434](http://www.facebook.com/note.php?note_id=395277003434) ("Joe [Miller] is a true Commonsense Constitutional Conservative"); see also Joseph Boven, *Bachmann calls for constitutional conservative takeover to free 'nation of slaves'*, COLORADO INDEP., July, 10, 2010, <http://coloradoindependent.com/57145/bachmann-calls-for-constitutional-conservative-takeover-to-free-nation-of-slaves> (Representative Michelle Bachmann embracing the constitutional conservative label).

The most considered use of the label "constitutional conservative" came from a group of leading conservatives, including Reagan Attorney General Edwin Meese, who met in February 2010 and drafted what they called the "Mount Vernon Statement." The document embraced the theme of constitutional conservatism as the best path for a revitalized right in the twenty-first century:

A Constitutional conservatism unites all conservatives through the natural fusion provided by American principles. It reminds economic conservatives that morality is essential to limited government, social conservatives that unlimited government is a threat to moral self-government, and national security conservatives that energetic but responsible government is the key to America's safety and leadership role in the world. A Constitutional conservatism based on first principles provides the framework for a consistent and meaningful policy agenda.

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“It is becoming apparent to millions of voters the solution lies in electing officials who understand, respect and abide by the Constitution as much as we citizens are expected to follow the law,” explained longtime conservative fundraiser Richard Viguerie.<sup>172</sup> FreedomWorks Chairman Dick Armey’s central basic advice to the newly elected Tea Party-supported members of Congress is quite simple: “Look to the Constitution to govern your policy. You do not swear an oath to the Republican Party or the tea party—your pledge is to defend the Constitution. Let this govern your votes. The Constitution was designed to limit government power, so make sure your votes go only to bills that are right and necessary.”<sup>173</sup>

The Independence Caucus, an organization that describes itself as a “national citizens organization” and has been aligned with local Tea Party groups, has created a lengthy list of yes-or-no “vetting questions” for congressional candidates. It is basically a test of Tea Party bona fides, designed to measure a candidate’s commitment to the Independence Caucus’s mission of promoting limited government, fiscal responsibility, and “adherence to constitutional authority.”<sup>174</sup> The first group of questions focuses on the “proper role of government and national authority,” and is prefaced with a statement explaining that all elected public officials take an oath to the Constitution, and that the oath “mandates that all public officials refrain from taking any actions or passing any legislation that is not constitutionally empowered to their elected office.”<sup>175</sup> The first question asks whether the candidate agrees that the Tenth Amendment “limits the Federal Government to the 30 enumerated powers that are specified in the Constitution.”<sup>176</sup> The second question gives a mini-history of what it characterizes as the flawed constitutional reasoning of *Wickard v. Filburn*,<sup>177</sup> the 1942 Supreme Court opinion that introduced the substantial effects test into the commerce clause doctrine. The reasoning of *Wickard* allows for the application of the commerce power to intrastate activity that, when analyzed in the aggregate, substantially affects interstate commerce. It then asks if the candidate agreed to vote against any proposed legislation (and to oppose the “expansion and perpetuation” of existing legislation) that regulates “any areas that are not specifically and expressly enumerated in the Constitution and are therefore reserved as

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Edwin Meese et al., *The Mount Vernon Statement*, Feb. 17, 2010, <http://www.themountvernonstatement.com/>.

<sup>171</sup> See, e.g., ZERNIKE, *supra* note 17, at 65 (quoting a Tea Party activist proclaiming, “I’m not a Republican anymore. I’m a Constitutionalist.”). This label was also embraced by W. Cleon Skousen. See, e.g., SKOUSEN, *5000 YEAR LEAP*, *supra* note 48, at 337.

<sup>172</sup> Richard Viguerie, *Constitutionally, the Next Time*, WASH. TIMES, Nov. 23, 2009, <http://www.washingtontimes.com/news/2009/nov/23/constitutionally-the-next-time/>.

<sup>173</sup> Dick Armey, *Stay True to Principle—And the Constitution*, POLITICO, Jan. 18, 2011, <http://www.politico.com/news/stories/0111/47697.html>.

<sup>174</sup> Independence Caucus, *Mission Statement*, [http://www.icaucus.org/index.php?option=com\\_content&view=article&id=51&Itemid=81](http://www.icaucus.org/index.php?option=com_content&view=article&id=51&Itemid=81).

<sup>175</sup> Independence Caucus, *The Process: Vetting Questions—Section 1*, [http://www.icaucus.org/index.php?option=com\\_content&view=article&id=90&Itemid=153](http://www.icaucus.org/index.php?option=com_content&view=article&id=90&Itemid=153).

<sup>176</sup> *Id.*

<sup>177</sup> 317 U.S. 111 (1942).



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the exclusive province of the states; such as Education, Energy, Welfare, Labor issues, Non-Interstate roads, farm subsidies, etc.”—regardless of the Court’s holding in *Wickard*.<sup>178</sup> The questionnaire also asks the candidate to commit to pending legislation that would require each bill to include specific reference to its constitutional basis.<sup>179</sup>

The candidate questionnaire created by the Independence Caucus offers a critique of *Wickard v. Filburn*, but generally treats the decision as fact—not as a target for reform. When it comes to using the commerce power as defined by the Court: “just because Congress has been allowed to do so, doesn’t mean they should do so ....”<sup>180</sup> There is no mention of the candidate’s responsibility to reshape the federal judiciary. Rather, the focus is on constitutionally responsible legislation, regardless of what the Court would allow.

Mike Lee, newly elected U.S. Senator from Utah and a Tea Party favorite, has been quite explicit in talking about the constitutional commitments he, as an elected representative, would feel compelled to follow, regardless of existing judicial doctrine. In a speech to the Federalist Society in November 2010, soon after his election victory, Lee stated, “The solution, I believe, lies not in attempts within the federal judiciary to roll back *Wickard v. Filburn*.”<sup>181</sup> “Don’t get me wrong,” he went on, “I would love it if that happened. And I applaud those states that have attacked President Obama’s health care plan in the courts ....”<sup>182</sup> But the solution lies in focusing on the political branches—members of Congress must take more responsibility for the Constitution—they must not forget “the fact that under Article VI, each member of Congress is required to take an oath to uphold the Constitution. In my mind, that means more than doing that which you can get away with in court.... [M]embers of Congress need to be held accountable, and need to hold themselves accountable, to their oath, regardless of what the courts might be willing to enforce—that that needs to become part of the American political discourse.”<sup>183</sup>

In 2009, with the Tea Party movement gaining momentum and seeking to mobilize opposition to the new health care law, Republicans in both houses of Congress introduced the Enumerated Powers Act. It would require all laws to “contain a concise and definite statement of the constitutional authority relied upon for the enactment of each portion of that Act.”<sup>184</sup> A similar proposal was included in the Independent Caucus’

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<sup>178</sup> Vetting Questions—Section 1, Question 3, *supra* note 175.

<sup>179</sup> *Id.* (Question 4). The questionnaire also asked if the candidate would commit to oppose any federal grants “not directly related to some power specifically delegated to the Federal Government”—a proposal that “would eliminate upwards of 90% of the Federal-aid programs presently plaguing the nation.” *Id.* (Question 5).

<sup>180</sup> Independence Caucus, The Process: Vetting Questions—Section 1, Question 2, [http://www.icaucus.org/index.php?option=com\\_content&view=article&id=90&Itemid=153](http://www.icaucus.org/index.php?option=com_content&view=article&id=90&Itemid=153).

<sup>181</sup> Lee Address, *supra* note 67.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> <http://www.govtrack.us/congress/billtext.xpd?bill=h111-450>. The wording of the Senate bill was slightly different, requiring “a concise explanation of the specific constitutional authority relied upon for the enactment of each portion of that Act.”

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candidate questionnaire.<sup>185</sup> The proposal has clearly resonated with the Tea Party rank and file. A version of it was the top vote-getter for the “Contract From America,” an online survey designed as a way in which the Tea Party agenda could be created by a kind of popular referendum process.<sup>186</sup> The proposal, titled “Protect the Constitution,” would “[r]equire each bill to identify the specific provision of the Constitution that gives Congress the power to do what the bill does.”<sup>187</sup> The proposal was also included in the Republican Pledge to America, which the party rolled out during the 2010 elections.<sup>188</sup> After the 2010 elections, the new Republican-controlled House included this requirement in its new procedural rules. (The new rules also provide that the Constitution be read aloud at the beginning of the new session.<sup>189</sup>) This requirement, a Republican press release explained, “will serve to refocus members of Congress, with every bill they introduce, on the Constitution that they take an oath to support and defend.”<sup>190</sup> The Republican leadership issued a memorandum about the new requirement to all House members, which included guidelines on what the new rule would actually require.<sup>191</sup> The memorandum included some “illustrative examples of citations to constitution authority,” such as:

The constitutional authority on which this bill rests is the power of Congress to make rules for the government and regulation of the land and naval forces, as enumerated in Article I, Section 8, Clause 14 of the United States Constitution.<sup>192</sup>

Or, to quote a more Tea Partiesque example:

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<http://www.govtrack.us/congress/billtext.xpd?bill=s111-1319>. The House bill was introduced by John Shadragg, Republican from Arizona, and gained seventy co-sponsors. <http://www.govtrack.us/congress/bill.xpd?bill=h111-450>. The Senate bill was introduced by Thomas Coburn, Republican from Arizona, and gained twenty-four co-sponsors. <http://www.govtrack.us/congress/bill.xpd?bill=s111-1319>.

<sup>185</sup> Independence Caucus, The Process: Vetting Questions—Section 1, Question 4, [http://www.icaucus.org/index.php?option=com\\_content&view=article&id=90&Itemid=153](http://www.icaucus.org/index.php?option=com_content&view=article&id=90&Itemid=153).

<sup>186</sup> Contract From America, <http://www.thecontract.org/>. The Contract From America was created by Ryan Hecker, an activist affiliated with the Houston Tea Party Society.

<sup>187</sup> *Id.*

<sup>188</sup> A Pledge to American: The 2010 Republican Agenda, <http://pledge.gop.gov/> (“We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.”).

<sup>189</sup> H. Res. 5, 112th Cong., 1st sess., at 32 (conference print), available at [http://rules-republicans.house.gov/Media/PDF/112-Hres5-CP\\_xml.pdf](http://rules-republicans.house.gov/Media/PDF/112-Hres5-CP_xml.pdf).

<sup>190</sup> House Republicans Release Proposed 112th Congress Rules Package, Committee on Rules—Republicans, <http://rules-republicans.house.gov/News/Read.aspx?id=442>. See also LEVIN, *supra* note 59, at 12 (calling on conservatives to “[d]emand that all public servants, elected or appointed, at all times uphold the Constitution and justify their public acts under the Constitution.”).

<sup>191</sup> Memorandum from Speaker-Designate Boehner, et al., RE: New Constitutional Authority Requirement for Legislation, Dec. 17, 2010, available at <http://www.washingtonpost.com/wp-srv/politics/pdf/constiitutional-authority-requirement.html>.

<sup>192</sup> *Id.*

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This bill makes specific changes to existing law in a manner that returns power to the States and to the people, in accordance with Amendment X of the United States Constitution.<sup>193</sup>

Although these were rather spare constitutional justifications, the memorandum indicated that “a sponsor may provide additional explanatory details if they [sic] wish.”<sup>194</sup> The memorandum included suggestions for resources (“in addition to the Constitution itself”) that may be used to assist in the task. They include the Federalist Papers (“considered by many to be the primary source of authority on what the Constitution was understood to mean when it was ratified”); the Annotated Guide to the Constitution produced by the Congressional Research Service and another one produced by the Heritage Foundation;<sup>195</sup> the Founder’s Constitution (a collection of Founding Era documents);<sup>196</sup> and various commentary provided by “a number of think-tanks and associations from across the political spectrum”—the Brookings Institution, the Cato Institute, the Federalist Society, the American Constitution Society.<sup>197</sup>

The memorandum concludes with “Frequently Asked Questions”:

Q. Isn’t it the courts’ duty to determine whether a law is constitutional and thus doesn’t this rule infringe on the power of the courts?

A. No. While the courts have the power to overturn an Act of Congress on the basis that it is unconstitutional, Members of Congress have a responsibility, as clearly indicated by the oath of office each Member takes, to adhere to the Constitution.

Q. What impact will the Constitutional Authority Statement have on litigation regarding the constitutionality of Acts of Congress?

A. To the extent that a court looks at the legislative history of an Act, the Constitutional Authority Statement would be part of that history. However, the courts have made clear that they will not uphold an unconstitutional law simply on the basis that Congress thinks that the law is constitutional.

Q. What if the citation of constitutional authority is inadequate or wrong?

A. As stated earlier, the adequacy and accuracy of the citation of constitutional authority is a matter for debate in the committees and in the House. Ultimately, the House will express its opinion on a proposed bill, including its constitutionality, by either approving or disapproving the bill.

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> HERITAGE GUIDE TO THE CONSTITUTION (David F. Forte & Mathew Spalding eds., 2005). “The particular aim” of the guide “is to provide *lawmakers* with a means to defend their role and to fulfill their responsibilities in our constitutional order.” *Id.* at vii (emphasis added).

<sup>196</sup> THE FOUNDERS CONSTITUTION (Philip Kurland & Ralph Lerner eds., 1986), *available at* <http://press-pubs.uchicago.edu/founders/>.

<sup>197</sup> Memorandum from Speaker-Designate Boehner, *supra* note 191.

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Q. So why have this Rule at all?

A. Just as a cost estimate from the Congressional Budget Office informs the debate on a proposed bill, a statement outlining the power under the Constitution that Congress has to enact a proposed bill will inform and provide the basis for debate. It also demonstrates to the American people that we in Congress understand that we have an obligation under our founding document to stay within the role established therein for the legislative branch.<sup>198</sup>

The reason this requirement that all congressional legislation contain a specific reference to the constitutional basis of authority gained so much traction has much to do with a moment in the fall of 2009 during the height of the debate over the federal health care bill. At a press conference held by House Speaker Nancy Pelosi, a reporter from the Cybercast News Service (CNS), a conservative news organization, asked the Speaker where in the Constitution she found the basis for the individual mandate provision of the health care bill, she was dismissive. “Are you serious? Are you serious?” she asked. When the reporter responded in the affirmative, she shook her head and moved on to another questioner.<sup>199</sup> In response to follow-up inquiry from CNS, Pelosi’s office spokesperson reiterated the Speaker’s point that the constitutional question is “not a serious” question.<sup>200</sup> The Speaker’s office also sent the reporter a copy of a statement posted on the Speaker’s website the previous month that dismissed the constitutional challenge to the health care bill as “nonsensical” and then went on to defend the constitutionality of the legislation under the commerce and taxing power.<sup>201</sup> This confrontation, and Pelosi’s dismissive attitude toward the question of the law’s constitutionality, has been referenced again and again in Tea Party literature.<sup>202</sup> It was cited as clear evidence that the Democratic leadership was playing fast and loose with the Constitution, ignoring conservative concerns that health care and other measures pushed beyond the boundaries of Article I’s list of Congress’ enumerated powers.

The House Tea Party Caucus has begun a high-profile Constitution study group, not unlike the ones that have popped up around the nation with the encouragement of local Tea Party groups. Michelle Bachmann, U.S. Representative from Minnesota and founder of the Tea Party Caucus, organized a series of what she called “Conservative Constitutional Seminars” for members of Congress.<sup>203</sup> “Every week we’ll start our week

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<sup>198</sup> *Id.*

<sup>199</sup> Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says: ‘Are You Serious?’*, CNSNew.Com, Oct. 22, 2009, <http://www.cnsnews.com/news/article/55971>.

<sup>200</sup> *Id.*

<sup>201</sup> Health Insurance Reform Daily Mythbuster: ‘Constitutionality of Health Insurance Reform’, Speaker Nancy Pelosi website, Sept. 16, 2009, <http://www.speaker.gov/newsroom/factcheck?id=0107>.

<sup>202</sup> See, e.g., WOODS, *supra* note 101, at 1; CODEVILLA, *supra* note 31, at 45, 80-81; Ken Klukowski, Letter to the Editor, POLITICO, Oct. 28, 2009, <http://www.politico.com/news/stories/1009/28787.html> (“Yes, Madame Speaker, I’m serious. The individual mandate is unconstitutional. If Obamacare passes, we’ll see you in court.”)

<sup>203</sup> Justice Scalia to Address Conservative Constitutional Seminar, Congresswoman Michele Bachmann, News, Dec. 15, 2010,

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with a class on the Constitution and how maybe bills that we're working on fit in with the Constitution—real time application.”<sup>204</sup> “We're going to do what the NFL does and what the baseball teams do,” she explained. “[W]e're going to practice every week, if you will, our craft, which is studying and learning the Declaration, the Constitution, and the Bill of Rights.”<sup>205</sup> The class became a major news story before it even began, when Bachmann announced that Justice Scalia would lead the group's first meeting.<sup>206</sup>

There was also the highly publicized reading of the Constitution from the floor of the House of Representatives at the start of the term of the 112th Congress—the first time this had ever been done in the history of the House. Republican Congressman Bob Goodlatte of Virginia, a fiscal conservative and staunch opponent of the health care bill,<sup>207</sup> initiated the idea. “One of the resounding themes I have heard from my constituents is that Congress should adhere to the Constitution and the finite list of powers it granted to the federal government,” he said in a press release. “As the written expression of the consent the American people gave to their government—a consent with restrictions and boundaries—the public reading of the Constitution will set the tone for the 112th Congress.”<sup>208</sup> “Call it the tea party-ization of Congress,” wrote *Washington Post* reporters about the newfound congressional fascination with the Constitution.<sup>209</sup> “After handing out pocket-size Constitutions at rallies, after studying the document article by article and after demanding that Washington return to its founding principles, tea party activists have something new to applaud. A pillar of their grass-roots movement will become a staple in the bureaucracy that governs Congress.”<sup>210</sup>

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<http://bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=217599;> Gabriella Schwarz, *Congress to be Schooled*, Cnn.com, <http://politicalticker.blogs.cnn.com/2010/12/15/congress-to-be-schooled-2/#more-139906>.

<sup>204</sup> *Gingrich, Bachmann Speak to Brody File About New GOP Congress*, The Brody File, CBN.com, <http://blogs.cbn.com/thebrodyfile/archive/2010/12/09/gingrich-bachmann-speak-to-brody-file-about-new-gop-congress.aspx>.

<sup>205</sup> *Scalia To Teach Bachmann's Inaugural Class On The Constitution*, Right Wing Watch, Dec. 13, 2010, <http://www.rightwingwatch.org/content/scalia-teach-bachmanns-inaugural-class-constitution>; <http://www.youtube.com/watch?v=nIPXkY0zoEo>.

<sup>206</sup> *Id.*; *Justice Scalia and the Tea Party*, N.Y. TIMES, Dec. 19, 2010, at WK7.

On January 24, Scalia talked at the seminar. According to reports of some who attended, Scalia gave his trademark defense of originalism and urged the lawmakers to read the Federalist Papers and to follow the Constitution as it was written. David G. Savage & Kathleen B. Hennessey, *Scalia Gives Talk on Constitution to Members of House*, CHI. TRIBUNE, Jan. 25, 2011, at 12.

<sup>207</sup> “All Americans should be worried anytime the federal government tries to trample on or ignore our Constitution,” Goodlatte wrote in defending his opposition to the health care bill. Bob Goodlatte, *The Wrong Prescription for America*, Mar. 26, 2010, <http://goodlatte.house.gov/2010/03/the-wrong-prescription-for-america.shtml>.

<sup>208</sup> GOODLATTE TO LEAD HISTORIC READING OF U.S. CONSTITUTION ON HOUSE FLOOR, Press Release, Jan. 4, 2011, <http://goodlatte.house.gov/2011/01/goodlatte-to-lead-historic-reading-of-us-constitution-on-house-floor.shtml>.

<sup>209</sup> Philip Rucker & Krissah Thompson, *Two new rules will give Constitution a starring role in GOP-controlled House*, WASH. POST, Dec. 30, 2010.

<sup>210</sup> *Id.*

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The Tea Party has created a constitutional agenda that does not simply provide a collection of principles that might be attractive to certain segments of the population, but also provides ways in which citizens can take part in a constitutional movement. This is a constitutional project around which a social movement can mobilize. Mike Lee and others in the Tea Party movement recognize that constitutional litigation is far harder to use as a tool of social mobilization—it is slow, it is detached from the people themselves, and it is dependent on a small number of individuals who are only indirectly accountable to democratic inputs. By turning to congressional elections and lawmaking as an arena of constitutional contestation, the Tea Party has found a way in which everyday citizens can stake out constitutional claims and then demand, in a relatively direct manner, that government abide by these constitutional principles. This approach to constitutionalism is far more empowering, and far more effective as a tool of movement mobilization, than working through the courts.

### VI. THE FUTURE OF TEA PARTY CONSTITUTIONALISM

An assessment of the impact of the Tea Party's constitutional project can be divided into three areas of possible influence: the development of constitutional law in the courts; the role of the Constitution outside the courts; and scholarship in the field of popular constitutionalism.

#### *A. Constitutional Law*

While the central target of the Tea Party constitutional movement has been the political process and, more generally, popular attitudes toward the Constitution, there have been clear signs that the Tea Party's influence is being felt in the judiciary as well. Nowhere is this more evident than in litigation challenging the constitutionality of the federal health care law.

Of the many issues around which the Tea Party has mobilized over the past two years, none has been so effective a rallying cry as opposition to the health care law that President Obama signed into law on March 23, 2010.<sup>211</sup> On this matter, the Tea Party, a diverse and unwieldy coalition of agendas on its best of days, speaks with a marked singularity of purpose. From the time the Obama administration first proposed a national health care program, Tea Party loyalists challenged it not only as a policy matter, but also as an unconstitutional extension of federal power. In its effort to establish a national health care program, particularly the requirement included in the final version of the bill that individual citizens must carry health insurance, Tea Partiers have argued that Congress has gone beyond its constitutionally enumerated powers, as defined in Article I of the Constitution. The Tea Party case against the health care law also regularly references two other constitutional values dear to the hearts of Tea Partiers, which the health care law violates: state sovereignty and individual liberty.

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<sup>211</sup> Patient Protection and Affordable Care Act, March 23, 2010, 111th Cong., 2d Sess., Public Law 111-148.

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Today none of these constitutional claims are limited to the Tea Party. They have become mainstream tenets of Republican opposition to the health care bill. It is worth considering how this happened—how a fringe constitutional claim, at first limited to Tea Party and libertarian true believers, became mainstream. At the time of its passage, Republicans framed their opposition primarily on policy grounds. While constitutional objections were in the air, they were a distinctly minor strain.<sup>212</sup>

During deliberation of the bill, the prevailing assumption on the constitutional question, reflected in Speaker Pelosi's dismissive non-response to the reporter's question on the issue, was that the constitutional basis for the law was simply not a real issue. *The Washington Post's* Charles Lane wrote an entry on his paper's blog under the title "Is health reform unconstitutional? Don't laugh." Lane allowed that the chance of a successful legal challenge to health care was "a long shot," but then went on to advance what he portrayed as the contrarian argument, concluding that it was not "a total laugher."<sup>213</sup> On the left, constitutional concerns with the health care law were generally described as the province of fringe libertarians. "Pelosi is right to be dismissive of the fringe right-wing theory behind this question, which has no basis in the Constitution itself," wrote Ian Millhiser of the liberal blog ThinkProgress.<sup>214</sup> Writing in *American Prospect*, Yale Law Professor Jack Balkin offered a hypothetical scenario in which the Court struck down the pending health legislation on constitutional grounds, while assuring his readers in definitive terms that the Court "will not" ever do so.<sup>215</sup> The constitutional challenges reside in the "realm of fantasy," wrote Linda Greenhouse, ex-

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<sup>212</sup> Early articulations of the constitutional challenge include: Orrin Hatch, Letter to the editor, POLITICO, Nov. 9, 2009, <http://www.politico.com/news/stories/1109/29302.html>; David B. Rivkin Jr. & Lee A. Casey, *Mandatory Insurance Is Unconstitutional*, WALL ST. J., Sept. 18, 2009; David B. Rivkin Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009.

Minnesota governor Tim Pawlenty created a brief flurry of controversy in September 2009 when he suggested that states might, based on the Tenth Amendment, block implementation of the health care bill. Tom Scheck, *Amid criticism, Pawlenty backtracks from state's rights comment*, MPRNews.com, Sept. 11, 2009, <http://minnesota.publicradio.org/display/web/2009/09/11/pawlenty-tenth-amendment>. Pawlenty quickly retracted his statement, and in an subsequent interview he carefully distinguished his policy-based concerns from constitutional issues: "[I]n the legal sense, I think the courts have addressed these Tenth Amendment issues, but more in the political sense, in the common sense arena, we need to have a clear understanding of what the federal government does well and what should be reserved to the states." *Pawlenty Backs Off Nullification*, ABCNews.com, <http://blogs.abcnews.com/george/2009/09/pawlenty-backs-off-nullification.html>. The governor said he was not considering a potential lawsuit to the bill if it passed. Scheck, *supra*.

<sup>213</sup> Charles Lane, *Is health reform unconstitutional? Don't laugh*, POST PARTISAN, WASH. POST (blog), Mar. 24, 2010, [http://voices.washingtonpost.com/postpartisan/2010/03/is\\_health\\_reform\\_unconstitutio.html](http://voices.washingtonpost.com/postpartisan/2010/03/is_health_reform_unconstitutio.html).

<sup>214</sup> Ian Millhiser, *Pelosi Dismisses Tenth Reporter: 'Are You Serious?'*, THINKPROGRESS, Oct. 23, 2009, <http://thinkprogress.org/2009/10/23/pelosi-serious/>.

<sup>215</sup> Jack M. Balkin, *What to Do About the Court?* AMER. PROSPECT, Oct. 1, 2009.

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Supreme Court reporter for the *New York Times*, now teaching at Yale Law School.<sup>216</sup> They raise “[i]nteresting theoretical questions, to be sure,” but when it comes to actually getting a majority of the justices to agree with them, “[t]he answer, almost certainly, is no.”<sup>217</sup> Erwin Chemerinsky, dean of the University of California, Irvine, School of Law, wrote a widely cited defense of the health care bill on constitutional grounds. “Those who object to the health care proposals on constitutional grounds are making an argument that has no basis in the law,” Chemerinsky wrote. “They are invoking the rhetorical power of the Constitution to support their opposition to health care reform, but the law is clear that Congress constitutionally has the power to do so. There is much to argue about in the debate over health care reform, but constitutionality is not among the hard questions to consider.”<sup>218</sup> Chemerinsky’s argument, along with those of several other legal scholars, were cited by Senator Max Baucus on the floor of the Senate as the bill moved toward passage.<sup>219</sup>

In the months following passage, with the Tea Party movement in full effect, these confident assumptions soon dissipated. The Tea Party insisted that the law was fatally flawed not only as a matter of policy but also as a matter of constitutional principle. And, in a matter of months, their constitutionally based argument became a centerpiece of the Republican Party’s opposition to the law. Quite simply, the Tea Party made the Constitution a central part of the health care debate.

Although the Tea Party’s constitutional arguments against the health care bill have been targeted predominantly at mobilizing popular opposition to the law and pressuring state and federal elected representatives to oppose it, the movement’s impact appears to have been felt in the courts as well. The Tea Party’s success in making its constitutional arguments a central component of opposition to health care has likely influenced the various court-based challenges to health care that are currently proceeding through the federal judiciary and are almost surely heading to the Supreme Court. When the law was passed, only a relatively small (if vocal) minority of legal scholars thought the constitutional objections to health care would be seriously entertained by the courts. The near consensus position of constitutional experts, repeated throughout the mainstream media, was that the courts would never step in to overturn the law on constitutional grounds. But as the Tea Party effectively energized opposition to the health care law in the lead-up to the 2010 elections, all the time insisting that the

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<sup>216</sup> Linda Greenhouse, *Which Side of History?* N.Y. TIMES OPINIONATOR (blog), Mar. 25, 2010, <http://opinionator.blogs.nytimes.com/2010/03/25/which-side-of-history/>.

<sup>217</sup> *Id.*

<sup>218</sup> Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, Oct. 23, 2009, <http://www.politico.com/news/stories/1009/28620.html>; see also Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PENN. L. REV. \_\_\_\_ (forthcoming, 2011).

<sup>219</sup> Floor Statement of Senator Max Baucus (D-Mont.) Regarding the Constitutionality of Health Care Reform, Dec. 22, 2009, available at <http://finance.senate.gov/newsroom/chairman/release/?id=21832ee9-6731-4fdf-858a-871375258c33> (“Most legal scholars who have considered the question of a requirement for individuals to purchase health coverage argue forcefully that the requirement is within Congress’ power to regulate interstate commerce.”).



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constitutional concerns of its members be taken seriously, these predictions gradually became less confident. (Although polling has shown a divided county on attitudes toward the health care bill as whole and mixed attitudes on particular provisions, overwhelming majorities oppose the individual mandate.<sup>220</sup>) Even before federal judges began striking down the individual mandate provision of the law, the press and legal scholars had started to qualify their predictions of what the courts were going to do with the health care challenges.<sup>221</sup>

Although it would be much too simplistic to say that Tea Party activism and its success in the 2010 elections will change the way the Supreme Court is likely to rule on the health care legislation, public opinion does play a role in creating the conditions that are required to make such a holding even a possibility. Recent history has shown that a certain baseline of popular support—as expressed in opinion polls, in election returns, as well as in social movement activism—is a necessary, if not sufficient, condition for a Supreme Court to strike down a major act of Congress. Simply put, even when there are legally viable arguments<sup>222</sup> for holding a law unconstitutional, the Supreme Court is highly unlikely to do so when the law retains significant political and popular support following its passage. At the time of passage of the health care bill, most assumed that support for the program would only grow in the coming months and years. This did not happen. While opinion polls have found support for individual provisions of the Affordable Care Act, the law as a whole has failed to garner the kind of widespread acceptance its proponents had hoped and expected. This fact, a product of political (and constitutional) mobilization rather than lawyerly constitutional analysis, has made the health care law far more vulnerable to a constitutional challenge in the courts.

The basic claim that the modern Supreme Court rarely stands in the way of popular acts of national legislation has been well developed in the political science literature and has recently become quite prominent in the legal academy. As Barry Friedman writes in *The Will of the People*, one of the most prominent articulations of this argument that the Court is basically a majoritarian institution, following the Supreme Court's failed effort in the 1930s to block major pieces of the New Deal, the Court and the citizenry made a "tacit deal": "The American people would grant the justices tier power, so long as the Supreme Court's interpretation of the Constitution did not stray too far from what a majority of the people believed it should be. For the most part, this deal

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<sup>220</sup> AP-National Constitution Center Poll, Aug. 11-16, 2010, at 7, available at <http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20August%20NCC%20topline.pdf>.

<sup>221</sup> For a particularly self-reflective appraisal of this development, compare Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power*, FINDLAW, Nov. 2, 2009, <http://writ.news.findlaw.com/dorf/20091102.html> (dismissing the constitutional objection to the health care bill as "unsound as a matter of constitutional law") with Mike Dorf, *Tribe, the Health Care Mandate, and Legal Realism*, DORF ON LAW, Feb. 9, 2011, <http://www.dorfonlaw.org/2011/02/tribe-health-care-mandate-and-legal.html> (reassessing earlier argument and now concluding that the constitutional objections to the law "is not completely off the wall" and that he is "no longer confident that the case will be a slam dunk in the Supreme Court.").

<sup>222</sup> By which I simply mean arguments that draw on the traditional, generally accepted basic tools of constitutional analysis: text, history, and precedent.

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has stuck.”<sup>223</sup> While the Tea Party’s vision of the Constitution generally does not have the kind of majority support that Friedman describes, it has received attention beyond its polling numbers because it has been attached to such a vibrant—and often controversial—social movement.<sup>224</sup> Tea Party leaders recognize this dynamic relationship between extrajudicial constitutional mobilization and judicial doctrine. Matt Kibbe, president of FreedomWorks, has said that “courts look at public opinion, and on health care the courts are going to consider what the American people and the existing Congress think, although they may not admit it.”<sup>225</sup> One commentator described Virginia’s legal brief submitted in support of its challenge to the law as “both a court pleading and a Tea Party manifesto about an overreaching federal government.”<sup>226</sup> “[T]he constitutional arguments that Congress lacks the power to pass health care reform,” writes Jeffrey Rosen, “which seemed far-fetched only a year ago, are more likely to gain traction in the courts now that the arguments are being resurrected in Congress and among the Tea Party faithful.”<sup>227</sup>

Early indications of the possible influence of the Tea Party movement on the courts can be seen in the two federal district court opinions that have held the individual mandate provision of the health care law unconstitutional (three other district courts have upheld the law, while twelve more have dismissed challenges without deciding on the merits). It is impossible to say that these judges would have decided the cases differently in the absence of a politically powerful movement that was dedicated to convincing the nation that this law was indeed unconstitutional. But it seems safe to say that the Tea Party made it easier for conservative judges to strike down the mandate. The mandate could readily be defined as an unprecedented expansion of federal power,<sup>228</sup> and therefore the question of its constitutionality could be understood as a legal issue on which there was no controlling precedent. In such a situation, where traditional techniques of legal analysis do not compel a particular result, political or ideological inclinations are likely to be determinative.<sup>229</sup>

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<sup>223</sup> FRIEDMAN, *supra* note 27, at 4.

<sup>224</sup> See, e.g., Siegel, *Text in Contest*, *supra* note 58, at 312-13 (“Claims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution.”).

<sup>225</sup> Rosen, *Radical Constitutionalism*, *supra* note 42.

<sup>226</sup> Dahlia Lithwick, *Dream a Little Dream: Why the Cuccinelli health care win in Virginia matters more than you think*, SLATE, Dec. 13, 2010, <http://www.slate.com/id/2277782/>.

<sup>227</sup> Rosen, *Radical Constitutionalism*, *supra* note 42.

<sup>228</sup> The argument here is that the requirement that individuals purchase health insurance is the first time the federal government has compelled an activity under its commerce clause power. This argument depends upon accepting an activity/inactivity distinction that, while debatable on both empirical and logical grounds, offers grounds that are stable enough to support a legal doctrine. Other areas of constitutional doctrine rely on various distinctions that are far more tenuous, at least. The state action doctrine, for example, also relies on a sharp action/inaction distinction. The doctrine does not make all that much logical sense, but it works. The same could be said about the commerce clause argument against the health care mandate.

<sup>229</sup> Michael Klarman has presented this basic descriptive claim in its simplest form: “When the law is clear, judges will generally follow it, unless they have very strong preferences to the contrary. When the law is indeterminate, judges have little choice but to make decisions based on

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On December 13, 2010, Judge Henry E. Hudson of the U.S. district court for eastern district of Virginia became the first federal judge to strike down part of the health care law when he struck down the individual mandate provision as outside the scope of congressional commerce or taxing power.<sup>230</sup> “At its core,” Hudson wrote, “this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about an individual’s right to choose to participate.”<sup>231</sup> “This case is not about health insurance, it is not about health care. It is about liberty” proclaimed Virginia Attorney General Ken Cuccinelli, who argued the case, after Judge Hudson announced his decision. “This ruling is extremely positive for anyone who believes in the system of federalism created by our Founding Fathers.”<sup>232</sup> In praising the decision, the *Wall Street Journal* editors noted that because of it “Liberals may be forced to take ObamaCare opponents seriously after all.”<sup>233</sup> The speed with which accepted wisdom on the possibility that the courts could kill the health care bill shifted was notable. According to the *New York Times* reporter covering the health care challenges, writing as the Virginia case was nearing its end, “That this stage in the legal assault on the health law has arrived so quickly is striking, given that many prominent law professors dismissed the challenges as baseless only seven months ago, when the first of more than 15 lawsuits were filed.”<sup>234</sup>

Then, on January 31, 2011, in a U.S. district court in Florida, Judge Roger Vinson issued his own decision striking down the individual mandate as beyond Congress’ commerce power.<sup>235</sup> Judge Vinson went one step further than Judge Hudson, however,

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political factors.” MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 5 (2004). For an application of this kind of reasoning to the health care challenge, see Stuart Taylor, *Health Care Lawsuits and Party-Line Judging*, KAISER HEALTH NEWS, Dec. 6, 2010, <http://www.kaiserhealthnews.org/Columns/2010/December/120610stuarttaylor.aspx> (“With no clear guidance from the precedents, the outcome is likely to turn less on legalities than on the justices’ views of whether the new law is good or bad for the country and whether ... they should second-guess the elected branches on the most important new legislation in decades. The latter calculation might well turn partly on how striking down the new health care law would play in Peoria. If majorities of the public and Congress are clamoring for repeal when the justices are mulling the issue—probably in 2012 or 2013—the conservatives could strike it down without fear of a big public backlash.”); Lithwick, *supra* note 226 (“This is not really a constitutional debate; it’s about policy preferences ...”).

<sup>230</sup> *Cuccinelli v. Sebelius*, 702 F.Supp.2d 598 (E.D. Va., Dec. 13, 2010).

<sup>231</sup> *Id.* at \_\_\_\_.

<sup>232</sup> Kenneth T. Cuccinelli II, Attorney General of Virginia, Press Release, Dec. 13, 2010, [http://www.oag.state.va.us/PRESS\\_RELEASES/Cuccinelli/121310\\_HealthCare\\_Ruling.html](http://www.oag.state.va.us/PRESS_RELEASES/Cuccinelli/121310_HealthCare_Ruling.html).

<sup>233</sup> Editorial, *Yes, Virginia ...* WALL ST. J., Aug. 3, 2010, at A16.

<sup>234</sup> Kevin Sack, *Ruling on Health Law Is Due by End of Year*, N.Y. TIMES, Oct. 15, 2010, at A17; see also Kevin Sack, *Judge Voids Key Element of Obama Health Care Law*, N.Y. TIMES, Dec. 14, 2010, at A1 (“[T]he ruling was ... striking given that only nine months ago, prominent law professors were dismissing the constitutional claims as just north of frivolous.”).

<sup>235</sup> *Florida v. U.S. Dept. Health & Human Serv.*, \_\_\_\_ F.Supp.2d \_\_\_\_, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

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and ruled that the individual mandate could not be severed from the rest of the law and therefore the entire law is unconstitutional. The case Judge Vinson heard involved twenty-six states that had joined a constitutional challenge to the health care bill launched by Florida Attorney General Bill McCullom.<sup>236</sup> From the start of the trial, Judge Vinson expressed considerable sympathy for the arguments of the challenges to the health care law.<sup>237</sup> “It would be a giant leap for the Supreme Court to say that a decision to buy or not to buy is tantamount to activity,” Vinson announced during the trial.<sup>238</sup> Thus it was hardly a surprise when he ruled as he did.

Vinson’s opinion was notable not only for the sweeping holding, but also for the sharply critical tone he took toward the law and the government’s defense of it.<sup>239</sup> One commentator described the opinion as a “Tea Party Manifesto.”<sup>240</sup> The stakes could not be higher, Judge Vinson explained. The case “is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.”<sup>241</sup> He then cycled through representative touchstones of Tea Party constitutionalism, including Madison’s Federalist 45 (“The powers delegated ... to the federal government are few and defined”) and the Tenth Amendment.<sup>242</sup> He offered a lengthy and heavily originalist account of the evolution of the commerce power, in which he made little effort to hide his sympathy for a far more restrictive interpretation. “[F]or most of the first century and a half of Constitutional government ... the Clause was narrowly construed .... But, everything changed in 1937 ....”<sup>243</sup> Judge Vinson even seemed to tap into the Tea Party-inspired vogue for revolutionary history: “It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving East India Company a monopoly and imposing a nominal tax on all tea sold in American would have set out to create a government with the power to force people to buy tea in the first place.”<sup>244</sup>

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<sup>236</sup> The partisan divide on the issue is readily apparent: all but one of the attorneys general who have joined the lawsuit are Republican. Louisiana’s attorney general is the only Democrat to join. In addition to the twenty-six states, the suit was also joined by two private citizens and the National Federation of Independent Business.

<sup>237</sup> Janet Adamy, *Judge Leery of Health Mandate*, WALL. ST. J., Dec. 17, 2010, <http://online.wsj.com/article/SB10001424052748703395204576023733405954012.html>.

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., Noam N. Leavy & David G. Savage, *Judge strikes down health care law*, CHI. TRIBUNE, Feb. 1, 2011, at 12 (characterizing Vinson’s opinion as “stinging”).

<sup>240</sup> Mark Hall, *Judge Vinson’s Tea Party Manifesto*, HEALTH REFORM WATCH, Jan. 31, 2011, <http://www.healthreformwatch.com/2011/01/31/judge-vinsons-tea-party-manifesto/>; see also Timothy Jost, *Analyzing Judge Vinson’s Opinion Invalidating The ACA*, HEALTH AFFAIRS BLOG, Feb. 1, 2011, <http://healthaffairs.org/blog/2011/02/01/analyzing-judge-vinsons-opinion-invalidating-the-aca/> (“This is a radical decision. Judge Vinson has a clear vision of the limited federal government the founders intended that is very much in line with that espoused by the Tea Party Movement.”)

<sup>241</sup> *Florida v. U.S. Dept. Health & Human Serv.*, \_\_\_ F.Supp.2d \_\_\_, 2011 WL 285683, at 1 (N.D. Fla., Jan. 31, 2011).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 15-16.

<sup>244</sup> *Id.* at 22

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“Surely this is not what the Founding Fathers wanted,” he concluded about the idea that Congress could require individuals to purchase health insurance. To allow Congress to extend its reach this far would leave us with “a Constitution in name only.”<sup>245</sup>

Today, in the wake of these two district court decisions striking down the individual mandate provision, the new conventional wisdom is that there is a serious constitutional question at issue and it is not clear what the ultimate resolution is going to be in the Supreme Court.<sup>246</sup> As Randy Barnett has written, “if the Court views the Act as manifestly unpopular, there may well be five Justices who are open to valid constitutional objections they might otherwise resist.”<sup>247</sup> The Tea Party’s impact can be seen on the public’s expectation of the judiciary—and, according to early indications, on the judiciary itself. This is a popular constitutional movement that has stayed away from the courtrooms, whose major contribution has been to reorient the role of the Constitution in contemporary political practice, yet one of its most lasting influences might very well be helping to create the conditions necessary for a landmark Supreme Court ruling striking down the core of the health care bill.

### *B. The Constitution Outside the Courts*

Aside from possible developments in the courts that might be linked to Tea Party activism, there is also the question of the impact of the Tea Party’s constitutional agenda on the movement’s preferred terrain: constitutional debate and practice outside the courts. Unlike the realm of courts and constitutional doctrine, where victories and losses tend to be clearly defined, the achievements and failures of a popular constitutional movement are generally less susceptible to measurement. Nonetheless, there are certain indications by which the impact of the Tea Party as a constitutional movement might be considered.

One might, for instance, simply note that the American people seem to be talking about the Constitution far more than they did before the Tea Party appeared on the scene. Although I am not aware of polling data on this point, discussion of the history and meaning of the Constitution has become more prominent as the press has sought to make sense of the emergence of the Tea Party. Controversial Tea Party claims about the meaning of the Constitution regularly sparked media coverage and responses by lawyers and scholars. The Constitution also became a central talking point during the 2010 elections, particularly by those candidates who sought to curry favor with Tea Party groups. Politicians regularly carried their pocket Constitutions with them to the lectern,

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<sup>245</sup> *Id.*

<sup>246</sup> *But see* Laurence Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 8, 2011, at A27 (arguing that “this law’s constitutionality is open and shut” and predicting the Supreme Court will uphold the law, probably by a 8-1 vote). As Michael Dorf has observed, it is hard to know whether Professor Tribe truly believes this prediction or whether he “is simply trying to work the refs.” Mike Dorf, *Tribe, the Health Care Mandate, and Legal Realism*, DORF ON LAW, Feb. 9, 2011, <http://www.dorfonlaw.org/2011/02/tribe-health-care-mandate-and-legal.html>.

<sup>247</sup> Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 NYU J. L. & LIBERTY 581, 636 (2011).

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ready to wave it and read from it at appropriate moments. The decision of the new Republican majority in the House to read the text of the Constitution on the floor in early 2011, and the ensuing debate over what parts would and would not be read, had the effect of launching yet another public discussion about the Constitution. Tea Partiers often note the increased interest in the Constitution with more than a little bit of pride. “More people read the U.S. Constitution in the last 6 months than in last 50 years,” Texas Governor Perry announced last year.<sup>248</sup> He was exaggerating, but perhaps not too much. Polls consistently show that historically few Americans have spent much time with their founding documents.<sup>249</sup> The Tea Party movement, *New York Times* legal reporter Adam Liptak wrote, “has made the Constitution central to the national conversation.”<sup>250</sup>

The Tea Party movement also appears to have been quite successful in “selling” originalism to a broader audience.<sup>251</sup> Polls show a spike in public support for originalism coinciding with the ascendancy of the Tea Party. Starting in 2003, Quinnipiac University conducting periodic surveys of the following question:

Which comes closer to your point of view?: A) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution or B) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution.<sup>252</sup>

Between 2003 and 2008, support for view A hovered around 40%, view B around 50%.<sup>253</sup> Then, in the April 2010 poll, the numbers basically reversed. Forty-nine percent of respondents favored original intention, with “changing times” dropping ten points from the 2008 poll to 42% percent.<sup>254</sup> (Among Tea Party supporters, 78% favored original intention.<sup>255</sup>)

While it would be inaccurate to identify any Tea Party political success as a mark of achievement for its constitutional agenda, the two are obviously intertwined. (Indeed,

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<sup>248</sup> Jonathan Martin, *Perry taps into fear of Washington*, POLITICO, Mar. 2, 2010, <http://www.politico.com/news/stories/0310/33741.html>.

<sup>249</sup> See, e.g., MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986) (emphasizing historically low levels of constitutional literacy); Lepore, *supra* note 99 (same).

<sup>250</sup> Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK1.

<sup>251</sup> Jamal Greene’s article *Selling Originalism* analyzes the popularity of originalism in terms of the “market for constitutional methodologies.” Greene, *Selling*, *supra* note 62, at 660.

<sup>252</sup> Quinnipiac University Poll, Apr. 21, 2010, Question 31, <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1447>.

Note that option A is a rather stark version of originalism, focusing squarely on original *intent* (as opposed to original public meaning) and requiring that original intention be the *only* acceptable basis for constitutional interpretation. Most originalists would not insist on such exclusivity of methodology.

<sup>253</sup> *Id.* (2003 39/54; 2005 (May) 42/51; 2005 (July) 44/50; 2007 43/48; 2008 40/52).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

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this is one of the defining contributions of the Tea Party: to inject constitutional considerations into what has previously been understood as questions of politics and policy.) The blending of the Tea Party's political and constitutional agendas is particularly evident when Tea Party candidates running for office campaigned on their constitutional views, and when these same people, when in office, justify their policy decisions on constitutional grounds. Thus, the 2010 election results and the early actions of the new Congress should be seen, at least in part, as achievements of the Tea Party as a constitutional movement. The Tea Party's strength was also clearly evident when the House voted to repeal the health care law, with supporters of repeal citing prominently the constitutional question as a central basis for their votes. And while the repeal measure was defeated in the Senate, the Senate's reconsideration of the health care law included Judiciary Committee hearings on its constitutionality—something that was not done the first time through. With the rise of the Tea Party, and particularly in the wake of the 2010 midterm elections, the tenor in Washington has clearly changed. The political center of gravity has moved, in ways symbolic and substantive, in the direction of the Tea Party. All of this has provided a more prominent platform for Tea Party leaders to promote their vision of the Constitution.

It is important to keep in mind that one of the strengths of Tea Party constitutionalism is that it allows for small-scale victories for its participants.<sup>256</sup> Organizing a constitution study group, working to elect a candidate who shares Tea Party constitutional commitments, convincing a state legislature to pass a resolution denouncing federal overreach and asserting state sovereignty under the Tenth Amendment, lobbying Congress to simply do *less* (because much of what it had been doing was beyond its constitutional authority)—while none of these acts might be particularly dramatic in their own right, and while much of this can be dismissed as nothing more than symbolic politics, they are all, when viewed through the lens of popular constitutional mobilization, achievements of Tea Party constitutionalism. Taken together, they add up to a significant achievement for a grassroots movement in an era supposedly dominated by popular deference to judicial supremacy on matters of constitutional interpretation.

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<sup>256</sup> Because the Tea Party has been able to build a constitutional movement that is largely indifferent or antagonistic toward the courts, it is not clear what the impact of a Supreme Court ruling striking down part or all of the health care law would be on the Tea Party. Such a ruling would clearly be viewed favorably by the Tea Party. A 2010 poll found that 80% of self-identified Tea Party supporters approved of the lawsuits challenging the health care law. Quinnipiac University Poll, Apr. 21, 2010, Question 21, <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1447>. But litigation victories are not always victories from the perspective of movement mobilization. They can have the effect of dissipating energy from extrajudicial activism. They might encourage Tea Party activists to see litigation as a more important tool in their constitutional toolkit, with uncertain benefits to the movement. Ironically, then, to have the Supreme Court resolve the central issue around which the Tea Party has mobilized its constitutional challenge to the status quo would not necessarily be a victory for the Tea Party as a constitutional movement. In fact, a Supreme Court ruling upholding the health care law might very well serve the purposes of the movement more than a Court decision striking the law down. As the aftermath of *Roe v. Wade*, 410 U.S. 113 (1973) has shown, courtroom defeats can be valuable focal points for movement mobilization.

*C. Popular Constitutionalism*

Whatever its effects on constitutional law and practice, the experience of the Tea Party should spark a reevaluation within the legal academy about the possibilities and limitations of popular constitutionalism. One of the central issues that scholars of popular constitutionalism are going to have to assess, a question that has not been a central focus of the scholarship thus far, is whether there is an ideological tilt to popular constitutionalism. That is, whether popular constitutionalism tends to serve one side of the ideological spectrum more effectively than the other. These kinds of examinations have been commonplace with regard to the judiciary, with conclusions running the gamut from the idealistic *Carolene Products*<sup>257</sup> vision of the judiciary as the refuge of the disempowered; to the belief, often associated with critical legal studies scholarship and its variants, that the courts function basically to protect the powerful and the privileged;<sup>258</sup> to the more measured assumption, widely heard today, that the courts tend to mirror dominant social preferences, be they liberal or conservative.<sup>259</sup> What might a similar analysis of popular constitutionalism yield? While this question is too large and complicated to do justice here, I will briefly identify the kinds of provocative questions about ideology and the dynamics of popular constitutional mobilization that the case study of the Tea Party raises.

The experience of the Tea Party indicates that, at least in the context of modern American political and constitutional culture, popular constitutionalism serves populist conservatism remarkably well. Most obviously, insisting, as the Tea Party has done, that the text and history of the Constitution play a role in debates over federal policy tends to provide added leverage to those who advocate more limited government. While resistance to federal regulatory authority can be found across the political spectrum (consider, for instance, the liberal-libertarian alliance that briefly blocked renewal of the Patriot Act in early 2011<sup>260</sup>), it has been the centerpiece of the modern conservative agenda. As a matter of popular constitutional mobilization, demanding that Congress do *less* (or that it repeal what it has already done) because of constraints based in the Constitution is a powerful weapon.

Add to this the readily mobilized interpretive gloss of common-sense textualism and populist originalism, and the constitutional deck quickly becomes stacked in favor of anti-federal-regulation interests. The belief that constitutional principles are largely self evident and readily discoverable in the document's text, the hagiographical approach to the Founders, the populist-inflected suspicion of centralized power and embrace of a powerful but ill-defined concept of individual liberty—all of this provides a

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<sup>257</sup> U.S. v. *Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938) (suggesting that “prejudice against discrete and insular minorities” might require special judicial attention).

<sup>258</sup> See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIECLE]* (1997); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

<sup>259</sup> See, e.g. FRIEDMAN, *supra* note 27.

<sup>260</sup> *A Patriot Act Surprise* (editorial), N.Y. TIMES, Feb. 13, 2011, at WK 7.



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constitutional platform ready made for popular organization and activism. Strict textualism, in its most reductionist form, would go something like this: Article I says nothing about education or health care, therefore Congress lacks authority to enter into these areas. And history, or at least the Founders-centric history to which the Tea Party has attached itself, similarly works to the advantage of critics of federal oversight. The unavoidable fact that the federal regulatory state has grown immeasurably since the nation's beginning means that the Founding Era contains plenty of material with which to challenge the proposed policy on originalist grounds. To insist that the text and history of the Constitution be a central factor in the debate has tended to bolster the case of small-government opponents of new regulations more than its proponents. When it comes to political and social mobilization, the benefits of "going constitutional," at least on the modern American scene, seem to favor the cause of small-government conservatism.

### **CONCLUSION**

In this Article I have sought to shed new light on the nature and significance of the Tea Party's campaign to reconceptualize the role of the Constitution in American life and politics. Most accounts of the Tea Party have focused on content of the claims its adherents have made about the Constitution, many of which call for quite radical breaks from constitutional tradition. Yet largely missing from these accounts is a recognition of the ways in which the Tea Party has been able draw upon the Constitution to energize and mobilize large numbers of American citizens. The basic constitutional claims that have emerged from the Tea Party are often controversial, but they are not particularly new. But the variety of mechanisms by which the Tea Party has sought to promulgate these claims and to make them compelling to the people and their elected representatives is distinctive, if not unprecedented on in recent American history. It is in these mechanisms of constitutional practice—educational outreach efforts, state-level mobilization, and national electoral politics—that we see the way the working parts of the Tea Party as a constitutional movement.

The Tea Party should be understood as a quintessential example of popular constitutionalism. Movement activists have located tactics of constitutional claim-making that function largely outside the realm of the courts, that retain some sense of constitutional reasoning as distinct from pure politics, and that energize and mobilize significant numbers of people. This is no small achievement. Whether similar tactics might yield comparable results for a movement with different ideological commitments is not clear, as the Tea Party case study indicates that popular constitution mobilization might serve certain constitutional claims better than others. Agree or disagree with the Tea Party on the substance of its vision of the Constitution, scholars should give more attention to the what the movement reveals about the dynamics of constitutional mobilization.