

# POPULAR CONSTITUTIONALISM ON THE RIGHT: LESSONS FROM THE TEA PARTY

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## INTRODUCTION

Within the legal academy over the past decade or so, popular constitutionalism has emerged as an important and often quite controversial theoretical framework for understanding the dynamics of constitutional development.<sup>1</sup> In its strongest and most provocative form, popular constitutionalism demands that the American people play a central role in interpreting the meaning of the Constitution, and that the courts should, to one degree or another, defer to the legitimate constitutional claims of the people and their elected representatives. The Supreme Court is not (or should not be) the final arbiter of constitutional meaning.<sup>2</sup> Ordinary citizens should regularly engage with their Constitution, and they should do so not just in some abstract sense, but in an immediate and active way.<sup>3</sup> Popular constitutionalism, in short, is based on the belief that responsibility for shaping the meaning of the Constitution is not just the province of the courts; it is also a basic duty of the people themselves.

History provides a rich canvas for exploring the record and potential of popular constitutionalism. Much of the work produced by scholars of popular constitutionalism has been efforts to excavate past moments of popular mobilization around constitutional claims. They have examined episodes of U.S. history, identifying ways in which popular demands made upon constitutional text and principles resulted in shifts in general

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1. See, e.g., Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 960 (2004) (describing the popular constitutionalism as an "emerging new discourse" within the legal academy); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 n.1 (2010) (citing sources describing popularity of popular constitutionalism among legal academics).

2. This normatively oriented version of popular constitutionalism is found most prominently in the work of Larry Kramer. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 6-7 (2001); see also, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

3. Kramer, *supra* note 1, at 959 ("In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law.").

assumptions and expectations about the Constitution.<sup>4</sup> This, in turn, pressured those in positions of official authority—most notably but not exclusively judges—toward new interpretations of the Constitution. Popular constitutionalism thus offers a response to the tension inherent in democratic constitutionalism: between a commitment to popular sovereignty and a commitment to constitutionally entrenched norms that stand above majoritarian decision-making. Through this dynamic of constitutional responsiveness, both the Constitution and the courts benefit. A constitutional system that is responsive to the constitutional commitments of the people serves a crucial legitimating function.<sup>5</sup>

While American history reveals a robust tradition of popular constitutional engagement, popular constitutionalists generally see developments of recent years as reasons for concern. Larry Kramer, whose book *The People Themselves* is the single most prominent contribution to the field of popular constitutionalism, laments that Americans no longer take seriously their responsibility as interpreters of the Constitution.<sup>6</sup> The people have become too deferential to the courts; they have lost a sense of authority over their founding document.<sup>7</sup> In accepting judicial claims of primacy over interpreting the Constitution, the people themselves have abdicated a basic duty of constitutional citizenship.<sup>8</sup>

The modern judiciary—particularly the Supreme Court of recent years—is also to blame for the decline of popular constitutional engagement. Advocates of popular constitutionalism have attacked the Court's efforts to assert a preeminent, even exclusive role in defining the meaning of the Constitution for all of American society.<sup>9</sup> By Kramer's ac-

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4. The bulk of Kramer's book is a close reading of the practice of extrajudicial constitution claim-making and judicial review in the early republic. KRAMER, *supra* note 2 *passim*; see also Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); William E. Forbath, *Popular Constitution in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 1013 (1987); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*]; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000) [hereinafter Post & Siegel, *Equal Protection*]; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

5. On this point, the work of Post and Siegel is essential. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

6. KRAMER, *supra* note 2, at 227-48.

7. *Id.*

8. *Id.*

9. Recent cases in which the Court has emphasized its exclusive interpretive supremacy on questions of constitutional interpretation include *Dickerson v. United States*, 530 U.S. 428, 428 (2000); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833, 866-67 (1992) ("Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever

count, the Court's repeated claims that it is supreme in defining the meaning of the Constitution, coupled with widespread popular acceptance of these claims, from both left and right, caused "popular constitutionalism [to] fade[] from view" in the post-New Deal period.<sup>10</sup> Popular constitutionalists have called for increased popular engagement with the nation's founding document as an antidote to the problem of judicial supremacy.<sup>11</sup>

As if made to order, we are today witnessing in the Tea Party a political movement that has, to an extent unprecedented in modern American history, placed the Constitution at the center of its reform agenda. This movement has done so with remarkably little concern for the courts and judicial interpretations of the Constitution. As I explain below, Tea Party constitutionalism is premised on a belief that citizens have a responsibility to read their Constitution, to stake out claims about its meaning, and to demand that public officials act in accordance with these claims. The Tea Party, it would seem, is precisely the kind of popular assertion of responsibility over the Constitution that popular constitutionalists had been calling for.

But the Tea Party has hardly been embraced by advocates of popular constitutionalism. The reason is not hard to discern. Although as a formal matter, the theory of popular constitutionalism has no ideological or partisan valence, it has for the most part been advocated by liberals and progressives. It has generally been framed as a critique of recent Supreme Court decisions, particularly those that have served conservative interests.<sup>12</sup> The underlying assumption behind much of the scholarship on popular constitutionalism is that the Supreme Court, at least in recent years and perhaps as a general rule, is more conservative than the populace.<sup>13</sup> Therefore a more democratically responsive constitutional system, a system in which popular claims on the Constitution play a larger role, would generally serve the causes of most concern for liberals

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the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." The seminal articulation of this principle, prominently referenced in all these recent cases, is *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (proclaiming the Supreme Court to be "supreme in the exposition of the law of the Constitution").

10. KRAMER, *supra* note 2, at 223.

11. *See, e.g., id.* at 228–32.

12. Much of the momentum for popular constitutionalism as a scholarly movement derived from (1) the Rehnquist Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), *see, e.g.,* KRAMER, *supra* note 2, at 231; Kramer, *supra* note 2, at 153; and (2) the Rehnquist Court's limitations on congressional power under Section 5 of the Fourteenth Amendment in cases such as *Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001); *Morrison*, 529 U.S. at 616 n.7; *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 637–38 (1999); *City of Boerne*, 521 U.S. at 524; *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) [hereinafter Post & Siegel, *Juricentric Restrictions*]; Post & Siegel, *Equal Protection*, *supra* note 4, at 441–42.

13. Kramer, *supra* note 2, at 130–31.

and progressives—most notably the promotion of various human rights causes.<sup>14</sup>

So the Tea Party's emergence presents something of a dilemma. Here we have a movement that seems to be doing much of what popular constitutionalists have been calling for. It is claiming independent interpretive authority over the Constitution. It is finding ways in which to act upon its constitutional claims that do not depend upon the courts. Yet the central claim on the Constitution that the Tea Party has embraced is a commitment to sharply limited government. The Tea Party vision of the Constitution is in direct opposition to the idea of the Constitution as a vehicle for the protection of civil rights and social welfare rights that has been at the heart of the popular constitutional project within the legal academy. If this is popular constitutionalism, might it require a reconsideration of some of the assumptions that have driven scholarship on popular constitutionalism?

In this Article, I consider the lessons that the Tea Party offers for scholars of popular constitutionalism. Specifically, I argue that the experience of the Tea Party should spark a reconsideration of some assumptions that tend to drive much of the interest in popular constitutionalism. Some who have embraced popular constitutionalism seem to assume that popular constitutional mobilization is a vehicle particularly well suited for advancing progressive constitutional claims. Alternately, some have assumed that popular constitutionalism has no particular ideological or partisan valence—that it is basically a neutral vehicle for advancing constitution claims of all kinds. But the lessons of the Tea Party might require a rethinking of these assumptions. The Tea Party has shown that, at least on the modern American scene, popular constitutional mobilization is particularly effective at advancing causes much closer to the heart of the conservative or libertarian agenda. Part of the explanation for this has to do with the nature of constitutionalism as well as cultural assumptions prevalent in recent American history. But, more importantly, it has to do

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14. See, e.g., TUSHNET, *supra* note 2, at 181 (defining “populist constitutionalism” as centered on the promotion of human rights);

In a recent string of decisions invalidating federal civil rights legislation, the Supreme Court has repeated the simple but powerful message: ‘The Constitution belongs to the courts’. . . . These decisions break with the judicial practice of the last half century, when the Court employed doctrines of deference to vindicate democratic values in constitutional interpretation, defining the scope of federal power in terms that gave great weight to Congress’s judgments about the nation’s needs and interests. No longer does the Court emphasize the respect due to the constitutional judgments of a coequal and democratically elected branch of government. Now it claims that only the judiciary can define the meaning of the Constitution.

Post & Siegel, *Juricentric Restrictions*, *supra* note 12, at 1. Most of the historically oriented works on popular constitutionalism have focused on moments in which popular movements advocated for the expansion of federal authority in the name of promoting social welfare and civil rights. See KRAMER, *supra* note 2, at 220; cf. L.A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 887 (2005) (suggesting that “Kramer sees popular constitutionalism only when he approves of the cause”).

with the mechanism available for popular constitutional mobilization. These mechanisms serve certain causes better than others, and they serve demands for less government regulation particularly well. This, I suggest, has been the central lesson of the Tea Party for popular constitutionalism.

In Part I of this Article, I examine the basic project of popular constitutionalism, including its normative implications. I explore the challenges popular constitutionalists have had in defining their central concept, and I offer a working definition of popular constitutionalism that identifies what is unique about efforts of constitutional mobilization (as differentiated from social movements that lead to constitutional change). Part II describes the basic tenets of Tea Party constitutionalism. Here I explore the substance of the Tea Party's constitutional vision, the strategies of constitutional interpretation the Tea Party has embraced, and the predominantly extrajudicial processes by which the Tea Party has sought to advance its reading of the Constitution. Part III then considers whether popular constitutionalism advances certain claims on the Constitution better than others. Drawing on the lessons of the Tea Party, I look at those mechanisms that have proven particularly effective at mobilizing and advancing popular constitutional claims, and I question how different kinds of claims might be advanced through these mechanisms. I suggest that there is some evidence to support the hypothesis that popular constitutionalism may be most effective when it is used to advance a conservative-libertarian agenda, such as that of the Tea Party.

## I. POPULAR CONSTITUTIONALISM DEFINED

### *A. The Fundamentals of Popular Constitutionalism*

The great contribution of popular constitutionalism scholarship has been to draw our attention to the ideas and commitments of extrajudicial actors on questions of constitutional meaning. By challenging the idea that the Supreme Court is the only—or even the preeminent—authoritative interpreter of the Constitution, popular constitutionalism provides a more accurate description of American constitutional development. This is popular constitutionalism as a descriptive claim.

There is also a normative component to much of popular constitutional scholarship. For some popular constitutionalists, a better appreciation of the importance of the constitutional commitments of the American people and a more skeptical attitude toward the idea of judicial interpretive supremacy points toward an alternative framework for arguing how the constitutional system *should* work. Extrajudicial inputs are not only a fact of life in the American constitutional system, but, according to some advocates of popular constitutionalism, we are better off because of it. We should encourage more popular engagement with the Constitution and its history. Taking this one step further (and here is the most controversial element of popular constitutionalism), some advocates of

popular constitutionalism argue that the courts should do more to recognize and respect extrajudicial constitutional commitments, even when they diverge from judicially defined constitutional law.<sup>15</sup> In this critique of judicial interpretive supremacy, popular constitutional scholarship points toward a normative theory of judicial decision-making. On questions of constitutional interpretation, judges should view themselves in a dialogue with the people and their elected representatives. Some scholars have gone so far as to suggest that the proper attitude of the courts should be one of deference to certain extrajudicial claims on the Constitution.

*B. A Working Definition of Popular Constitutionalism*

A central challenge in defining popular constitutionalism is to locate something distinctly “constitutional” about social movements that engage in a variety of issues. Simply because a social movement claims that its agenda is supported or inspired by the Constitution or by constitutional principles cannot be enough to turn a social movement into a popular constitutional movement. Or, if this is enough, then the concept of popular constitutionalism has little to no analytical utility.

Drawing on the work of several leading scholars in the field, in this section I offer a working definition of popular constitutionalism. My goal here is not to come up with a categorical framework that conclusively identifies one movement as being properly a popular constitutional movement and another as outside the definition. Such an approach would be of limited utility. Rather, I undertake this definitional project so as to offer a framework by which we can compare different movements in terms most relevant to popular constitutional analysis. The concept, as I define it, is best understood as residing on a two-dimensional spectrum, with one axis representing the “popular” component of the movement, the other representing the “constitutional” component.

The relative “popularity” of a constitutional movement does not reference its level of popular support. Rather, it looks at the movement’s relationship to the courts, particularly the Supreme Court. A movement that acts in ways that are largely autonomous from the courts and judicial doctrine would score highly on this scale. A movement that is more deferential to judicial interpretive authority on constitutional questions, such as a litigation-centered movement whose primary mission is to convince the Court to rule a certain way in a constitutional case, would score poorly.

Understood this way, then, a basic component of popular constitutionalism is some level of assumed interpretive autonomy from the judiciary. While a broad-based campaign aimed specifically at convincing

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15. See, e.g., Post & Siegel, *Juricentric Restrictions*, *supra* note 12; Post & Siegel, *Equal Protection*, *supra* note 4.

the justices of the Supreme Court to chart a new path of constitutional interpretation is a constitutional movement of a sort, it does not quite capture the essence of popular constitutionalism, at least as that concept has been developed over the past decade or so.<sup>16</sup> For such an approach would seem to grant to the courts the interpretive authority that is rightly that of the activists. The critical actors in this scenario are lawyers and judges, not the people themselves. In contrast, popular constitutionalism, according to Kramer, “does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large.”<sup>17</sup> Kramer, for one, has dismissed the popular constitutional bona fides of most contenders to this label of the past fifty years because they tend to frame their constitutional arguments as challenges “directed *at* rather than against the Court.”<sup>18</sup>

I would argue that popular constitutionalism must contain a self-conscious move that is at the center of legal analysis: an effort to make a distinction between law from politics. Specifically, for purposes of defining a popular constitutional movement, an extrajudicial constitutional claim must include some effort to distinguish constitutionality from political or moral advisability—it must at least recognize the possibility that there is a difference between the decision of what makes good or just policy and the measure of a given policy’s constitutional status.<sup>19</sup> In formulating their visions of popular constitutionalism, both Mark Tushnet and Larry Kramer have identified some recognition of the law-politics

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16. *But see* Post & Siegel, *Popular Constitutionalism*, *supra* note 4, at 1029 (“In contrast to Kramer, we do not understand judicial supremacy and popular constitutionalism to be mutually exclusive systems of constitutional ordering.”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 351 (2001) (“A look at our constitutional history suggests that judicial supremacy is, in important respects, a collaborative practice, involving the Court in partnerships with the representative branches and the People themselves.”).

17. Larry D. Kramer, “*The Interest of the Man*”: *James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 700 (2006).

18. KRAMER, *supra* note 2, at 221; *see also* Kramer, *supra* note 17, at 698 n.3 (arguing that recent anti-abortion activism has accepted the principle of judicial supremacy because the state-level legislative restrictions on abortions these activists have advanced have been designed not as assertions of “co-equal authority to say what the Constitution means,” but as a way to get the Court to revisit its prior holding in *Roe*).

19. A common criticism of the theory of popular constitutionalism is that it is impossible to distinguish it from social and political activism generally. For example, James Fleming has written: All of Kramer’s historical examples of popular constitutionalism provide answers to the question of *who* may interpret—and involve rejection of claims that courts rather than other departments or the people themselves are the ultimate or exclusive interpreters of the Constitution. None of them gives us any idea of *what* is the content of the constitutionalism in popular constitutionalism and how it binds and guides the people themselves. Thus, it is not clear that there is any particular content to popular constitutionalism that constrains the people themselves . . . . The upshot of all this is that it is not clear that there is a domain of popular constitutionalism as distinguished from the domains of ordinary politics and justice.

James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1392 (2005) (emphasis added) (footnote omitted).

divide as a necessary attribute of the concept.<sup>20</sup> In *Taking the Constitution Away from the Courts*, Tushnet insisted that his version of popular constitutionalism (which he labeled “populist constitutional law”) must be understood as a *legal* concept.<sup>21</sup>

The most problematic term here is *law*. How can constitution decisions made away from the courts, particularly by ordinary citizens, be law? . . . [I]t is law because it is not in the first instance either the expression of pure preferences by officials and voters or the expression of unfiltered moral judgments.<sup>22</sup>

Kramer further develops the point: “[P]opular constitutionalism is not mere politics, but is in fact a legal concept that treats the Constitution as ‘law’ in its proper sense.”<sup>23</sup> The key distinction between law and politics is a sense that law “binds and limits” in ways that politics does not: “The law itself encumbers the field of available action.”<sup>24</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 not exist in the political domain.”<sup>25</sup>

If we put together these two necessary components of popular constitutionalism—an assumption that constitutional principles function differently from policy and a measure of autonomy from the courts—then it becomes clear that popular constitutionalism is best considered on a spectrum. This spectrum would have on one end an exclusively “juricentric”<sup>26</sup> or “legal constitutionalist”<sup>27</sup> or “catholic”<sup>28</sup> approach to constitutional interpretation, which would include reform efforts aimed exclusively at constitutional litigation. On the other end would be popular constitutionalism in its purest form—popular movements that mobilize around constitutional interpretations that either act as if the Supreme Court is irrelevant or act in direct opposition to existing constitutional

20. TUSHNET, *supra* note 2, at x–xi; KRAMER, *supra* note 17, at 699.

21. TUSHNET, *supra* note 2, at x.

22. *Id.* at x–xi. Tushnet adds that while he identifies “populist constitutionalism” as a legal concept, it still “accords a large place for politics, in two senses: Populist constitutional law gains its content from discussions among the people in ordinary political forums, and political leaders play a significant role in assisting the people [who] conduct those discussions.” *Id.* at xi.

23. KRAMER, *supra* note 17, at 699.

24. *Id.*

25. *Id.* at 699–700; *see also* KRAMER, *supra* note 2, at 30 (describing eighteenth-century constitutionalism, which serves as a model for Kramer’s concept of popular constitutionalism, as “self-consciously legal in nature,” albeit with a “notion of legality [that] was less rigid and more diffuse [than modern conceptions]—more will willing to tolerate ongoing controversy over competing plausible interpretations of the constitution, more willing to ascribe authority to an idea as unfocused as ‘the people’”).

26. Post & Siegel, *Juricentric Restrictions*, *supra* note 12, at 2 (“The juricentric Constitution imagines the judiciary as the exclusive guardian of the Constitution.”).

27. KRAMER, *supra* note 17, at 699 (distinguishing “popular constitutionalism” from “legal constitutionalism,” defined as “the idea that constitutional interpretation has been turned over to the judiciary and, in particular, the Supreme Court”).

28. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27–30 (1988).

doctrine (with any modification of that doctrine only an incidental or secondary goal of the constitutional mobilization).

## II. TEA PARTY CONSTITUTIONALISM<sup>29</sup>

Part II breaks down the elements of the Tea Party as a constitutional movement. I first offer a brief summary of the emergence of the Tea Party movement. Then I examine the core tenets of Tea Party constitutionalism. I give particular attention to the ways in which the Tea Party's ideas about how best to interpret the Constitution provide a platform for constitution mobilization. I then describe the major areas of activism and mobilization for the Tea Party's constitutional project.

### *A. The Emergence of the Tea Party Movement*

The Tea Party was born in early 2009, when a series of scattered rallies denouncing the Obama Administration's stimulus program (a continuation and expansion of policy begun under the Bush Administration), coalesced into a loosely organized national movement flying the banner of the "Tea Party."<sup>30</sup> (This name always harkened back to the revolutionary protest against British authority, but in the early stages of the movement some supporters also promoted it as an acronym for "Taxed Enough Already.") The Tea Party gained media attention with nationwide protest rallies on tax day, April 15, 2009.<sup>31</sup> It was not clear at this point whether this was going to be a flash in the pan, a brief flurry of anger before people got back to their lives, or whether it had the potential for something more sustained.

By the following summer, with the Tea Party still gaining adherents and energy, its potential political force was put on display when the movement aimed its attention on President Obama's health care reform.<sup>32</sup> Local Tea Party groups, encouraged and guided by a number of national organizations that sought to capture and direct the energy of this growing movement, organized protests at town hall meetings members of Congress were holding around the country to discuss the pending health care legislation.<sup>33</sup> Health care provided a convenient and effective focal point for the second wave of Tea Party activism. When Congress went into its summer recess in August, many of its members held town hall meetings to talk to their constituents.<sup>34</sup> Tea Party leaders targeted these meetings as a way for the Tea Party to get itself heard. As one leader explained in

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29. The following section draws on material examined at considerably more length in Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L. Q. (forthcoming, 2011).

30. Liz Robbins, *Protesters Air Views on Government Spending at Tax Day Tea Parties Across U.S.*, N.Y. TIMES, Apr. 16, 2009, at A16.

31. *Id.*

32. KATE ZERNIKE, BOILING MAD: INSIDE TEA PARTY AMERICA 83 (2010).

33. *Id.*

34. *Id.*

a strategic memo, Tea Partiers should follow the lessons of Chicago-based community organizer Saul Alinsky: “freeze it, attack it, personalize it, and polarize it.”<sup>35</sup> There were two objectives at these meetings: to challenge the Representative and to draw the audience’s attention to the fact that the Democratic leadership “is acting against our founders’ principles.”<sup>36</sup> Tea Partiers indeed attended these meetings in full force, often using disruptive tactics.<sup>37</sup>

September 12, 2009, saw the largest round of Tea Party rallies yet. These were organized in large part by FreedomWorks, a libertarian organization that has aligned itself with the Tea Party, and Glenn Beck, who was launching what he called a “9–12” project.<sup>38</sup>

In 2010, the Tea Party emerged a major force on the national political scene. The year began with Scott Brown’s dramatic victory, on January 19, in the special election in Massachusetts to fill the senate seat of Edward Kennedy.<sup>39</sup> Massachusetts showed the Tea Party’s ability to bring together grassroots activism and big-money support. The Brown victory foreshadowed the power of the Tea Party as a player in the mid-term elections the following fall. In the coming months, Tea Party-backed candidates would produce numerous upsets in the Republican primaries, and a number of them would go on to win in the November elections.<sup>40</sup>

Although early critics of the Tea Party dismissed it as an artificial movement, as “Astroturf,” as a movement with powerful backers but without real grassroots support, by 2010, the reality that this was a grassroots movement with widespread support became increasingly difficult to deny.<sup>41</sup> *Time* magazine reported in February 2010: “Across the country, from Muskegon, Mich., to Wetumpka, Ala., Tea Party meetings are being convened in restaurants and living rooms and libraries and office buildings—and online. Tea Party thinking has inspired hundreds of websites and Facebook pages.”<sup>42</sup> By the spring of 2010, polls found almost one in five Americans identifying themselves as supporting the Tea Party, with four percent of the population saying they had given money to a Tea Party group or attended a Tea Party event.<sup>43</sup> Exit polling at the November 2010 mid-term congressional elections found forty percent of

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35. *Id.*

36. *Id.* at 83–84.

37. *Id.* at 84–85.

38. *See id.* at 24–25, 85.

39. *Id.* at 88–92.

40. Alex Altman, *Primary Round-Up: A Tea Party Triumph (Or Two) Is a Win For Dems*, *TIME*, Sept. 15, 2010.

41. ZERNIKE, *supra* note 32, at 4.

42. David von Drehle, *Why the Tea Party Movement Matters*, *TIME*, Feb. 18, 2010, <http://www.time.com/time/politics/article/0,8599,1964903,00.html>.

43. Kate Zernike & Megan Thee-Brenan, *Poll Finds Tea Party Backers Wealthier and More Educated*, *N.Y. TIMES*, Apr. 15, 2010, at A1 (summarizing a New York Times/CBS News poll).

those who cast their votes saying they were sympathetic to the Tea Party movement.<sup>44</sup> The Tea Party closed 2010 by making the short list for *Time* magazine's "Person of the Year."<sup>45</sup>

### *B. The Fundamentals of Tea Party Constitutionalism*

Attempting to make sense of the Tea Party is no easy task. Although there are a few national Tea Party-affiliated organizations,<sup>46</sup> and a number of national figures who are identified with the movement,<sup>47</sup> the Tea Party has been largely driven by local groups that have popped up around the country over the past two years.<sup>48</sup> Because of its decentralized organization, under its umbrella is a diverse collection of interests and agendas. The Tea Party, like any broad-based social movement, contains many contradictions. Nonetheless, when one focuses on the Tea Party's attitude toward the Constitution, a relatively coherent constitutional vision emerges.

Tea Party constitutionalism revolves around four fundamental assumptions. The first is that 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. The Founding period was a special moment, never to be replicated—the Founders were perhaps even divinely inspired. As Tea Party-backed candidate for U.S. Senate, Christine O'Donnell explained in a speech: "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."<sup>49</sup>

The second fundamental assumption is that the meaning of the Constitution and the lessons of history are readily accessible to American citizens who take the time to educate themselves. The Tea Party rejects hierarchical assumptions about authoritative constitutional interpretation in favor of more individualistic or community-based, decentralized ap-

44. *Fox Hannity* (Fox News Network television broadcast Mar. 4, 2011).

45. David von Drehle, *2010 Time Person of the Year Runner-Up: Tea Party*, *TIME*, Dec. 15, 2010, [http://www.time.com/time/specials/packages/article/0,28804,2036683\\_2037118\\_2037102,00.html](http://www.time.com/time/specials/packages/article/0,28804,2036683_2037118_2037102,00.html); see also *TODAY Viewers Want Chilean Miners to Win TIME Title*, *TODAY* (Dec. 10, 2010, 3:37 PM), [http://today.msnbc.msn.com/id/40609817/ns/today-today\\_celebrates\\_2010/#](http://today.msnbc.msn.com/id/40609817/ns/today-today_celebrates_2010/#).

46. The most prominent of these include: Tea Party Patriots, Tea Party Nation, and FreedomWorks. Various local groups, such as the Chicago-based Sam Adams Alliance, have gained a level of national prominence. The Tea Party Express, which is basically a conservative Republican fund-raising group that targets certain electoral races, has also gain considerable influence. And there are also various political action committees—such as the Koch-backed Americans for Prosperity, that have effectively tapped into the Tea Party fervor. See von Drehle, *supra* note 44.

47. Glenn Beck is perhaps the most prominent single individual associated with the Tea Party. Other significant figures include Sarah Palin, Ron Paul, and Michelle Bachmann. See Lydia DePillis, *The Tea Party Glossary: Everything You Need to Know About the Movement, From Nuts to Nuts*, *NEW REPUBLIC* (Feb. 3, 2010, 11:50 PM), <http://www.npr.com/article/politics/the-tea-party-glossary>.

48. *The Rise of the Tea Party*, *THE WEEK* (Feb. 10, 2010, 11:36 AM), <http://theweek.com/article/index/106173/the-rise-of-the-tea-party>.

49. Christine O'Donnell, Speech at the 2010 Values Voter Summit (Sept. 16, 2010), available at [http://www.huffingtonpost.com/2010/09/17/christine-odonnell\\_n\\_721382.html](http://www.huffingtonpost.com/2010/09/17/christine-odonnell_n_721382.html).

proaches. 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>50</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.

The corollary of this belief in the accessibility of the Constitution, and the third basic assumption of the Tea Party’s constitution vision, is a commitment to the idea that all Americans, not just lawyers and judges, have a responsibility to understand the Constitution and to act faithfully toward it. The Constitution is accessible. As Dick Armey, 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>51</sup> A popular Tea Party bumper sticker reads: “I have this crazy idea that the Constitution *actually means something*.”<sup>52</sup> 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.<sup>53</sup> Rather, the Tea Party has made its efforts in the area of educational outreach, state-level political mobilization, and national electoral politics.

The fourth fundamental tenet of Tea Party constitutionalism involves the movement’s substantive idea of what the Constitution actually means. At the heart of the Tea Party’s vision is a belief that the overarching purpose of the Constitution is to ensure that the role of government, and particularly the federal government, is limited. Only by following constitutionally defined constraints on government can individual liberties be preserved. In the words of Tea Party favorite Senator Rand Paul of Kentucky, “belief in self-reliance, limited government and the Consti-

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50. INDEPENDENCE CAUCUS, <http://www.ourcaucus.com> (last visited Apr. 15, 2011).

51. ZERNIKE, *supra* note 32, at 67; *see also* ANGELO M. CODEVILLA, THE RULING CLASS: HOW THEY CORRUPTED AMERICA AND WHAT WE CAN DO ABOUT IT 44 (2010) (all that is needed to understand the meaning of the Constitution is “the dictionary and grammar book”).

52. *Political Bumper Stickers*, 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) (last visited Apr. 15, 2011).

53. The relative inattention to the courts reflects a general sense among Tea Party supporters that the Supreme Court is simply not on their side. *See, e.g.*, CODEVILLA, *supra* note 50, at 42–43 (attacking the courts as having a “[d]isregard for the text of laws, for the dictionary definition of words and the intentions of those who wrote them” and enforcing a “Constitution imagined by the judge and supported by the ruling class”); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 32 (2005).

tution hold the keys to fixing our problems and getting our nation back on track.”<sup>54</sup>

Conservative columnist Charles Krauthammer neatly summarizes the assumptions underlying Tea Party constitutionalism:

What originalism is to jurisprudence, constitutionalism is to governance: a call for restraint rooted in constitutional text. Constitutionalism as a *political* philosophy represents a reformed, self-regulating conservatism that bases its call for minimalist government—for reigning in the willfulness of presidents and legislatures—in the words and meaning of the Constitution. . . . 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.<sup>55</sup>

Here are all the basic elements of the Tea Party’s constitutional vision: the Constitution as a framework for “minimalist government”; the Constitution invites individual “study and recitation”; the Constitution’s “words and meaning” are self-evident; the Constitution as “an anchor” holding the nation fast to its founding principles.

### *C. Constitutional Interpretation as Social Mobilization*

Tea Party constitutionalism has also coalesced around a particular method of constitutional interpretation, namely originalism. This is a notable development because the most prominent arguments in defense of originalism have emphasized the ways in which it supposedly constrains judges. Originalism, this argument goes, relies upon tools of constitutional analysis that are particularly suited to judges. It insulates judges from relying upon their own value judgments when interpreting the Constitution better than any other interpretive approach. Yet the version of populist originalism that the Tea Party has embraced has detached the case for originalism from concerns with judicial restraint. For the Tea Party, originalism is a tool of extrajudicial constitutional mobilization.

Radio show host Mark Levin in his 2009 best-seller, *Liberty and Tyranny*, lays out the basic case for originalism as a tenet of movement conservatism:

The Conservative 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

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54. Rand Paul, *Rand Paul, Libertarian? Not Quite*, USA TODAY (Aug. 9, 2010, 6:13 PM), [http://www.usatoday.com/news/opinion/forum/2010-08-10-column10\\_ST2\\_N.htm](http://www.usatoday.com/news/opinion/forum/2010-08-10-column10_ST2_N.htm).

55. Charles Krauthammer, Op-Ed, *Constitutionalism*, WASH. POST, Jan. 7, 2011, at A19.

government excess. There really is no other standard by which the Constitution can be interpreted without abandoning its underlying principles altogether.<sup>56</sup>

In various forms, this basic defense of originalism as an act of national fidelity and a call to arms 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.<sup>57</sup> “It’s up to us to light a fire under our fellow citizens.”<sup>58</sup>

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 Glenn 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>59</sup> Beck has called for a “Refounding.”<sup>60</sup> The Beck-inspired “9–12 Project” has identified nine principles for its followers, each supported with a quotation from Jefferson or Washington.<sup>61</sup> The group also calls on its followers to meet regularly with family and neighbors to discuss the importance of the Founders’ design for America.<sup>62</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>63</sup>

This last point—that the Founders and the Constitution they drafted is “alive today”—is central to Tea Party ideology.<sup>64</sup> For the Tea Party, the Founders’ ideas and personalities are present with us 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>65</sup>

56. MARK R. LEVIN, *LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO* 36 (2009).

57. Lauren Ricks, *Anyone for T.E.A.? 300 Gather at County Courthouse to Protest More Taxes*, ATHENS DAILY REV., Apr. 16, 2009, available at Westlaw ATHENS DLY.

58. *Id.* “I came because I want our country restored to our founding principles,” explained an attendee at the rally. *Id.*

59. JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* 156 (2010) (quoting *The Glenn Beck Show* (Fox News television broadcast Apr. 30, 2010)).

60. *Glenn Beck Reveals the Plan*, GLENN BECK (Nov. 26, 2009, 3:19 AM), <http://www.glennbeck.com/content/articles/article/198/33398>.

61. *9 Principles, 12 Values*, THE 9-12 PROJECT, <http://the912-project.com/about/the-9-principles-12-values/> (last visited Apr. 15, 2011).

62. *Our Mission*, THE 9-12 PROJECT, <http://www.the912project.com/2009/03/24/mission-statement-2/> (last visited Apr. 15, 2011).

63. LEPORE, *supra* note 59, at 157 (quoting *The Glenn Beck Show* (Fox News television broadcast May 7, 2010)).

64. See Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK1.

65. See, e.g., Adam Nagourney, *Tea Party Choice Scrambles in Taking on Reid in Nevada*, N.Y. TIMES, Aug. 18, 2010, at A1 (writing that 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

Furthermore, the Founders, by most Tea Party accounts, were in basic agreement on the key points. 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 W. Cleon Skousen, the late ultra-conservative conspiracy theorist whose work has become widely influential in the Tea Party,<sup>66</sup> “is that, while the nation’s Founders came from widely divergent backgrounds, their fundamental beliefs were virtually identical.”<sup>67</sup>

Thus we can see in the Tea Party the transformation of originalism from a method of constitutional interpretation whose primary attribute was its claimed ability to limit judges into a method of constitutional interpretation that has become a focal point for a movement that has largely ignored the courts in promulgating its various constitutional claims. Originalism in its populist form has become an act of respect, even reverence, for the Founding generation. Populist originalists emphasize the accessibility of Founding Era history, offering clear and consistent answers to the most pressing dilemmas of modern America. This may not be good history, but it offers a powerful tool for constitutional mobilization.

#### *D. The Process of Constitutional Mobilization*

One of the most important contributions of the Tea Party movement for scholars of popular constitutionalism is that it has demonstrated the viability of various extrajudicial mechanisms of popular constitutional claim-making.<sup>68</sup> In this section, I examine the mechanisms by which the Tea Party has sought to inject its constitutional vision into popular consciousness and political practice. I categorize these mechanisms into three categories: (1) the Tea Party’s promotion of its constitutional vision through educational outreach efforts; (2) state-level Tea Party activism, including lobbying for state “sovereignty” and nullification measures; and (3) 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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founding fathers and their writings . . . you might draw those conclusions: That they were conservative. They were fiscally conservative and socially conservative”).

66. 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; see also Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG., Nov. 26, 2010, at 34.

67. W. CLEON SKOUSEN, *THE MAKING OF AMERICA: THE MEANING AND SUBSTANCE OF THE CONSTITUTION* 10 (1985).

68. Various commentators have noted that the popular constitutionalists have been short on concrete descriptions of “the particular institutional mechanisms that would make their vision a reality in today’s world.” David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069, 1069 (2006); see also David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2049–50 (2010); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 321 (2008).

### 1. Educational Outreach

Premised on the idea that the Constitution is a document that is readily accessible to all Americans and a belief that higher levels of constitutional consciousness will naturally support their cause, national and local Tea Party groups have sought to promote constitutional literacy among the citizenry. “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>69</sup> Glenn Beck regularly rails against the lack of schooling about the Constitution,<sup>70</sup> and he has called on his listeners to act as a “constitutional watchdog for America.”<sup>71</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 Angelo Codevilla, the author of a widely discussed recent populist conservative manifesto.<sup>72</sup> One Tea Party-affiliated campaign—called “Save the Constitution—Read It!”—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>73</sup>

The Tea Party Patriots sell an “Official Tea Party Patriots’ Coloring & Activity Book” for children.<sup>74</sup> According to their website, “[i]nspired by the principles of Freedom and Liberty immortalized in the United States Constitution . . . the book includes a simple and fun emphasis on funda-

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69. Philip Rucker & Krissah Thompson, *Two New Rules Will Give Constitution a Starring Role in GOP-Controlled House*, WASH. POST (Dec. 30, 2010, 10:57 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122901402.html>.

70. See Bradford Plumer, *The Revisionaries*, THE NEW REPUBLIC, Sept. 2, 2010, at 16.

71. Ian Millhiser, *Rally ‘Round the True Constitution’*, AMER. PROSPECT, Aug. 25, 2009, [http://prospect.org/cs/articles?article=rally\\_round\\_the\\_true\\_constitution](http://prospect.org/cs/articles?article=rally_round_the_true_constitution).

72. CODEVILLA, *supra* note 51, at 84.

73. *Commit*, SAVE THE CONSTITUTION READ IT!, <http://www.saveitreadit.org/page/commit.php> (last visited Apr. 15, 2011).

74. *Coloring Book*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/coloringbook.aspx> (last visited Apr. 15, 2011).

mental freedoms and is part of a long term effort to educate the next generation of children on the basics of American liberty.<sup>75</sup>

Tea Party activists often compare their constitution classes to Catholic catechism<sup>76</sup> or Bible study.<sup>77</sup> They often proudly carry copies of the Constitution, and pocket copies are regularly distributed at Tea Party events.<sup>78</sup> A group called Let Freedom Ring holds public readings of the Constitution,<sup>79</sup> and some Tea Party groups have requested opportunities to go into schools to talk about the Constitution.<sup>80</sup>

## 2. State-Level Constitutional Mobilization

The second category of constitutional activity is state-level mobilization. This has included campaigns to get state legislatures to pass “sovereignty resolutions”—statements asserting a commitment to the principle of state sovereignty as recognized in the Tenth Amendment of the Constitution.<sup>81</sup> Some states have even gone so far as to declare the right to nullify federal policy that the state legislature deems unconstitutional.<sup>82</sup> Another element of state-level constitutional activism is efforts to mobilize support for certain Tea Party-favored amendments to the Constitution.

The mobilization of states’ rights ideology and even the possibility of state nullification of federal policy has been one of the most controversial elements of the Tea Party’s constitutional project. 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

75. *Id.*

76. ZERNIKE, *supra* note 32, at 79.

77. Rucker & Thompson, *supra* note 69 (describing 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 mode[l]ed on Bible study groups.”).

78. ZERNIKE, *supra* note 32, at 67; Bill Donahue, *The Calling Chuck Henthorn Led Ohio Tea Partiers to the Glenn Beck Rally: Can Their Vision Of Patriotism—Duty And God's Marching Orders—Reshape America?*, WASH. POST, Oct. 24, 2010, at W09; Mara Liasson, *Tea Party: It's Not Just Taxes, It's the Constitution*, NPR, (July 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=128517427>; Plumer, *supra* note 70, at 17.

79. Plumer, *supra* note 70, at 16.

80. *Id.*

81. Kathy Kiely, *Some States Pass Sovereignty Measures*, USA TODAY (May 17, 2009, 5:05 PM), [http://www.usatoday.com/news/nation/2009-05-14-secede\\_N.htm#](http://www.usatoday.com/news/nation/2009-05-14-secede_N.htm#); *see also The 10th Amendment Nullification Movement*, TENTH AMENDMENT CENTER, <http://www.tenthamendmentcenter.com/the-10th-amendment-movement/> (last visited Apr. 15, 2011).

82. Jack Kenny, *N.H. House Asserts State's Right to Nullify Federal Laws*, THE NEW AMERICAN (Mar. 31, 2011, 7:30 PM), <http://www.thenewamerican.com/usnews/constitution/6935-nh-house-claims-states-right-to-nullify-federal-laws>.

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>83</sup> 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.

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>84</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" resolutions. A popular model resolution has been promoted by the Tenth Amendment Center: the non-binding "10th Amendment Resolution."<sup>85</sup> It includes some rather prosaic Tea Partyesque rhetoric—a statement that sovereignty resides 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, [which] . . . infringe on the sovereignty of the people of this state" and may be unconstitutional.<sup>86</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>87</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 enforce-

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83. Cara Kumari, *Tea Partiers Tell Lawmakers To Deliver*, WSMV (Jan. 12, 2011, 9:40 PM), <http://www.wsmv.com/politics/26471655/detail.html>.

84. W. Gardner Selby & Jason Embry, *Perry Stands by Secession Idea, Says He Won't Push It*, AUSTIN AMERICAN-STATESMAN, Apr. 17, 2009, at A01.

85. *10th Amendment Resolution*, TENTH AMENDMENT CENTER, [www.tenthamendmentcenter.com/10th-amendment-resolution/](http://www.tenthamendmentcenter.com/10th-amendment-resolution/) (last visited Apr. 15, 2011).

86. *Id.*

87. *Id.*

ment of the individual mandate.<sup>88</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.<sup>89</sup> Virginia was the first to do so, passing its nullification law on March 4, 2010.<sup>90</sup> At this time, thirty-six other states were considering similar legislation.<sup>91</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>92</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>93</sup> In early 2011, Tennessee passed a law that would allow residents to choose to opt-out of the health care mandate.<sup>94</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>95</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

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88. THOMAS E. WOODS, NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 122 (2010).

89. Becky Bohrer, *Alaska Gov. Refusing to Enact Health Care Law*, MSNBC (Feb. 17, 2011, 5:44 PM), <http://www.msnbc.msn.com/id/41651066/#>.

90. Act of March 10, 2010, ch. 106, 2010 Va. Acts 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 . . . .”) (codified at VA. CODE ANN. § 38.2-3430.1.1 (2010)).

91. 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>.

92. *ALEC’s Freedom of Choice in Health Care Act*, AM. LEGISLATIVE EXCHANGE COUNCIL, <http://www.alec.org/AM/Template.cfm?Section=FOCA&Template=/CM/HTMLDisplay.cfm&ContentID=15323> (last visited Apr. 3, 2011).

93. *Id.*; see also David Lightman, *All Over Map on Health Care*, CHI. TRIBUNE, Feb. 22, 2011, at C4.

94. *State House Passes Health Freedom Act*, THE CHATTANOOGAN.COM (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*, THE WEEKLY STANDARD (Jan. 3, 2011), [http://www.weeklystandard.com/articles/nullifying-obamacare\\_524862.html](http://www.weeklystandard.com/articles/nullifying-obamacare_524862.html); *The Compact-Health Care Compact*, HEALTHCARE COMPACT, <http://www.healthcarecompact.org/compact>.

95. *Nullifying Federal Mandates*, TENTH AMENDMENT CENTER, <http://www.tenthamendmentcenter.com/wp-content/uploads/brochures/Nullification-Brochure.pdf>.

Federal law being repealed. Nullification does not require permission from any person or institution outside of one's own State.<sup>96</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.

### 3. National Politics

The third area of Tea Party constitutional activism I consider takes place in the arena of national electoral politics. The plan here is straightforward: to make fidelity to the Constitution a central qualification for elected office. The constitutional principle of limited federal power can be effectuated simply by demanding that members of Congress recognize their constitutional responsibilities—and voting them out of office if they fail to do so. 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. Thus far, it is here, in congressional politics, that the Tea Party's constitutional agenda has had its most significant impact.

"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 long-time conservative fundraiser Richard Viguerie.<sup>97</sup> FreedomWorks Chairman Dick Armey's 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>98</sup>

The Independence Caucus, an organization that describes itself as a "national citizens organization" and has been aligned with local Tea Party groups, created a lengthy list of yes-or-no "vetting questions" for congressional candidates.<sup>99</sup> It is basically a test of Tea Party bona fides, designed to measure a candidate's commitment to the Independence

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96. *Id.*

97. Richard Viguerie, *Constitutionally, the Next Time*, WASH. TIMES (Nov. 23, 2009, 5:45 AM), <http://www.washingtontimes.com/news/2009/nov/23/constitutionally-the-next-time/>.

98. Dick Armey, *Stay True to Principle — and the Constitution*, POLITICO (Jan. 18, 2011, 04:25 AM), <http://www.politico.com/news/stories/0111/47697.html>.

99. See *The Process: Vetting Questions*, INDEPENDENCE CAUCUS, <http://www.icaucus.org/vetting-process/the-questions> (last visited June 29, 2011).

Caucus's mission of promoting limited government, fiscal responsibility, and "adherence to constitutional authority."<sup>100</sup>

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, that the solution to federal overreach lies in focusing on the political branches. Members of Congress must take more responsibility for the Constitution, he explained. 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>101</sup>

When the new Republican House majority was installed in early 2011, one of the most publicized changes was to require that all federal laws specify the constitutional basis for congressional authority.<sup>102</sup> This was a proposal the Tea party had advocated during the 2010 elections.<sup>103</sup> The reason this requirement 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 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.<sup>104</sup> "Are you serious? Are you serious?" she asked.<sup>105</sup> When the reporter responded in the affirmative, she shook her head and moved on to another questioner.<sup>106</sup> This confrontation, and Pelosi's dismissive attitude toward the question of the law's

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100. *Mission Statement*, INDEPENDENCE CAUCUS, [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) (last visited Apr. 19, 2011).

101. Senator-Elect Michael S. Lee, Address to 2010 National Lawyers Convention (Nov. 19, 2010), available at <http://www.fed-soc.org/audioLib/LeeAddress-11-19-10.mp3>.

102. See, e.g., Rucker & Thompson, *supra* note 69.

103. See *About Us*, CONTRACT FROM AMERICA, <http://www.thecontract.org/aboutus> (last visited Apr. 19, 2011). The Contract From America was created by Ryan Hecker, an activist affiliated with the Houston Tea Party Society. The proposal was also included in the Republican Pledge to America, which the party rolled out during the 2010 elections. Republicans in Congress, *A Pledge to America: A New Governing Agenda Built on the Priorities of our Nation, the Principles We Stand For, & America's Founding Values*, <http://pledge.gop.gov/resources/library/documents/pledge-a-pledge-to-america.pdf> ("We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.")

104. Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says: 'Are You Serious?'*, CNSNEWS.COM (Oct. 22, 2009), <http://www.cnsnews.com/news/article/55971>.

105. *Id.*

106. *Id.*

constitutionality, has been referenced again and again in Tea Party literature.<sup>107</sup> It is regularly 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 Congress's constitutionally enumerated powers.

The House Tea Party Caucus began 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>108</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>109</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.<sup>110</sup> Republican Congressman Bob Goodlatte of Virginia, a fiscal conservative and staunch opponent of the health care bill,<sup>111</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.<sup>112</sup> "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>113</sup> "Call it the tea party-ization of Congress," *Washington Post*

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107. See, e.g., CODEVILLA, *supra* note 51, at 45; WOODS, *supra* note 88, at 1; Ken Klukowski, *Letter to the Editor*, POLITICO (Oct. 28, 2009, 05:09 PM), <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.")

108. *Justice Scalia to Address Conservative Constitutional Seminar*, CONGRESSWOMAN MICHELE BACHMANN (Dec. 15, 2010), <http://bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=217599>; Gabriella Schwarz, *Congress To Be Schooled*, CNN.COM (Dec. 15, 2010, 11:24 PM), <http://politicalticker.blogs.cnn.com/2010/12/15/congress-to-be-schooled-2/#more-139906>.

109. Editorial, *Justice Scalia and the Tea Party*, N.Y. TIMES, Dec. 18, 2010, at WK7; Schwarz, *supra* note 108. 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 C12.

110. Felicia Sonmez, *Constitution Day: House Holds First-Ever Floor Reading of Founding Document*, WASH. POST (Jan. 6, 2011, 11:45 AM), <http://voices.washingtonpost.com/44/2011/01/constitution-day-house-to-lead-1.html>.

111. As Goodlatte wrote in defending his opposition to the health care bill: "All Americans should be worried anytime the federal government tries to trample on or ignore our Constitution . . ." *The Wrong Prescription for America*, CONGRESSMAN BOB GOODLATTE (Mar. 26, 2010), <http://goodlatte.house.gov/2010/03/the-wrong-prescription-for-america.shtml>.

112. *Goodlatte to Lead Historic Reading of U.S. Constitution on House Floor*, CONGRESSMAN BOB GOODLATTE (Jan. 4, 2011, 02:33 PM), <http://goodlatte.house.gov/2011/01/goodlatte-to-lead-historic-reading-of-us-constitution-on-house-floor.shtml>.

113. *Id.*

reporters wrote about the newfound congressional fascination with the Constitution.<sup>114</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>115</sup>

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. Although critics often dismiss these Tea Party-inspired episodes and reforms as little more than publicity stunts, they have been effective at keeping the Tea Party’s constitution claims in the public eye. The Tea Party has achieved something considerable in creating a viable popular constitutional movement—a movement that has been able, for the most part, to avoid becoming dependent on the outcomes of constitutional litigation but at the same time has had considerable success in keeping its agenda focused on the Constitution’s text and its history.

### III. LESSONS FROM THE TEA PARTY

In its self-conscious commitment to extrajudicial constitutional interpretation, the Tea Party offers one of the clearest demonstrations of the dynamics of popular constitutionalism in modern American history. This still-unfolding movement might offer valuable lessons about the capacities and limitations of popular constitutional mobilization.

In this section, I will explore one possible lesson that emerges from the Tea Party case study. The hypothesis I will consider is that (1) popular constitutionalism is better suited to advancing certain kinds of constitutional claims over others, and that (2) the Tea Party experience suggests that popular constitutional mobilization can be particularly effective in advancing the small-government, anti-regulation agenda that is at the heart of the modern conservative-libertarian movement.

In pursuing this hypothesis, I am challenging an assumption prevalent within popular constitutional scholarship. Scholarship on popular constitution has had something of a leftward tilt. Most of the most enthusiastic proponents of popular constitutionalism in the legal academy self-identify as political liberals or progressives.<sup>116</sup> They envision popular

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114. Rucker & Thompson, *supra* note 69.

115. *Id.*

116. This observation is explored in Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 86 NOTRE DAME L. REV. (forthcoming 2011),

engagement with the Constitution as an antidote to a Supreme Court that, for reasons having to do both with the ideological commitments of particular justices and the institutional constraints of the judiciary, has too often blocked progressive reforms favored by the elected branches and by popular movements.<sup>117</sup> Popular constitutionalism is thus assumed to offer an attractive oppositional force to a Supreme Court that today and perhaps more generally (with the Warren Court as an aberrational moment) is basically a conservative institution. In treating popularly based constitutional commitments as oppositional to a conservative judiciary, popular constitutionalists assume that popular constitutional mobilization is well suited to the kinds of claims favored by progressives. Or, at minimum, they assume that popular constitutionalism provides ideologically neutral mechanisms through which all kinds of constitution claims—those favored by progressives as well as those favored by conservatives—can be advanced. The Tea Party experience raises the question of whether unleashing the people themselves as autonomous claimants on constitution meaning results in predictably progressive constitution claims. More provocatively, the Tea Party experience might suggest that popular constitutionalism could in fact have a rightward tilt. At least in the modern American scene, it would seem that those mechanisms that are most readily available for advancing extrajudicial constitutional

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available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1658549](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658549). One need only look at the contributor list to a volume that emerged from a conference co-sponsored by the American Constitution Society and dedicated to strategizing the advancement of a progressive constitutional vision, to see the obvious overlap between liberal law professors and the leading proponents of popular constitutionalism and its variants. *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009). One should not take this point too far, however. While it seems clear that the majority of the most important advocates of popular constitutionalism (at least in its most recent incarnation) have been liberal, two qualifications are necessary. First, some of the theory's most prominent critics are also liberal. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673 (2004). And some of the most prominent proponents of variations on the theory of popular constitutionalism are well-known conservatives. Advocacy of variants of extrajudicial constitutionalism can be traced back to Edwin Meese and are found in the scholarship of Michael Stokes Paulson and others. Second, popular constitutionalism, as a theory of constitutional development, does not call for any particular outcome, whether liberal or conservative. As David Pozen has written:

Popular constitutionalists do not tend to claim that judicial supremacy has diminished social welfare or social justice, though they occasionally draw attention to the Court's propensity to thwart progressive legislation or to the fragility of constitutional commitments that lack a grounding in public support. The focus is on process and culture more than outcomes. As normative theorists, popular constitutionalists have stressed a nonconsequentialist point about the courts' ability to impede collective self-determination.

Pozen, *supra* note 1, at 2057.

117. See, e.g., William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1772 (1994) (“[A]s the federal judiciary continues roughly on the course set in the 1980s, resuming its historic role as a largely conservative, sometimes reactionary force in American life, perhaps progressive constitutional thinkers can do more. The Constitution, after all, was not written solely for courts to interpret, nor does it mean only what judges say it means. On the contrary, the Constitution often has been the terrain for broad public debates. And until relatively recently, neither popular nor scholarly discussion of constitutional matters focused so narrowly on judicial doctrine. For most of United States history, when politicians, reformers-and scholars-debated the meaning of the Constitution, they far more often addressed the citizenry and the legislatures than the courts.”).

claims tend to serve conservative and libertarian interests better than progressive ones. What follows is a provisional effort to sketch some of the factors that could be drawn upon to evaluate this claim.

#### *A. The Conservative Constitution*

A central factor in considering the possible ideological tilt of popular constitutional mobilization is the nature of the Constitution itself. Most of the Constitution's text is quite old. Although the Constitution can be read many ways, it is, first and foremost, a monument to a vision of governance from a past era. The "lessons" that can be easily extracted from this document, extracted without much intermediary direction (such as judicial doctrine), are not the kinds of lessons that tend to inspire those on the left today.

"The Framers' constitution, to a large degree, represented values we should abhor or at least reject today," Michael Klarman stated in his 2010 Constitution Day lecture.<sup>118</sup> "The Constitution was drafted over 200 years ago by people with very different concerns and values."<sup>119</sup> Not only is there the obvious point that the original Constitution actively supported the institution of slavery, but there is the point that "the Framers' constitution was mostly a conservative, aristocratic response to what they perceived as the excesses of democracy that were overrunning the states during the 1780s."<sup>120</sup> The Framers were skeptical of democracy, Klarman emphasizes, and they were fully accepting of limiting the vote to white male property owners.<sup>121</sup> Those provisions that would seem to prevent the government from doing what a majority of the people believe it should do are generally stretched or ignored. The idea of enumerated powers for Congress has largely been pushed aside; the administrative state is clearly problematic on separation of powers and nondelegation grounds, but it is here to stay; we now have an "imperial executive" that is a far cry from what the Founders envisioned for this office.<sup>122</sup> "The Framers would not recognize our system of government today," explains Klarman, "yet the idea that courts would strike it down as unconstitutional seems almost inconceivable. The original design of the Constitution has become almost completely irrelevant."<sup>123</sup>

This kind of skepticism was the central theme of Justice Thurgood Marshall's controversial remarks on the document's bicentennial:

I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, fore-

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118. Michael Klarman, *A Skeptical View of Constitution Worship*, BALKINIZATION (Sept. 27, 2010), <http://balkin.blogspot.com/2010/09/skeptical-view-of-constitution-worship.html>.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

sight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite ‘The Constitution,’ they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.<sup>124</sup>

It would be hard to find a description of constitutional development more at odds with the Tea Party movement than Marshall’s. For Marshall, the Founding Fathers were deeply flawed men, as was the Constitution they created. “[T]he true miracle was not the birth of the Constitution, but its life.”<sup>125</sup>

What is important to note is that Marshall’s speech is that it was a call for a kind of constitutionalism, but it was a constitutionalism based in a skepticism toward the original document and the history surrounding the framing of the document. It sought to demote the centrality of the text and of the late eighteenth century and to elevate the subsequent history of struggles to, in Jack Balkin’s phrase, “redeem” the Constitution.<sup>126</sup> Not a miraculous moment in the summer of 1787, but subsequent struggles to overcome the limitations of the 1787 generation are at the heart of Marshall’s constitutional vision and, more generally, contemporary progressive constitutionalism.

Justice Marshall had faith that his vision of the Constitution—a vision of the Constitution largely detached from its eighteenth century roots—aligned with that of “contemporary Americans.” But, as demonstrated in opinion polls showing considerable support for originalism and in the successes of the Tea Party in pushing an originalist conception of the Constitution, this assumption appears questionable, at least in today’s political environment. The case of the Tea Party indicates that, at least in the context of modern American political and constitutional culture, popular constitutionalism serves insurgent 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), it has been the centerpiece of the modern conservative agenda. As

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124. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

125. *Id.* at 5.

126. JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

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 constitutional text and history is a powerful weapon. 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 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.

*B. Populist Conservative Constitutionalism—The Historical Record*

In using popular constitutional mobilization in the name of limiting the power of the federal government and mobilizing around states' rights principles, the Tea Party locates itself into a venerable tradition dating back to at least to the period of the American Revolution. Considered historically, many of the most powerful expressions of popular constitutionalism have been in the service of resistance to federal government authority.

In delineating this intellectual history of popular constitutionalism, Kramer identifies the eighteenth-century Anglo-American concept of "fundamental law" as "law created by the people to regulate and restrain government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people."<sup>127</sup> Kramer elaborates that "[t]he object of fundamental law was to regulate public officials, who were thus in the position of ordinary citizens with respect to it and required to do their best to ascertain its meaning while going about the daily business of governing."<sup>128</sup> In defending the newly drafted Constitution against Anti-Federalist charges that it created a national government that would devour the states, Federalists emphasized the ways in which the people could protect themselves against federal over-reach.<sup>129</sup> In *Federalist* No. 46, James Madison famously recognized the importance of popular mobilization as a mechanism for resisting unconstitutional encroachments of federal authority.<sup>130</sup> When faced with a federal law that transcends the limits of constitutional authority, states, Madison insisted, retained considerable ability to mobilize opposition:

The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the

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127. KRAMER, *supra* note 2, at 29.

128. *Id.* at 30.

129. *See id.* at 83–91.

130. *See* THE FEDERALIST NO. 46 (James Madison).

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>131</sup>

Many of the most conspicuous episodes of popular constitutional mobilization in American history have been aimed at standing up against federal power based on an originalist or fundamentalist reading of the Constitution.<sup>132</sup> This was the case when Jefferson and Madison sought to mobilize opposition within the states to the Alien and Sedition Acts of 1798.<sup>133</sup> This was also the case in the lead-up to the Civil War, when the South argued that the Constitution protected slavery against federal interference, while abolitionists who refused to enforce federal fugitive slave laws also claimed to be acting on constitutional principle.<sup>134</sup>

Moving into the twentieth century, we can see a similar pattern of social and political movements drawing on the text and history of the Constitution in order to protect against the growth of federal power. The Constitution became a powerful symbol of what was perceived to be a simpler and more principled time—it became, in essence, a rallying point for those who sought to slow the social and political changes of modern society. In his cultural history of the Constitution, *A Machine that Would Go of Itself*, historian Michael Kammen locates the first nationwide effort to mobilize the American people in order to specifically promote and defend the Constitution as taking shape in the 1910s and continuing through the 1930s.<sup>135</sup> Like today's Tea Party, this was a movement that was ideologically conservative, reacting against the trend toward the centralization of governmental power, increased federal regulations, and perceived encroachments by governing philosophies that were seen as

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131. *Id.*

132. See, e.g., Forbath, *supra* note 4, 167 n.10 (noting that prior to the New Deal, the tradition of the extrajudicial constitutional interpretation, which he terms the “political Constitution,” “focused chiefly on the powers of state versus federal government and on interbranch allocations of power” and that “[i]ndividual rights arose more rarely as objects of direct congressional interpretation and enforcement”).

133. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528–29, 540–44 (1861).

134. Timothy S. Huebner, *Lincoln's Legacy: Enduring Lessons of Executive Power*, 3 ALB. L. REV. 615, 624 (2010).

135. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO ITSELF* 206–08 (2006).

dangerous and radical.<sup>136</sup> As a speaker at a 1934 Constitution Day celebration proclaimed, the Constitution is “a bulwark against communism and Fascism.”<sup>137</sup> Constitution Day—an observance initiated by various patriotic groups in the late 1910s—became a regular platform for denunciations of Progressive and then New Deal policy.<sup>138</sup> Like the Tea Party, this movement adopted a quasi-religious language to describe its efforts. It was a “constitutional revival” that was called for, explained Senator William E. Borah in 1924.<sup>139</sup> This movement sought to increase popular understanding of the Constitution, sparking the creation of various organizations and citizens clubs, emphasizing constitutional fidelity as a particularly patriotic exercise.<sup>140</sup> In the 1920s, members of constitutionalist groups such as the National Security League, the National Association for Constitutional Government, the Constitutional League were described as “Constitution Worshipers” and “Professional Patriots.”<sup>141</sup>

In the 1950s and 1960s, white southerners opposed to civil rights also sought to energize popular engagement with the Constitution and the history of the Founding. In their efforts to oppose *Brown v. Board of Education*<sup>142</sup> and the possibility of federally mandated school desegregation, southern segregationists took their stand on the Constitution. In 1956 almost all southern members of Congress put their names on a statement, soon to be known as the “Southern Manifesto,” denouncing *Brown* as “unwarranted exercise of power by the Court, contrary to the Constitution.”<sup>143</sup>

The Founding Fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power. They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.

We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.

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136. *Id.*

137. *Wall St. Observes Constitution Day*, N.Y. TIMES, Sept. 19, 1924, at 23 (quoting comments of Professor William B. Guthrie, in a speech sponsored by the National Security League).

138. KAMMEN, *supra* note 135, at 219–23.

139. *Id.* at 219; *see also id.* at 225 (describing the emergence of “a constitutional cult . . . that manifested strong religious overtones”).

140. *Id.* at 206–08, 220–21.

141. *Id.* at 224–25.

142. 349 U.S. 294 (1955).

143. 102 CONG. REC. 4459–60 (1956).

The original Constitution does not mention education. Neither does the 14th Amendment nor any other amendment.<sup>144</sup>

The statement argued that the separate-but-equal principle, having been “restated time and again, [had become] a part of the life of the people of many of the States and confirmed their habits, traditions, and way of life.”<sup>145</sup> “We reaffirm our reliance on the Constitution as the fundamental law of the land,” the southern members of Congress wrote in conclusion.<sup>146</sup> “We decry the Supreme Court’s encroachment on the rights reserved to the States and to the people, contrary to established law, and to the Constitution.”<sup>147</sup> Writing of the advocates of “massive resistance,” one contemporary observer noted: “In a sense they have become ‘constitutional fundamentalists,’ trying to restore the true faith that is alleged to have been corrupted by modernism.”<sup>148</sup>

Extrajudicial claims on the Constitution have been pursued for causes of all kinds. Nonetheless, as these prominent examples suggest, efforts to inject constitutionalism into policy debate and to energize a social movement by highlighting constitutional principles and history have been particularly successful when pursued those promoting an agenda of anti-regulation, small government conservatism.

### *C. Progressive Constitutionalism*

The current generation of liberals and progressives has sought to counter conservative claims on the Constitution’s meaning by offering their own vision of the Constitution. There are certainly textual bases that progressives can look to in staking their claims on the Constitution. The Tea Party reading of the Constitution tends to focus its energies on Article I and the Bill of Rights (particularly the Tenth Amendment). In contrast, a progressive reading of the Constitution tends to focus on what comes before and after those sections. The Preamble contains what is easily the most stirring and empowering rhetoric of the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>149</sup>

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Lewis M. Killian, *The Purge of an Agitator*, 7 SOC. PROBS. 152, 153 (1959). See Powe, *supra* note 14, at 866–70, for a discussion of Massive Resistance as fitting the mold of popular constitutionalism.

149. U.S. CONST. pmb1.

These words provide a powerful platform for claiming the need for more active government involvement in the lives of the American people, all in the service of “establish[ing] Justice” and “promot[ing] the general Welfare” and “secur[ing] the Blessings of Liberty.”<sup>150</sup> These principles, based in the Declaration of Independence as well as the Preamble, are the essence of what Mark Tushnet calls the “thin Constitution”—the narrative of constitutional meaning that can function in the extrajudicial realm.<sup>151</sup>

Rather than demonizing the state as conservative populist constitutional tends to do, progressive constitutionalism, in both its judicial and extrajudicial forms, tends to embrace a positive vision of government power. This is a vision of federal power formulated, in tentative terms, during the period of Radical Reconstruction, then born anew through the struggles culminating in the New Deal and civil rights movement. It rejects the libertarian belief that liberty and power are invariably competing in a zero-sum game. Instead, progressives identify ways in which government authority can affirmatively act to protect rights. Government has the ability, perhaps even the constitutional responsibility, to uproot entrenched inequalities and ensure certain minimum benefits for its citizens without which freedom is impossible.<sup>152</sup> Progressive popular constitutionalism occurs when people mobilize around a vision of human equality and social justice, and do so in the name of fundamental principles contained in our Constitution and embodied in the nation’s ongoing struggle to form a “more perfect union.”<sup>153</sup> As Robin West has written, “Only by reconceptualizing the Constitution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, can we make good on its richly progressive promise.”<sup>154</sup>

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150. *Id.*

151. See TUSHNET, *supra* note 2, at 9.

152. See, e.g., Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in THE CONSTITUTION IN 2020, *supra* note 116, at 89 (calling for an “understanding of the state as under a moral duty, a legal duty, and a constitutional duty to act in the interest of all, and not just a prohibition against acting in certain discriminatory ways”). This distinction between classical and modern liberal constitutional visions is nicely captured in Justice Jackson’s famous opinion in *West Virginia State Board of Education v. Barnette*:

[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men’s affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.

319 U.S. 624, 639–40 (1943).

153. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 708–10 (1990).

154. *Id.* at 651; see Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 84 CHI.-KENT L. REV. 1127, 1129 (2006).

William Forbath, one of the most powerful advocates of this constitutional vision, has traced the development of what he calls the “social citizenship tradition.”<sup>155</sup> In contrast to the more commonly recognized court-centered egalitarian tradition based on *Brown* and its progeny, the social citizenship tradition “was a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts. Aimed against harsh class inequalities, it centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy.”<sup>156</sup> Forbath explains, “In public political discourse, New Dealers cast the changes they sought as fundamental rights reinvigorating the Constitution’s promise of equal citizenship by reinterpreting it.”<sup>157</sup> What Forbath calls the “political Constitution”—in contrast to the “judicial Constitution”—was debated in Congress, in the executive branch, and in the public sphere, with the courts playing little role.<sup>158</sup>

On the hustings, in radio addresses, and in more sustained debates, speeches, and writings, the lawmakers and the president argued not simply that Congress had the *power* under the Constitution, rightly understood or amended, to regulate agriculture, industry, and labor. They argued that citizens had fundamental economic and social rights under the Constitution, rightly understood or amended; and Congress, therefore, had the *duty* to exercise its power to govern economic and social life in a way that sought to secure those rights. . . . [T]he “social citizenship” tradition . . . provided them not only a rights rhetoric, but also a constitutional narrative, modes of interpretation, and conceptions of the allocation of interpretive authority.<sup>159</sup>

The central institution for institutionalizing this constitutional vision, what President Franklin D. Roosevelt called the “general Welfare Constitution,”<sup>160</sup> was Congress. “[T]he New Dealers carried forward a long tradition of congressional constitutional argument, interpretation, rights recognition, and precedent-making.”<sup>161</sup>

Not only do progressive legal scholars identify quite different substantive rights in the Constitution than do Tea Party constitutionalists, favoring most substantive visions of the equal protection principle and emphasizing the constitutional bases for active government involvement in advancing social welfare and justice, but the basic vision of the Constitution they tend to advance is in direct opposition to the Tea Party’s vision of the Constitution. The Tea Party rallies around a vision of the

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155. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1998).

156. *Id.*

157. Forbath, *supra* note 4, at 182.

158. *Id.* at 167; see Robin West, *supra* note 152, at 79–91 (differentiating the “legislated Constitution” from the “adjudicated Constitution”).

159. Forbath, *supra* note 4, at 176 (emphasis added).

160. Forbath, *supra* note 155, at 69.

161. Forbath, *supra* note 4, at 167.

Constitution as fundamentally a source of limits on government authority, as a bulwark against evolving standards of proper governance, as a way to keep the present-day Americans in touch with certain basic truths about liberty identified by a heroic generation of founding Americans. Progressive constitutionalists question each of these suppositions. They locate within the Constitution sources of government authority. They insist that constitutions have never been nor should they be static embodiments of a single past moment. They note that there have been heroic struggles over constitutional principles since 1787 that should also be part of our constitutional self-understanding. This is a living, responsive, democratic conception of constitutional development. “Constitutional politics involves reinterpreting and revising our fundamental commitments and arriving anew at considered popular judgments about the rights of citizens and the duties of government,” Forbath explains.<sup>162</sup>

While the progressive claims about the core meaning of the Constitution are diametrically opposed to the Tea Party’s claims, there are interesting parallels between the two constitutional projects. Indeed, in many ways they are mirror images of one another. Each challenges, in quite profound ways, the constitutional status quo. Each looks to past moments in American history as offering guidance for achieving their constitutional vision. Each sees the courts as basically antagonistic to their constitutional vision. Each takes seriously the value of extrajudicial constitutional engagement and interpretation. Each identifies Congress in particular as the institutional focal point for their constitutional projects. Thus we can see a good deal of overlap between Tea Party constitutionalism and modern progressive constitutionalism, both in terms of tactics of constitutional mobilization and assumptions about the construction of constitutional meaning. Both take seriously the constitutional responsibilities of Congress. Both recognize that members of Congress have an obligation to interpret the Constitution, without being necessarily constrained by judicial interpretation.

In response to the Tea Party’s war for the Constitution, progressive legal scholars have fought back. Much of the counter-offensive has come in the form of taking issue with the Tea Party’s reading of the Constitution and claims about its history.<sup>163</sup> “The Constitution belongs to all of

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162. *Id.* at 176; see Post & Siegel, *supra* note 5, at 374 (“[T]raditions of popular engagement . . . authorize citizens to make claims about the Constitution’s meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.”).

163. See LEPORE, *supra* note 59, at 96–97; Sean Wilentz, *Confounding Fathers: The Tea Party’s Cold War Roots*, THE NEW YORKER, Oct. 28, 2010, at 32; David H. Gans, *Rand Paul, the Tea Party, and Our Constitution*, CONSTITUTIONAL ACCOUNTABILITY CENTER, (May 21, 2010), <http://theusconstitution.org/blog/history/?p=1696>; Plumer, *supra* note 70.

us,” writes Garrett Epps.<sup>164</sup> “It’s time to take it back from those who are trying to steal it in plain sight.”<sup>165</sup> Epps is critical of liberals for being unable or unwilling to deal with the Constitution in terms that resonate with the American people. “Scholars from top schools hold forth with polysyllabic theories of hermeneutics that ordinary citizens can’t fathom.”<sup>166</sup> Conservatives, on the other hand, “don’t hesitate to speak directly to the public and, often, to dumb down the Constitution.”<sup>167</sup> Yet, Epps contends that the Constitution is not a conservative document. He finds “precious little evidence” that the Constitution “was set up to restrain the federal government.”<sup>168</sup> “[T]he document as a whole is much more concerned with what the government *can* do—not with what it can’t. . . . [T]he Constitution allowed for a government adequate to the challenges facing a modern nation.”<sup>169</sup> Those limits on government power that the Constitution does include, he argues “are mostly limits on state governments and corresponding increases in federal power.”<sup>170</sup> By Epps’ reckoning, “a careful reading of the Constitution” shows that the framers “wrote a document that in essence says, ‘Work it out.’”<sup>171</sup>

Epps proposes to fight the Tea Party on their own terms. “To save our Constitution, we have to read it”—something he believes few people take the time to do.<sup>172</sup> He even becomes something of a cheerleader for the document and the experience of reading it:

The Constitution as a whole takes effort to read; but once one puts in the effort—several readings, all the way through, and some serious thought about what one has read—it reveals a surprising, indeed sometimes dazzling, array of meanings. By turns political, legal, epic and poetic, it shows us a number of strategies for dealing with contemporary challenges.

. . . .

At its most basic level, reading the Constitution requires the tools that Vladimir Nabokov urged readers to bring to any text: imagination, memory, a dictionary and a willingness to use all three when the going gets tough.<sup>173</sup>

And he concludes his attack on the Tea Party with a call to arms:

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164. Garrett Epps, *Stealing the Constitution*, THE NATION (2011), available at <http://www.thenation.com/article/157904/stealing-constitution>.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

Read the Constitution and measure it against the absurd claims we hear every day. This is a matter of life and death for our Republic. We won't find the Tea Party manifesto there; nor will we find the agenda of progressive advocacy groups. What we will find is a set of political tools and a language that fair-minded citizens, progressive or conservative, can use to talk through our disagreements.

....

Ordinary Americans love the Constitution at least as much as far-right ideologues. It's our Constitution too.

It's time to take it back.<sup>174</sup>

The question for progressives like Epps who put their hopes in popular constitutional engagement is whether the principles of the thin Constitution can be effectively mobilized. Whether accurate or not, his description of the revelations to be found in the Constitution is hardly the kind of call to arms offered by the Tea Party. The only clear message Epps pulls from the text of the Constitution is that the Tea Party is wrong in its reading of the Constitution. But the best alternative he has for the Tea Party's libertarian constitutional vision is a call for talk. "Work it out" is hardly a rallying cry for a constitutional movement.

#### CONCLUSION

The question is, then, are certain constitutional arguments more sustainable in a popular arena? More specifically, is popular constitutionalism more effective—at least in our contemporary political climate—at advancing a conservative-libertarian agenda than a progressive one? The experience of the Tea Party suggests that this might very well be the case. One of the central issues that scholars of popular constitutionalism are going to have to assess in the wake of the emergence of the Tea Party is whether popular constitutionalism has an ideological tilt. This question has not been a central focus in scholarship on popular constitutionalism, but it deserves to be.

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174. *Id.*