

The Social and
Political
Foundations of
Constitutions

The Tea Party, the government shutdown, and Obamacare

Lawrence Rosenthal

Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- Obamacare has been the *bête-noire* of the Tea Party movement since its founding in February 2009. The current Tea Party tactic — shutting down the federal government unless Obamacare, currently being implemented, is defunded, delayed, or repealed — had its origin in the movement's disruption of Congressional Town Hall meetings in summer 2009.
- Beyond its bombastic rhetoric and tactics, the Tea Party's view of Obamacare is part and parcel of a theory of the US Constitution. This theory emerges from the 'state-rights' tradition in US history, and is expressed in the urgent conviction that the size of the US federal government and, in particular, liberal social policy, are destructive of the fundamental premises of the Constitution.
- The unique convergence of free-market absolutism and right-populist social conservatism in the wake of the financial meltdown and Obama election in autumn 2008 accounts for much of the Tea Party's dynamic growth. These developments transformed the long-standing populist sentiment of being squeezed by the 'liberal elite' from above and the Democratic Party's base from below into the sense that both the liberals and their base are now on top, crushing the 'real Americans' who make up the Tea Party.
- Tea Party constitutionalism is understood as 'popular originalism'. This view rests on a fundamentalist reading of the Constitution and the conviction that the US Supreme Court should not enjoy a monopoly on constitutional interpretation. This view is rooted in the American tradition of 'civil religion'.
- Objection to Obamacare is based on a notion that both benefits and political rights per se are zero-sum commodities. This view was articulated in the 'originalism' of Judge Robert Bork. This is a theory that at once interprets the Tea Party's fierce sense of dispossession, and forms a constitutional principle that rationalizes such extreme measures as the current government shutdown and the threat of default later in the month if Obamacare is not scrapped.

The Tea Party, the government shutdown, and Obamacare

Introduction

Fierce opposition to Obamacare early on established itself as the signature issue of the Tea Party movement in the United States. The movement arose barely a month after the January 2009 inauguration of Barack Obama as president — through a combination of planning by long-time Republican interests on the party's right wing (read: the likes of the Koch Brothers and Dick Armey); cheerleading and organizing by right media, especially talk radio and Fox news; and an extraordinary grass-roots uprising by largely ultraconservative Republican voters traumatized in the autumn of 2008 by the twin shocks of financial collapse and Obama's election.

While a 'leaderless' movement, and organizationally inchoate by ordinary political standards, the Tea Party's political style was firmly established in the summer of 2009. Congress was considering Obama's health care initiative. A large number of Congresspeople scheduled 'Town Hall meetings' on the subject of health care reform during the summer recess. What ensued was without precedent. The Tea Party not only organized widespread disruption of these meetings, they did so with aggressive tactics that left many Congresspeople intimidated and shaken. It is important to remember that until January 2011, Obama and the Democrats held not only the presidency, but also a majority in the House of Representatives, and, until January 2010, a 'filibuster-proof' majority in the Senate. Thus, the Tea Party's approach was, in effect, extra-parliamentary: it was attempting to prevent a legislative outcome that national elections did not sustain. For the Tea Party, the Obama government — indeed, the national government in the hands of liberal Democrats — lacked legitimacy. Already by the summer of 2009, Tea Partiers often referred to themselves as a resistance movement.

The 'by any means necessary' tactics of the summer of 2009 were the precursor of the current campaign to inflict punishment on the nation — the government shutdown; the threat later of a debt default. By 2010 the Tea Party had a caucus of over sixty Republican members in the House, and had honed the tactic of primarying: ousting Republican office holders by running a Tea Party candidate in the party's primary election, in which Tea Party militants make up a disproportionately large number of those showing up to vote. This leverage has proved remarkably successful with the leadership of the Republican Party. Now, the struggle has become a rearguard action — not to prevent the passage of Obamacare, but to prevent its implementation. Tea Party politicians and activists speak openly of this as a 'last chance to save America.' This is the context in which bringing economic ruin to the country can be contemplated. One thinks of Masada.

The Tea Party's constitution

Behind the Tea Party's anger and its views of the government's illegitimacy lay the movement's view of law and, especially, the meaning of the American Constitution. Indeed, rare is the American political movement that identifies itself as profoundly with the American Constitution as the Tea Party. Rare too, one that expends so much of its political energy proselytizing in the name of the Constitution. Nothing is more common at Tea Party rallies than handing out pocket-sized copies of the Constitution. Nothing seems to empower Tea Party spokespeople at all levels as much as the certainty that their views enjoy a unique fidelity to the word of the Constitution. With respect to Obamacare, at the outset few legal scholars believed there was a viable constitutional challenge to the law: the Patient Protection and Affordable Care Act, which passed in Congress in March 2010. Yet the movement's fierce organizing and the actions of Tea Party state Attorneys General and governors confected a legal juggernaut that barely failed at the Supreme Court level.

The Tea Party's view of the Constitution begins with a simple premise: the federal government is too big. It has expanded as a power hungry beast beyond the document's plain restrictions. This view harkens back to the oldest political fight of the Republic: the gruelling reluctance of the individual states to cede authority to a centralized government. This reluctance was behind the inadequacy of the first attempt at Union in the Articles of Confederation. It underlay myriad compromises forged in the writing of the Constitution, and was, finally, the motivation for the Bill of Rights, intended to assure the prerogatives of the states and the people. 'States' rights' has been the banner under which some of the most severe resistance to central power has expressed itself throughout the country's history, and has embraced such radical doctrines as nullification and secession.

These extremes are abundantly present in Tea Party rhetoric. One well-known example of a contemporary call for nullification came in Georgetown Law Professor Randy Barnett's proposal for an amendment to the Constitution that would permit a two-thirds majority of states to overturn federal laws they disapproved of. Besides this contemporary formulation of nullification, of which many more appear at the state level, the Tea Party has spoken in favour of repealing parts of the Fourteenth and the whole of the Sixteenth and Seventeenth Amendments (which established the federal income tax and the direct election of Senators), and of establishing a balanced budget amendment. Most often, perhaps, the Tea Party's states' rights conviction is expressed in the movement's passionate allegiance to the Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

It is not uncommon for Tea Party activists simply to call themselves Tenthers.

Tea Party populism: producerism redefined

The essence of populism is a group antipathy, profoundly felt, toward perceived elites. From the

populist point of view, these elites are understood to be corrupt, powerful, and ideologically suspect. Typically, populism sees itself as a middle stratum, caught between the corrupt elite and a dangerous underclass. A classic form of American populism, called producerism, saw itself as trapped in a vice, squeezed from top and bottom by parasitic forces which lived off the populists' — the producers' — hard work. Above were economic elites: bankers and monopolists. Below were the lazy and shiftless.

In right-wing American populism, the elite — the corrupt on top — are typically a cultural rather than an economic elite. Generally speaking, the populism of the Tea Party follows a long tradition of resentment of all things liberal — Hollywood, university professors, urban life, the Democratic Party, and much more — things that Tea Partiers often call 'un-American'. For Tea Partiers, these are the people who think they know better than they do and want to tell them how to run their lives.

This elite has long been associated on the right with a client base — the force felt pushing from the bottom, the poor, the working poor, welfare recipients, and, often, minorities. The election of a black president and the assumption of power by the liberal Democratic Party have fundamentally transformed the vice-like effect of such classical populist formulations as producerism. Now, both the liberal elite *and* their client base are on top. The experience is less one of being squeezed from top and bottom, but rather one of being flattened from above. As one Tea Party activist and former policeman put it, 'The people I was looking for back when I was a cop are now running the government'.¹

'Popular originalism' and fundamentalism

Legal scholars have characterized the Tea Party's constitutional perspective as the hybrid formulation 'popular originalism', melding the doctrine of originalism that has dominated conservative jurisprudence over the past several decades with the notion of 'popular constitutionalism', which has developed in recent years, ironically in major part by thinkers on the left, and which argues that interpretation of the Constitution is not properly confined to the courts. Instead, both politics, in the form of legislators at all levels, including and

especially state and local, as well as movements and associations in civil society, are appropriate sources of constitutional authority. The Tea Party's profound disappointment at the Supreme Court's upholding the constitutionality of Obamacare, and their sense of betrayal, above all by Chief Justice John Roberts, has confirmed the movement's conviction of popular constitutionalism and its rejection of the Supreme Court's monopolies as the final arbiter in constitutional matters.

The key to understanding the Tea Party's blend of popular constitutionalism and originalism is to be found in the concept of fundamentalism. For our purposes, fundamentalism has two important characteristics: the word, and every person his or her own interpreter. We will look at these in turn.

The word

Fundamentalism, of course, originates as a particular reading of the Bible in which the text of the Bible is both unerring and complete; that is, as the direct word of God, it is word-for-word absolute truth and is all the truth that needs be known. Tea Partiers read the Constitution (and the Declaration of Independence) in this manner and rebel against interpretation that seems to them beyond the word. Here is a quite ordinary intervention from a participant on a well-known pro-Tea Party website, Free Republic: 'I challenge the liberal *New York Times* editors to find constitutional warrant for federal activities outside those specifically authorized by the Constitution, *chapter and verse*. They can't find it'² (emphasis added). Chapter and verse: in short, the model of fundamentalist Protestant reading of the Bible is the Tea Party's model for reading the Constitution. A Louisiana Tea Party member reported that she 'attended weekend classes on the Constitution' and compared them with 'church Bible study'. Both local groups running educational programmes on the Constitution and the kinship these programmes share with Bible classes are Tea Party mainstays.

The practice of reading the Constitution is important not only for retaining fidelity to the word, but also because such repetition is what is needed to convert non-believers who will, in the fullness of time, come to see the light. In 2010, sixty-five Tea Party-identified Congresspeople were elected to the US

House of Representatives, making the Republicans the chamber's majority party. The opening of the new Congress in 2011 included a spectacle unprecedented in American history: the Constitution was read aloud word-for-word before the work of the Congress began. The Tea Party caucus in the House has also insisted that all new bills need to make explicit reference to the passages in the Constitution that attest to their constitutional validity — in effect, stating chapter and verse.

Every person his or her own interpreter

The populist element in Tea Party popular originalism — that individuals and institutions both in government and in civil society are as justified in interpreting the Constitution as are the courts — harkens back to the very founding of Protestantism. The hierarchy and practices of Roman Catholicism seemed to the likes of John Calvin and Martin Luther more an impediment to a believer's Godliness than a legitimate guide — and a self-serving impediment at that, a corrupt priestly bureaucracy whose major concern was its own privilege. The Protestant argument for an unmediated relationship between the individual and God rested on an unmediated relationship between the individual and the Word, the Bible. Protestantism's discarding of Catholicism's unwritten tradition in favour of the text foreshadowed the fundamentalist reading of the Constitution now embraced by the Tea Party.

American civil religion

Since the 1960s sociologists like Robert Bellah have discussed what they call the tradition of American civil religion. In its essence, American civil religion began in the hands of colonial preachers and has involved reading a particular version of the country's founding and enduring values back into Biblical tradition. Civil religion has been a continuing through-line in American history between the pulpit and politics, as in the well-known example of Ronald Reagan's popularizing John Winthrop's 1630 Massachusetts Bay characterization of America as 'a shining city on a hill'.

In American civil religion, the country's founding documents, the Declaration of Independence and the Constitution, are sacred texts; the country's founders

a sacred cult, lawgivers and prophets. Veneration of these documents and these individuals demands a religious fidelity to their memory and their writings. No movement in recent American history so embraces this element of American civil religion as fully as the Tea Party. Tea Party commonplaces like dressing up for political rallies in colonial costume, complete with wigs and three-cornered hats and re-enacting the triumphs of the founders in the persons of Washington, Jefferson, and the like, bespeak a desire not merely to speak for the tradition of the American civil religion, but to *embody* it.

Further, from the point of view of a Tea Party constitutionalism, it is significant to note the point at which American civil religion bleeds over to the view, long held on the Christian right, that the country and its founding and values are inherently and explicitly Christian. This conviction is a frequent thread throughout the history of American conservatism, and enjoys a hearty following in Tea Party circles (apart from its explicitly libertarian wing). In Turkey in 2009, President Obama offered the well-known constitutional view that ‘one of the great strengths’ of the United States is that ‘we do not consider ourselves a Christian nation or a Jewish nation or a Muslim nation; we consider ourselves a nation of citizens who are bound by ideals and a set of values.’³ This caused uproar in the Tea Party, led by Michelle Bachmann who, in the next Congress, would become the leader of the body’s Tea Party caucus. It led to the submission of HR397, a House resolution that explicitly declares the religious core of American society.

The secular elite

The Tea Party’s most basic constitutional premise — that the American government has wildly outstripped the document’s bounds — comes complete with an explanation of how the country came to this woeful pass. A dedicated class of individuals, heavily influenced by European ideas of socialism, communism, and even fascism, has laboured relentlessly since at least the Progressive era to undermine the very Americanness of the United States. This notion was the outstanding

premise of Glenn Beck’s ongoing history lesson that was critical for so many Tea Partiers in the first two years of the movement. Interestingly, it harkens back to some of the more sophisticated thinking that gave rise in the 1970s and earlier to the New Right — for example, Irving Kristol’s idea of the ‘New Class,’ academics and politicians, who lived far from the economic engine room of American society, but sought control through their ideas of social engineering. More recently, for Angelo Codevilla, who has written extensively on this class’s continuing subversion of American society, the liberal elite has ‘usurped’ the Constitution.

In politics, this is the filter through which Tea Partiers view liberal social policies, such as environmental protection or social insurance like Obamacare. More, Tea Partiers are convinced that such policy initiatives are merely ruses that liberals employ to gain power. A favourite Tea Party politician, Senator James Inhofe of Oklahoma, has called global warming ‘the second-largest hoax ever played on the American people, after the separation of church and state.’ Tea Party rhetoric is often quite radical in this regard, conflating liberals and their policies if not with communist or fascist tyranny then at least with European social democracy. This conflation is a taken-for-granted premise of Tea Party discourse. As one sign at a Tea Party rally in Washington put it, ‘Liberalism, Socialism, Communism. What’s the difference?’

In its more sober statements, the right’s criticism of liberalism labels its ideology statism. Tea Party thinking has very much embraced a view steeped in American civil religion that the liberal elite’s history of subversion has functioned by replacing God with the State, and religion with secular religion. In this view, as articulated in perhaps its most sophisticated form by Robert George of Princeton University, secularism becomes effectively a competing faith-based belief system that deludes itself with its pretensions to neutrality and science. This view leads to the argument that separation of Church and State is a false doctrine, and animates the work of far less exacting thinkers

like Evangelical minister and self-styled historian David Barton, who argues that the framers of the Constitution took their ideas and their language word-for-word from the sermons of colonial preachers. Barton was a regular presence on Glenn Beck's programme, and fellow Fox News commentator, former Arkansas governor and presidential candidate Mike Huckabee, called him America's most important historian, whose work should be taught in classrooms everywhere in the country.

Populism meets free-market absolutism

It is important to keep in mind that the Tea Party is not simply a populist movement. Rather it is a blend of populism with free-market absolutism. Free-market absolutism is the ideological project behind the Koch Brothers Tea Party, the Dick Armey Tea Party. It is the lineal descendent of an incensed Republican conservatism that furiously objected to Franklin Roosevelt's New Deal policies of the 1930s and has attempted to control the Republican Party ever since. What makes the Tea Party unique in the march of modern American conservatism is that the passions of the populist right, the uncompromising, expressive side of American conservatism, were brought to bear in the name of the doctrines of the fiscal absolutists. Suddenly, the zeal and the vitriol usually reserved for opposing abortion or the 'gay agenda' were being directed against Keynesian stimulus legislation, cap and trade climate legislation, economic regulation, taxation, and, above all, expansion of health insurance coverage to tens of millions of uninsured Americans.

The constituency of the Tea Party is overwhelmingly white, upper-middle class, and late-middle-aged. Tea Partiers see themselves as the 'real Americans' who have worked hard all their lives and earned everything they have. They view liberals, unions, and often minorities, as forces trying to take away what they possess and redistribute it to the 'undeserving', the poor who haven't worked hard. This constituency, which has historically been the hard right vote of the Republican Party, suffered a pair of cataclysmic shocks in the autumn of 2008. One was the massive financial crisis. With effects like the huge drop in the value of people's homes, the financial

crisis created a panic among this aging constituency that their relatively stable and secure economic condition might suddenly be in jeopardy.

The second shock of autumn 2008 was the election of a liberal Democratic president, and a black one at that. In the air was talk of a second coming of the New Deal. The spectre of redistribution was now at the door, along with economic collapse. This wildly heightened fear altered the focus of what would become the Tea Party's populist base (already somewhat mobilized by the vice presidential campaign of Sarah Palin) from its decades-long preoccupation with social issues to economic issues. In this way right-wing populism's alarm aligned them with free-market absolutism as never before. The Tea Party movement arose within a month of the inauguration of Barack Obama and dominated the discourse of American politics for the next two years. By 2010 it could claim responsibility not only for Republicans' retaking the House, but also for the party's winning numerous state houses and legislatures. The dynamism behind this meteoric rise — unlike anything seen for decades — was in large measure due to these two forces of the American right — right populism and free-market absolutism — notably putting aside their historical divergences and turning into a lockstep juggernaut.

Zero-sum and dispossession

What put the Tea Party on the American political map more than anything else was their fierce resistance to Obama's attempt to move the country toward universal health insurance, Obamacare. To Tea Partiers this epitomized their sense that what they had — reliable health insurance, including and especially Medicare — would be put in jeopardy by offering something similar to those without; who, they felt, didn't deserve it anyway.

This gets to a fundamental principle of American conservative and populist thought. In the view of Tea Party populists, proposing to grant health insurance to those tens of millions without coverage was tantamount to taking that very benefit away from them, dispossessing them. This is the logic behind the famously oxymoronic Tea Party banner that appeared regularly at movement rallies: 'Government hands off my Medicare'. Benefits, in

short, are not an expandable commodity, but a zero-sum one. They are a fixed sum. The only way to offer existing benefits to a new population is to take them, at least in part, away from those who already possess them, to dispossess them.

Zero-sum and liberty

But zero-sum thinking in American conservatism goes deeper than disputing spoils. The Tea Party's view about things like benefits is a subset of a more general vein of thinking in which liberty itself is seen as a zero-sum commodity. It is often difficult for liberals to follow conservatives who argue that government social programmes are destructive of freedom. What links the two in the American right-wing worldview is zero-sum thinking.

Robert Bork was, perhaps, the American right's grand legal theorist of the zero-sum view of liberty. Bork was famous for arguing that the 1964 Civil Rights Act was based on a principle of 'unsurpassed ugliness'. His reasoning in this regard is particularly well-known in the matter of public accommodations. The idea that lunch-counter owners could not deny service based on race took away the owners' freedom to deal only with whom they wished. Giving black people the right to sit at that counter — expanding their liberty — came at the counter-owners' expense. The counter owners were dispossessed of their freedom. Tea Party Republican candidate Rand Paul reiterated this view in 2010 during his campaign for the US Senate from Kentucky.

Implied in Bork's position on the Civil Rights Act was the equivalence of positive and negative rights. There was nothing inherently superior in the black person's right to be served as compared to the owner's right to deny service. Any judge who would see a superior interest in the right to be served was only relying on personal values and usurping the functions of the legislature, in Bork's thinking. Any law that would favour one or the other's freedom,

whether positive or negative, was playing favourites between claims of equal standing.

So extreme was this view for Bork that during his famous, and failed, 1987 confirmation hearings for a seat on the Supreme Court, under questioning by Illinois Senator Paul Simon, he was forced to carry his concept to the logical conclusion that the judiciary could not rightly call for the abolition of slavery. The freedom to hold slaves, in Borkian principle, enjoys the same protection as the freedom from slavery.

These zero-sum opinions lay at the heart of Bork's approach to constitutionalism. In these same hearings he described these views as the basis for his judicial philosophy, which he called 'original intent', and we might today simply call originalism. He displayed an almost metaphysical, natural law insistence that liberties cannot be created or expanded. They could only be 'redistributed'. He asserted that this was an 'arithmetic' and 'indisputable' certainty. According to Bork, since every expansion of liberty in one area means taking it away elsewhere, such action calls for value judgments in which no judicial principles of right and wrong pertain.

It may seem a long way from Bork's lofty calculus of liberty to the Tea Party's furious demand that others not enjoy the health insurance protection their government assures them. But the Tea Party's feeling that Obamacare means that something of theirs is being taken away and given to others was precisely the feeling that Robert Bork was translating into a judicial philosophy. It represents perhaps the defining element of a Tea Party constitutionalism. And it is the principle that translates the virulence, the fierce resistance of the Tea Party, into a legal theory. It is a principle that rationalizes the Tea Party's willingness to threaten national financial ruin in the form of a government shutdown and a potential debt default if Obamacare, now being implemented as the law of the land, is not stopped.

Notes

1 Quoted in Williamson, V., T. Skocpol, and J. Coggin (2011) 'The Tea Party and the Remaking of Republican Conservatism', *Perspectives on Politics*, 9.1: 34. Available at <http://scholar.harvard.edu/files/williamson/files/tea_party_pop.pdf>.

2 Available at <<http://www.freerepublic.com/focus/news/2633633/posts>>.

3 See <<http://www.whitehouse.gov/the-press-office/joint-press-availability-with-president-obama-and-president-gul-turkey>>.



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Lawrence Rosenthal is co-editor of *Steep: The Precipitous Rise of the Tea Party*, published in August 2012. He is the executive director of the Center for Right-Wing Studies at the University of California, Berkeley. Founded in 2009, the Center is a research unit dedicated to the study of right-wing movements in the twentieth and twenty-first centuries. Dr Rosenthal received his PhD in Sociology from UC Berkeley. He has taught at Berkeley in the sociology and Italian Studies departments and was a Fulbright Professor at the University of Naples in Italy. His work has appeared in the *Nation*, the *International Herald Tribune*, the *San Francisco Chronicle*, the *Sacramento Bee*, *Foreign Policy*, and other venues.

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our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

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