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## THE TEA PARTY MOVEMENT AND POPULAR CONSTITUTIONALISM

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### INTRODUCTION

The rise of the Tea Party movement followed a period during which many academic students of constitutional law focused on “popular constitutionalism”: the involvement of public opinion and popular movements in influencing constitutional interpretation.<sup>1</sup> Many of these scholars argue that popular constitutional movements have a beneficial impact on constitutional law,<sup>2</sup> and some even contend that popular constitutionalism should supplant judicial review entirely.<sup>3</sup> At the very least, the last generation of constitutional scholarship has established that public opinion influences and significantly constrains judicial interpretation of the Constitution.<sup>4</sup>

Most of the previous scholarship on popular constitutionalism focuses on movements identified with the political left, such as the civil rights

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<sup>1</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006) (link); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (link); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PENN. L. REV. 926 (2006) (link); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (link); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001) (link); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001) (link); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006) (link).

<sup>2</sup> See, e.g., Eskridge, *supra* note 1 (arguing that popular constitutional movements have helped promote racial equality and gay rights), and Siegel, *supra* note 1 (arguing that the feminist movement helped to promote gender equality norms in constitutional law).

<sup>3</sup> See, e.g., KRAMER, *supra* note 1, and TUSHNET, *supra* note 1.

<sup>4</sup> For a wide-ranging recent survey of the evidence reaching this conclusion, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

movement of the 1950s and 1960s,<sup>5</sup> the feminist movement,<sup>6</sup> and the gay rights movement.<sup>7</sup> Although the Tea Party movement is primarily composed of conservatives and libertarians, it has much in common with previous popular constitutional movements.

Part I of this Essay describes some of these similarities, focusing on the ways in which popular constitutional movements have arisen in response to social or economic crises, or major policy initiatives instituted by their opponents. Part II explains how the Tea Party movement shares key strengths and weaknesses of other popular movements. For example, public opinion on constitutional and policy issues is often influenced by widespread political ignorance and irrationality. There also tends to be a conflation of constitutional and policy preferences. The Tea Party is no exception to these trends. The evidence suggests, however, that Tea Party supporters are no more likely to be ignorant than public opinion generally, or their opponents on the political left. The proposals for constitutional reform advocated by the Tea Party have notable shortcomings. But they cannot be simply dismissed as ridiculous or irrational products of ignorance. Despite their flaws, the Tea Party movement and its predecessors serve a useful role as a check on the power of political elites.

Part III explains two possible advantages of one unusual feature of the Tea Party—the fact that it is the first popular constitutionalist movement in many years whose main focus is the need to limit federal power. The enormous size and scope of modern government undercuts meaningful democratic control over government policy because “rationally ignorant” voters cannot keep track of more than a small fraction of government activity. Strengthening democratic accountability is one of the main objectives of advocates of popular constitutionalism. The imposition of stricter limits on government power might make that goal easier to achieve. The Tea Party’s focus on limiting government also makes it less likely that we will see the emergence of a right-wing populist movement that is focused on intolerance and xenophobia, of the kind that often arose during previous economic downturns.

Ironically, the mostly right-wing Tea Partiers’ focus on limiting government could help advance two key objectives of mostly left-wing defenders of popular constitutionalism: strengthening democratic accountability and limiting popular hostility towards minorities and foreigners.

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<sup>5</sup> See, e.g., Eskridge, *supra* note 1, at 2073–2112; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1474–75 (2004) (link).

<sup>6</sup> See, e.g., Siegel, *supra* note 1.

<sup>7</sup> See, e.g., Eskridge, *supra* note 1, at 2159–2178.

## I. THE TEA PARTY AS A POPULAR CONSTITUTIONALIST MOVEMENT

Popular constitutional movements have been a common feature of American political history. The struggle over the ratification of the Constitution,<sup>8</sup> the political battle over slavery and its expansion into newly-acquired western territories,<sup>9</sup> the New Deal and the Great Depression,<sup>10</sup> and the struggle for civil rights in the 1950s and 1960s all generated popular movements agitating for their preferred constitutional visions.

There are some obvious commonalities between these movements and the Tea Party. First, and most important, all of the movements listed above argued that major elements of their agenda were not only prudent and just, but mandated by the Constitution. While arguing that that federal power should be rolled back for policy reasons, Tea Party activists also contend that the federal government has exceeded constitutional limits on its power.<sup>11</sup>

Second, each of these movements has arisen in response to a political or economic crisis. Strikingly similar to the above-noted response to the Great Depression, the Tea Party movement has emerged in the wake of the financial crisis of 2008 and the resulting deep recession. Serious crises are more likely to focus attention on fundamental constitutional principles and lead activists to claim that things have gone wrong because those principles have been violated.

Third, popular constitutional movements often arise in response to major policy changes initiated by their political antagonists. Thus, anti-Federalists mobilized in opposition to the Federalist effort to ratify the Constitution, abolitionists and the Free Soil movement arose in opposition to efforts to expand slavery into newly-acquired territories, and constitutional criticism of the Roosevelt Administration arose in response to the New

<sup>8</sup> For a recent detailed account, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010).

<sup>9</sup> See, e.g., Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923 (2006) (discussing the political battle over slavery expansion in the 1850s as an example of popular constitutionalism) (link). For a recent discussion of abolitionist constitutional thought, see Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, J. LEG. ANALYSIS (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1538862](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538862) (link).

<sup>10</sup> See, e.g., James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 988–996 (1997) (describing “pro-labor” interpretation of the Constitution advocated by labor union activists during the Great Depression and earlier) (link); but cf. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 624–28 (2003) (describing how New Deal-era constitutional change went beyond the demands of public opinion) (link).

<sup>11</sup> For discussions of Tea Party supporters’ views on these issues, see essays in this symposium by Randy Barnett and Jared Goldstein: Randy E. Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281 (2011) (link); Jared Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288 (2011) (link). See also Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9404E7DF143DF937A25750C0A9669D8B63> (discussing how the Tea Party “has made the Constitution central to the national conversation”) (link).

Deal. The Tea Party emerged in large part as a response by conservatives and libertarians to the Obama Administration's various initiatives to expand federal spending and regulation, especially the 2009 Stimulus Bill and the 2010 Health Care Bill.<sup>12</sup> Many of the Tea Party activists and leaders were also angry, however, about the growth of government that had begun under President George W. Bush, especially the TARP Bank Bailout Bill enacted in September 2008.<sup>13</sup> Thus, the Tea Party has ideological origins that go beyond partisan opposition to President Obama and the Democrats. Previous popular constitutionalist movements, of course, also often had ideological roots that went beyond immediate reactions to their opponents' agendas.<sup>14</sup>

The Tea Party's claims that their adversaries' policies are counter to the Constitution and American values are also far from unprecedented.<sup>15</sup> Both the critics and the defenders of slavery claimed that their opponents were violating the Constitution and going against the principles of the Declaration of Independence and the American political tradition.<sup>16</sup> Critics and defenders of New Deal constitutionalism made similar claims.<sup>17</sup> More recently, defenders of the civil rights movement sought to associate their

<sup>12</sup> The Tea Party first emerged in February and March of 2009 in the wake of the Stimulus Bill, and later grew in response to the debate over the health care bill. See, e.g., Kathleen Lucadamo, *Stimulus Critics Stage "Tea Party"*, N.Y. DAILY NEWS, Feb. 28, 2009, [http://www.nydailynews.com/money/2009/02/28/2009-02-28\\_stimulus\\_critics\\_stage\\_tea\\_party.html](http://www.nydailynews.com/money/2009/02/28/2009-02-28_stimulus_critics_stage_tea_party.html) (describing early emergence of Tea Party in response to the stimulus) (link); Kate Zernike & Megan Thee-Brennan, *Poll Finds Tea Party Backers Wealthier and More Educated*, N.Y. TIMES, Apr. 15, 2010, <http://www.nytimes.com/2010/04/15/us/politics/15poll.html> (noting that polls show that the health care bill was one of the three main issues about which Tea Party supporters were most angry) (link).

<sup>13</sup> For example, prominent Tea Party leaders Dick Arney and Matt Kibbe argue that "[t]he government expansion during President George W. Bush's reign provided the fuel [for the Tea Party]. And it was his Wall Street bailout that ignited the firestorm we see today." DICK ARNEY & MATT KIBBE, *GIVE US LIBERTY: A TEA PARTY MANIFESTO* 37 (2010). Many conservatives were critical of the TARP Bill when it was enacted and the majority House Republicans voted against it. See *Final Vote Results for Roll Call 681*, <http://clerk.house.gov/evs/2008/roll681.xml> (link). In 2010, Tea Party activists targeted Republicans who had voted for the bill. See Carl Hulse & David M. Herszenhorn, *Bank Bailout is Potent Issue for Fall Races*, N.Y. TIMES, July 11, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9C00E4DD173BF932A25754C0A9669D8B63> (link).

<sup>14</sup> For example, New Deal constitutionalism had roots in earlier arguments offered by Progressives, and the Republican Party of the 1850s advanced an antislavery interpretation of the Constitution that had previously been advocated by abolitionists. See Pope, *supra* note 10 (New Deal case); Barnett, *supra* note 9, at 1, 69 (abolitionism).

<sup>15</sup> This aspect of the Tea Party is emphasized in Jared Goldstein's contribution to this symposium. See also Jared A. Goldstein, *The Tea Party's Constitution* 16–24 (Roger Williams Univ. Legal Studies Paper No. 96, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1679446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679446) (noting similarities between the Tea Party movement and fundamentalist religious movements) (link).

<sup>16</sup> See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); Barnett, *supra* note 11; Graber, *supra* note 9, at 925–26.

<sup>17</sup> For example, Sinclair Lewis' famous 1935 novel *It Can't Happen Here* was one of many efforts to associate opposition to the New Deal with European fascism. SINCLAIR LEWIS, *IT CAN'T HAPPEN HERE* (1935).

goals with fundamental American principles and their opponents' goals with opposition to those principles, denouncing segregation as "un-American."<sup>18</sup> Given the quasi-sacred status of the Constitution in American political culture,<sup>19</sup> any suggestion that opponents' major policies violate it to some extent brands them as enemies of the nation's fundamental values.

In many ways the Tea Party movement closely parallels previous episodes of popular constitutionalism. It is far from clear, however, that it will be as effective as some of its more successful predecessors. So far, it has not managed to create a broad political consensus behind its goals of the sort that eventually enabled the civil rights movement to succeed. It is too early to say whether the Tea Party will have any major lasting impact.

## II. A CONSTITUTIONAL POLITICS OF IGNORANCE AND POPULISM

Because the Tea Party is a historically typical instance of popular constitutionalism, it exemplifies some of the standard strengths and weaknesses of such movements. Perhaps the most significant of the flaws is political ignorance. Adherents of popular movements are usually not experts on constitutional law or public policy, and often lack extensive knowledge about these subjects. This ignorance can lead public opinion to endorse severely flawed and even dangerous ideas. On the other hand, the Tea Party also exemplifies a major potential benefit of popular movements: their ability to serve as a check on the power of political elites.

### A. *The Tea Party and Political Ignorance*

#### 1. *Are Tea Party Supporters Unusually Ignorant about Politics?*

For decades, public opinion researchers have found widespread political ignorance in the American electorate.<sup>20</sup> Majorities are often ignorant of very basic facts about politics and public policy.<sup>21</sup> Recent surveys, for example, show that only forty-six percent of adults know that the Republicans won the House of Representatives but not the Senate in the November 2010

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<sup>18</sup> See, e.g., Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66–70 (1988) (describing how civil rights advocates argued that racism is "un-American") (link).

<sup>19</sup> See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–53 (1988) (discussing the "sacred" status of the Constitution in America's "civil religion").

<sup>20</sup> See, e.g., SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS (2003) (summarizing evidence of extensive voter ignorance); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996) (same); RICHARD SHENKMAN, JUST HOW STUPID ARE WE? FACING THE TRUTH ABOUT THE AMERICAN VOTER (2008) (same); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–1304 (2004) (same) (link); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 413–19 (1998) (same) (link).

<sup>21</sup> For an up-to-date survey of the evidence, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE ch. 2 (forthcoming 2012) (on file with author).

election.<sup>22</sup> Ignorance about basic aspects of the Constitution is also extensive. For example, fifty-eight percent of Americans cannot name the three branches of the federal government<sup>23</sup> and only twenty-eight percent can name two or more of the five rights guaranteed by the First Amendment.<sup>24</sup>

Widespread political ignorance clearly exists among Tea Party supporters as well. For example, some thirty percent of self-identified Tea Party supporters believe the “birther” claim that President Barack Obama was not born in the United States, a much higher figure than among all adults (twenty percent).<sup>25</sup>

At the same time, belief in comparably dubious political myths is common on the other side of the political spectrum. A 2007 poll found that some thirty-five percent of self-identified Democrats believed that President George W. Bush knew about the 9/11 terrorist attacks in advance, and twenty-six percent were not sure if he did.<sup>26</sup> Only twenty-two percent of the public as a whole endorsed the view that Bush had advance knowledge of the attacks.<sup>27</sup> Additionally, a 2009 study found that thirty-two percent of Democrats believed that “the Jews” deserve “a moderate amount” or “a great deal” of blame for the financial crisis of 2008, compared to eighteen percent of Republicans who endorsed the same sentiments.<sup>28</sup>

As these statistics show, political ignorance is common on both sides of the political spectrum, and both sides are prone to embrace misinformation that confirms their preexisting views.<sup>29</sup> The ubiquity of political ignorance is in part due to the fact that devoting little or no effort to acquiring political information is actually rational behavior for most voters. Because

<sup>22</sup> *Public Knows Basic Facts About Politics, Economics, but Struggles with Specifics*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, Nov. 18, 2010, <http://people-press.org/reports/pdf/677.pdf> (link).

<sup>23</sup> See e.g., SOMIN, *supra* note 21, at ch. 2; Brit Hume, *Zogby Poll: Most Americans Can Name Three Stooges, But Not Three Branches of Gov't*, FOX NEWS, Aug. 15, 2006, <http://foxnews.com/story/0,2933,208577,00.html> (link).

<sup>24</sup> *Americans' Awareness of First Amendment Freedoms*, MCCORMICK TRIBUNE FREEDOM MUSEUM, Mar. 1, 2006, [http://www.freedomproject.us/files/pdf/survey\\_results\\_report\\_final.pdf](http://www.freedomproject.us/files/pdf/survey_results_report_final.pdf) (link).

<sup>25</sup> See Stephanie Condon, *Poll: “Birther” Myth Persists Among Tea Partiers, All Americans*, CBS NEWS, Apr. 14, 2010, [http://www.cbsnews.com/8301-503544\\_162-20002539-503544.html](http://www.cbsnews.com/8301-503544_162-20002539-503544.html) (citing N.Y. Times/CBS News, *Polling the Tea Party*, N.Y. TIMES, Apr. 14, 2010, <http://www.nytimes.com/interactive/2010/04/14/us/politics/20100414-tea-party-poll-graphic.html?ref=politics#tab=1> (link)) (link).

<sup>26</sup> *22% Believe Bush Knew About 9/11 Attacks in Advance*, RASMUSSEN REPORTS, May 4, 2007, [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/bush\\_administration/22\\_believe\\_bush\\_knew\\_about\\_9\\_11\\_attacks\\_in\\_advance](http://www.rasmussenreports.com/public_content/politics/current_events/bush_administration/22_believe_bush_knew_about_9_11_attacks_in_advance); see also Ilya Somin, *An Inconvenient Truth: Political Ignorance is Widespread Among Voters in Both Parties*, FORBES, Feb. 12, 2010, <http://www.forbes.com/2010/02/12/obama-voters-democrats-republicans-opinions-contributors-ilya-somin.html> (link).

<sup>27</sup> *22% Believe Bush Knew About 9/11 Attacks in Advance*, *supra* note 26.

<sup>28</sup> Neil Malhotra & Yotam Margalit, *Anti-Semitism and the Economic Crisis*, BOSTON REV. May–June 2009, [http://bostonreview.net/BR34.3/malhotra\\_margalit.php](http://bostonreview.net/BR34.3/malhotra_margalit.php) (link).

<sup>29</sup> See Somin, *supra* note 26.

the chance of any one vote influencing the outcome of an election is infinitesimally small, there is little or no incentive to become knowledgeable about politics if the only reason for doing so is to become a “better” voter.<sup>30</sup> The rationality of widespread political ignorance helps explain why it has persisted for decades despite impressive increases in education levels and in the availability of information through various types of media.<sup>31</sup> Although the cost of acquiring information has declined, thanks to modern technology, it is still high enough to make it rational for most citizens to remain ignorant about most issues; the key constraint on political knowledge is not the availability of information, but voters’ willingness to spend time and energy learning and understanding it.<sup>32</sup>

On balance, there is no evidence suggesting that Tea Party supporters are more ignorant than either the electorate as a whole or their political opponents on the left. It is even possible that Tea Party supporters have slightly higher levels of political knowledge than the general public. Tea Partiers have higher income levels and are more ideologically extreme than the population as a whole.<sup>33</sup> They may also have slightly higher education levels.<sup>34</sup> Education, income, and relative ideological extremism are all associated with higher levels of political knowledge.<sup>35</sup>

## 2. *Tea Party-Backed Proposals for Constitutional Change*

Another possible way to gauge the degree of political knowledge in the Tea Party movement is to consider the two constitutional reform proposals that have gained the most support in Tea Party circles: the Repeal Amendment and the effort to abolish the Seventeenth Amendment, thereby eliminating the requirement that senators be popularly elected. If these proposals

<sup>30</sup> The theory of rational political ignorance was introduced by ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238–59 (1957). For recent defenses and extensions of the theory, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007); SOMIN, *supra* note 21, at chs. 3–4; Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 *CRITICAL REV.* 255 (2006) (link).

<sup>31</sup> For a detailed discussion of this point, see SOMIN, *supra* note 21, at ch. 4.

<sup>32</sup> See *id.* at chs. 2, 4, (surveying the evidence in detail).

<sup>33</sup> Some eighty-one percent of Tea Party supporters have incomes about \$30,000 per year, and fifty-five percent above \$50,000, compared to seventy-five percent and fifty percent respectively among the population as a whole. About seventy percent of Tea Party supporters identify themselves as “conservative,” and only twenty-two as moderate, compared to thirty-eight percent of the general population who say they are “moderate.” See Lydia Saad, *Tea Partiers Are Fairly Mainstream in Their Demographics*, GALLUP, Apr. 5, 2010, <http://www.gallup.com/poll/127181/tea-partiers-fairly-mainstream-demographics.aspx> (link).

<sup>34</sup> A March 2010 Gallup survey found nearly identical education levels between Tea Party supporters and the general population. *Id.* However, an April 2010 *CBS News/New York Times* poll found that some seventy percent of Tea party supporters have had at least some college education, which is slightly higher than the percentage in the general population (65% according to the Gallup study). *The Tea Party Movement: Who They Are*, CBS NEWS, Apr. 14, 2010, [http://www.cbsnews.com/htdocs/pdf/poll\\_tea\\_party\\_who\\_they\\_are\\_041410.pdf](http://www.cbsnews.com/htdocs/pdf/poll_tea_party_who_they_are_041410.pdf) (link).

<sup>35</sup> See SOMIN, *supra* note 21, at ch. 2.

turn out to be particularly foolish or obviously based on misinformation, that would be some indication that the Tea Party agenda is the product of greater-than-average levels of political ignorance.

Developed by Georgetown law professor Randy Barnett and endorsed by a variety of Tea Party leaders and Republican politicians,<sup>36</sup> the Repeal Amendment would allow a vote of two-thirds of the states to repeal any federal statute or regulation.<sup>37</sup> In my view, the Repeal Amendment would have only a very modest, albeit positive, impact if enacted.<sup>38</sup> Given the great difficulty of assembling a two-thirds majority of states to oppose a measure popular enough to be approved by both houses of Congress and signed by the President, the Amendment is likely to be used only in very unusual cases where Congress greatly runs afoul of public opinion.<sup>39</sup> For that reason, the amendment is unlikely to result in any substantial rollback of federal power. At the same time, however, it very modestly undercuts critics' claims that it will somehow cause great harm or undermine the Constitution.<sup>40</sup> And it would have the effect of making it marginally more difficult for Congress to pass laws that generate widespread public opposition. Whether or not the Repeal Amendment is a good idea, it is difficult to characterize it as the result of either ignorance or irrationality.

The same conclusion applies to efforts to repeal the Seventeenth Amendment, which mandates that senators be popularly elected rather than chosen by state legislatures,<sup>41</sup> as under the original Constitution.<sup>42</sup> The argument for repeal is based on the notion that senators chosen by state legislators are more likely to resist the expansion of federal power than popularly elected ones.<sup>43</sup> In my view, such expectations are misplaced. Most states already chose senators by popular election even before the Seventeenth Amendment was enacted, and senators chosen by state legislatures will often have incentives to support the expansion of federal power

<sup>36</sup> See Randy E. Barnett & William J. Howell, *The Case for a "Repeal Amendment"*, WALL ST. J., Sept. 16, 2010, <http://online.wsj.com/article/SB10001424052748703466704575489572655964574.html> (link); Matthew Boyle, *Constitutional Amendment Proposal to Streamline Legislative Repeals to Hit Congress Soon*, THE DAILY CALLER, Nov. 20, 2010, <http://dailycaller.com/2010/11/20/constitutional-amendment-proposal-to-streamline-legislative-repeals-to-hit-congress-soon/> (link).

<sup>37</sup> See Barnett & Howell, *supra* note 36.

<sup>38</sup> See Ilya Somin, *Reflections on the Repeal Amendment*, THE VOLOKH CONSPIRACY, Dec. 3, 2010, <http://volokh.com/2010/12/03/thoughts-on-the-repeal-amendment/> (link).

<sup>39</sup> See *id.*

<sup>40</sup> For an example of such claims, see Dana Milbank, *A Strange Way to Honor the Founding Fathers*, WASH. POST, Dec. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120105576.html> (link).

<sup>41</sup> U.S. CONST. amend. XVII (link).

<sup>42</sup> U.S. CONST. art. I, § 3, cl. 1, *superseded by* U.S. CONST. amend. XVII (link).

<sup>43</sup> See, e.g., Gene Healy, *Repeal the 17th Amendment?*, WASH. EXAMINER, June 8, 2010, [http://www.cato.org/pub\\_display.php?pub\\_id=11876](http://www.cato.org/pub_display.php?pub_id=11876) (link); Todd Zywicki, *Repeal the Seventeenth Amendment*, NAT'L REV., Nov. 15, 2010, <http://www.nationalreview.com/articles/252825/repeal-seventeenth-amendment-todd-zywicki> (link).

just as much as popularly elected ones.<sup>44</sup> The combination of these two factors makes it unlikely that repeal of the Seventeenth Amendment would lead to any meaningful new limits on federal power.

Be that as it may, it would be wrong to dismiss proposals to repeal the Seventeenth Amendment as ridiculous or irrational. It is difficult to definitively rule out the possibility that repeal would reinvigorate the Senate as a constraint on federal power. My colleague Todd Zywicki, a leading Seventeenth Amendment scholar, is among those advocating its repeal.<sup>45</sup>

If the Tea Party's constitutional reform proposals deserve criticism, it is in large part because they are unlikely to have any major effect if enacted. And, like all proposed constitutional amendments, the odds against their ever being ratified are steep. Even so, they do not seem to be products of ignorance.

One can argue about whether the ideas embraced by the Tea Party movement are correct or not. But its agenda is not driven by voter ignorance among Tea Party supporters above and beyond that which exists throughout the electorate as a whole.

### B. *Checking the Power of Political Elites*

Despite its weaknesses, which are typical of popular constitutionalist movements, the Tea Party does have at least one important virtue. It, like many of its predecessors, is a potentially useful check on the power of political elites—those members of government who make and interpret the laws. If the Constitution is the supreme law of the land and its interpretation is left solely up to political elites in the courts, Congress, and the Executive Branch, the practical result would be elite dominance of a political system unconstrained by public opinion. Given the incentive of elites to use political power for their own benefit at the expense of the public, this would be a dangerous state of affairs.

Even those skeptical that popular constitutionalism should displace judicial review<sup>46</sup> can acknowledge that it can usefully play a more limited role in constitutional politics. Judges and other elites with specialized expertise in constitutional interpretation have valuable roles of their own. But their power should not be left unchecked by the public.

The need for popular constraints on elite discretion is particularly important with respect to constitutional issues relating to the scope of federal power—the main focus of Tea Party activists' attention. Federal officials in Congress and the Executive Branch have little if any incentive to constrain the scope of their own authority, and much reason to expand it. This truth

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<sup>44</sup> See Ilya Somin, *Would Repealing the Seventeenth Amendment Curb Federal Power?*, THE VOLOKH CONSPIRACY, June 11, 2010, <http://volokh.com/2010/06/11/would-repealing-the-seventeenth-amendment-curb-federal-power/> (link).

<sup>45</sup> See Zywicki, *supra* note 43.

<sup>46</sup> For arguments of this type, see, e.g., KRAMER, *supra* note 1, and TUSHNET, *supra* note 1.

was dramatically illustrated during the first six years of the George W. Bush presidency, when the Republicans controlled both Congress and the White House. Although the Party claimed to stand for limited government, in reality it presided over massive expansions of federal spending and regulation.<sup>47</sup> In constitutional litigation, the Bush Administration defended nearly unlimited federal power—not only with respect to executive power over war and foreign policy, but also in cases addressing Congress’s power to engage in domestic regulation.<sup>48</sup> The Bush record suggests that many Republican Party elites are no more willing to accept constitutional restrictions on their authority than their Democratic counterparts, at least not when their party controls Congress and the White House.

Given the extreme reluctance of political elites in either party to accept constraints on their power, popular movements focused on limited government have a valuable role to play in enforcing such restrictions. Whether the Tea Party can succeed in constraining the use of federal power is far from clear. But at least it has focused attention on a crucial issue.

### III. THE TEA PARTY AS A MOVEMENT FOR LIMITED GOVERNMENT

Despite its many similarities to previous popular constitutionalist movements, the Tea Party is unusual in one important respect: it is the first such movement in many years to focus its efforts primarily on limiting the power of the federal government. Obviously, other recent constitutional movements have sought to limit exercises of federal power that threaten particular constitutional rights, such as the Second Amendment right to bear arms or the right to be free of race and gender discrimination. But the Tea Party is unusual in focusing on *structural* constraints on federal power that go beyond restrictions on the violation of specific individual rights. This focus has two important potential benefits different from those created by most other popular constitutionalist movements: it could strengthen democratic accountability and preclude the rise of a right-wing populist movement that is more focused on intolerance and xenophobia.

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<sup>47</sup> See, e.g., JOHN SAMPLES, *THE STRUGGLE TO LIMIT GOVERNMENT* 215–44 (2010) (documenting expansion of government during the Bush era); MICHAEL D. TANNER, *LEVIATHAN ON THE RIGHT: HOW BIG-GOVERNMENT CONSERVATISM BROUGHT DOWN THE REPUBLICAN REVOLUTION* (2007) (same).

<sup>48</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 15–33 (2005) (endorsing the administration’s position that Congress has virtually unlimited authority to regulate any activity) (link); see also Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507 (2006) (discussing sweeping implications of *Raich*) (link). The administration advocated similarly broad interpretations of federal power in other cases. See, e.g., Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After Gonzales v. Raich*, 2005–2006 CATO SUP. CT. REV. 113, 12233 (2006) (discussing several examples of such broad interpretations) (link).

A. *The Growth of Government and the Loss of Democratic Accountability*

Limiting federal power could help strengthen democratic control and accountability over the use of government power.<sup>49</sup> Even before the explosion of government spending and regulation that occurred in the wake of the financial crisis of 2008, government spending accounted for 36.8% of GDP in 2007 and 38.8% in 2008.<sup>50</sup> By 2009, federal spending alone had risen to some twenty-five percent of GDP.<sup>51</sup> In addition, the federal government now regulates nearly every aspect of our economy and society.<sup>52</sup> From 2000 to 2010, federal regulatory spending rose over seventy-five percent in real terms.<sup>53</sup>

State government spending and regulation have also risen, albeit to much smaller levels. But state and local governments are to some extent held accountable through “foot voting” as well as ballot box voting. Citizens who dislike the policies of the state or locality where they live can often “vote with their feet” and move elsewhere. For example, millions of African-Americans moved from the South to the North in the early twentieth century in order to live under less racially intolerant state governments.<sup>54</sup> More recently, there has been extensive migration towards states with economic policies that promote greater growth and lower taxes.<sup>55</sup> Relative to ballot box voters, foot voters have stronger incentives to acquire relevant political knowledge, since their decisions on where to live are decisive. An individual can decide to move without needing the agreement of an electoral majority. In this way, foot voting decisions differ profoundly from individual ballots cast in an election, each of which has only a mi-

<sup>49</sup> See, e.g., KRAMER, *supra* note 1 (arguing that government and interpretation of the Constitution should be controlled by the people); TUSHNET, *supra* note 1 at 17794 (emphasizing need to transfer power over constitutional law to “the people”).

<sup>50</sup> *Country Statistical Profile: United States 2010*, ORG. FOR ECON. COOPERATION & DEV., [http://www.oecd-ilibrary.org/economics/country-statistical-profile-united-states-2010\\_20752288-2010-table-usa](http://www.oecd-ilibrary.org/economics/country-statistical-profile-united-states-2010_20752288-2010-table-usa) (last updated May 27, 2010) (link).

<sup>51</sup> *Historical Table 1.3—Summary of Receipts, Outlays, and Surpluses or Deficits (-) in Current Dollars, Constant (FY 2005) Dollars, and as Percentages of GDP: 1940–2016*, OFF. OF MGMT. & BUDGET, <http://www.whitehouse.gov/omb/budget/Historicals/> (link).

<sup>52</sup> For a survey of the range and costs of federal regulation, see Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INST., 2010 (link). A 2005 study by the Small Business Administration found that federal regulation imposes over \$1 trillion in costs on businesses and consumers annually. See W. MARK CRAIN, *THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS 4* (2005 ed. 2005) (link).

<sup>53</sup> Susan Dudley & Melinda Warren, *A Decade of Growth in the Regulators’ Budget: An Analysis of the U.S. Budget for Fiscal Years 2010 and 2011*, 32 *REGULATORS’ BUDGET ES*, (2010) (link).

<sup>54</sup> See Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 *SOC. PHIL. & POL’Y* 202, 215–21 (2011) (link).

<sup>55</sup> See Elda Pema, *Do State Taxes Affect the Migration of Human Capital?* (2009) (unpublished manuscript), available at [https://www.msu.edu/~pemaelda/E\\_Pema-Taxes%20and%20Human%20Capital.pdf](https://www.msu.edu/~pemaelda/E_Pema-Taxes%20and%20Human%20Capital.pdf) (summarizing previous studies and providing evidence that higher-income and better-educated taxpayers are particularly likely to gravitate to low-tax jurisdictions) (link).

niscule chance of influencing the outcome.<sup>56</sup> Unfortunately, foot voting has little impact as a constraint on the federal government, since the costs of emigration are vastly higher than those of moving from one state or locality to another.

Given rational political ignorance, it is virtually impossible for voters to understand and keep track of more than a small fraction of today's massive federal government. Even a much better informed electorate than we currently have would probably be unable to do it. As a result, there is little meaningful democratic control over much federal activity.<sup>57</sup> Strengthening democratic accountability requires a reduction in the size, scope, and complexity of government, particularly at the federal level. We can recognize the importance of this problem for democratic accountability even if we are skeptical of the Tea Party's particular proposals for solving it.

The scope of government power is an issue where the need for popular constraints on elite discretion is particularly great.<sup>58</sup>

### *B. Preventing the Growth of More Dangerous Forms of Populism*

Historically, severe economic downturns have stimulated the rise of intolerant and xenophobic populist movements, often increasing public hostility to foreigners and racial, ethnic, or religious minorities.<sup>59</sup> It is easy and psychologically satisfying for rationally ignorant voters to blame their economic troubles on foreigners or disliked minority groups. The available data suggests that voters have a strong "anti-foreign bias" in their policy views even during normal times.<sup>60</sup>

It would be naive to imagine that such beliefs are completely absent among Tea Party supporters. For example, support for the Tea Party is correlated with opposition to immigration.<sup>61</sup> Some Tea Party activists have ad-

<sup>56</sup> See Somin, *supra* note 54, at 210–15 (discussing implications of this difference between foot voting and ballot box voting).

<sup>57</sup> For a more detailed exposition of this point, see Ilya Somin, *Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PENN. L. REV. PENNUMBRA 239, 240–43 (2009) (debating Sanford M. Levinson) (link).

<sup>58</sup> See *supra* Part II.B (noting that this is a standard benefit of popular constitutionalism).

<sup>59</sup> For a survey of the evidence, see BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* (2005).

<sup>60</sup> See CAPLAN, *supra* note 30, at 36–39, 58–59, 70–71.

<sup>61</sup> See Nathaniel Persily, Speech at AALS Panel on The Constitutional Politics of the Tea Party, Jan. 6, 2011, <http://www.aalsweb.org/am2011/thursday/hottopicconstitutional.mp3> (discussing data on Tea Party supporters). See also a *N.Y. Times/CBS News* poll of Tea Party supporters, showing that eighty-two percent of Tea Party supporters believe that illegal immigration is a "very serious problem" facing the country, compared to only sixty percent of the general population as a whole who believe the same. *Polling the Tea Party*, N.Y. TIMES, Apr. 14, 2010, <http://www.nytimes.com/interactive/2010/04/14/us/politics/20100414-tea-party-poll-graphic.html?ref=politics#tab=6> (link).

vocated a greater focus on such issues.<sup>62</sup> Nonetheless, Tea Party leaders have tried hard to keep the movement focused on limiting federal power and away from traditional social conservative issues such as opposition to gay rights, abortion, and immigration.<sup>63</sup> Indeed, social conservatives have expressed fears that the Tea Party has become too libertarian as a result.<sup>64</sup> The Tea Party “Contract From America,” perhaps the most widely publicized statement of the movement’s agenda, includes no social conservative proposals among its ten points, and does not even mention such issues as immigration, gay marriage, or abortion.<sup>65</sup> The recent January 2011 inaugural meeting of the Senate’s Tea Party Caucus also avoided these issues in favor of focusing on cutting government spending.<sup>66</sup> While social conservatism is by no means necessarily synonymous with intolerance or xenophobia, some social conservative positions do tap into such sentiments among voters, particularly opposition to immigration and gay rights.

Tea Party leaders have also tried hard to attract support from ethnic and religious minorities, and feature various minority speakers at their events.<sup>67</sup> Even if some of this emphasis on diversity is a matter of political strategy rather than principle, it still reduces the likelihood that the movement will move in an intolerant or xenophobic direction.

Although the majority of Tea Party supporters are self-described conservatives,<sup>68</sup> the focus of the movement has so far been primarily on what

<sup>62</sup> See, e.g., Jared A. Goldstein, Speech at AALS Panel on The Constitutional Politics of the Tea Party, Jan. 6, 2011, <http://www.aalsweb.org/am2011/thursday/hottopicconstitutional.mp3> (citing examples of Tea Party leaders who believe that opposition to illegal immigration should be a major focus of the movement).

<sup>63</sup> See, e.g., Ben Smith, *Tea Parties Stir Evangelicals’ Fears*, POLITICO, Apr. 12, 2010, <http://www.politico.com/news/stories/0310/34291.html> (link).

<sup>64</sup> See Smith, *supra* note 63.

<sup>65</sup> CONTRACT FROM AMERICA, Sept. 23, 2010, <http://www.thecontract.org/the-contract-from-america/> (link); see also Smith, *supra* note 63 (noting that none of the twenty-one issues originally proposed by the Tea Party—a list from which voters chose the top ten which then became “The Contract”—mentioned any socially conservative priorities) (link); Teddy Davis, *Tea Party Activists Unveil “Contract From America”*, ABC NEWS, Apr. 15, 2010, <http://abcnews.go.com/Politics/tea-party-activists-unveil-contract-america/story?id=10376437> (listing the ten points in the Contract) (link).

<sup>66</sup> See William Douglas & Lesley Clark, *Tea Party Caucus in Senate Very Small, Very Enthusiastic*, CHRISTIAN SCI. MONITOR, Jan. 28, 2011, <http://www.csmonitor.com/USA/Latest-News-Wires/2011/0128/Tea-Party-Caucus-in-Senate-very-small-very-enthusiastic> (noting focus on “deficit reduction”) (link).

<sup>67</sup> See, e.g., Kenneth P. Vogel, *Tea Party Outreach Courts Jews*, POLITICO, Sept. 13, 2010, <http://www.politico.com/news/stories/0910/42068.html> (noting that “Tea Party activists have long highlighted whatever involvement of racial and ethnic minorities there is in the movement” and have tried to increase support for the movement among African-Americans, Hispanics, and Jews) (link).

<sup>68</sup> See Saad, *supra* note 33 (noting that seventy percent of Tea Partiers claim to be conservative) (link). But see James Hohmann, *Tea Partiers in Two Camps: Sarah Palin vs. Ron Paul*, POLITICO, Apr. 19, 2010, <http://www.politico.com/news/stories/0410/35988.html> (noting evidence that some forty-two percent of Tea Party activists who attended a major movement demonstration in April 2010 were libertarian in orientation) (link).

may be seen as libertarian concerns.<sup>69</sup> An April 2010 *New York Times/CBS News* poll found that seventy-eight percent of self-described Tea Party supporters believed that “economic issues” are the more important issues facing the country, compared to only fourteen percent who said “social issues” are more important.<sup>70</sup>

Moreover, survey data suggests that many Tea Party supporters are more socially tolerant than expected. An exit poll conducted by *Politico* at a major April 2010 Tea Party rally in Washington, D.C. found that fifty-one percent of those surveyed believe that “Government should not promote any particular set of values,” while forty-six percent endorsed the more socially conservative view that “Government should promote traditional family values in our society.”<sup>71</sup> It is, of course, possible that committed movement activists who show up at rallies are more tolerant than less active Tea Party supporters in the general population. But the former probably have disproportionate influence over the development of the movement’s agenda.

The *New York Times/CBS News* survey of Tea Party supporters found that forty percent believe that Supreme Court’s decision protecting abortion rights in *Roe v. Wade* was a “good thing” and fifty-seven percent support either marriage rights (sixteen percent) or civil unions (forty-one percent) for “gay couples.”<sup>72</sup>

To the extent that the Tea Party movement succeeds in focusing right-wing populist energy on limiting the power of government, it makes it less likely that the current economic crisis will lead to the rise of a much more dangerous right-wing populist agenda. Even opponents of the Tea Party’s limited government agenda should welcome this aspect of its activism.

Of course, the Tea Party movement could still veer off in directions different from its current focus. Even if it does not, it might be supplanted by other right-wing populist groups that are much more intolerant or xenophobic. So far, however, it seems to have channeled populist energies in a more healthy direction than many of the available alternatives. Given the virtual inevitability that a right-wing populist movement of some kind would emerge during the current recession, this should be considered a positive development even by people on the left who otherwise dislike the Tea Party agenda.

<sup>69</sup> See *supra* note 64 and accompanying text.

<sup>70</sup> N.Y. Times/CBS News, *Polling the Tea Party*, N.Y. TIMES, Apr. 14, 2010, <http://www.nytimes.com/interactive/2010/04/14/us/politics/20100414-tea-party-poll-graphic.html?ref=politics#tab=6> (link).

<sup>71</sup> *Washington DC Tea Party Exit Poll*, POLITICO/TARGETPOINT, Apr. 19, 2010, [http://www.targetpointconsulting.com/system/uploads/22/original/POLITICO-TargetPoint\\_Tea\\_Party\\_Exit\\_Poll\\_Findings.pdf?1271686652](http://www.targetpointconsulting.com/system/uploads/22/original/POLITICO-TargetPoint_Tea_Party_Exit_Poll_Findings.pdf?1271686652) (internal quotations omitted) (link).

<sup>72</sup> N.Y. Times/CBS News, *Polling the Tea Party*, N.Y. TIMES, Apr. 14, 2010, <http://www.nytimes.com/interactive/2010/04/14/us/politics/20100414-tea-party-poll-graphic.html?ref=politics#tab=6> (link).

CONCLUSION

The Tea Party is in many ways a typical popular constitutionalist movement. As such, it exemplifies some of the standard strengths and weaknesses of such movements, including widespread political ignorance. At the same time, the evidence suggests that Tea Party supporters are no more ignorant than other voters, including those on the political left. Moreover, the Tea Party's unusual focus on limiting federal power could potentially create some important benefits.

The ultimate impact of the Tea Party on American constitutionalism remains to be seen. The movement could fade away, be co-opted by the Republican Party leadership, or veer off in a more socially intolerant direction. For now, the evidence shows only that the Tea Party is very much in the same tradition as previous popular constitutionalist movements. And its focus on limiting federal power could have some major beneficial effects.