

CORPORATE INFUSION: WHAT THE TEA PARTY'S REALLY SERVING AMERICA

If this Tea Party's dumping anything, it's the U.S. Constitution



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**JUSTICE FOR ALL.
NO EXCEPTIONS.**
That's the American Way



“The most formidable weapon against errors of every kind is reason.”

--Thomas Paine

Introduction

What are the politics of the Tea Party movement, which has been hailed since the 2010 elections as the most important new force in American public life? Because the Tea Party is not a unified national organization but an umbrella for hundreds of local groups with divergent tendencies and beliefs, it is not easy to identify a single coherent program. Yet the movement strikes similar themes across America and has been commonly described for its vehement anti-tax and anti-regulatory positions as “populist,” “constitutionalist,” and “libertarian.”

As we shall see, each of these labels falls short in dramatic ways. The Tea Party rejects the structural democratic reforms advanced by the Populist movement of the nineteenth and early-twentieth century; it seeks to strip from our Constitution the key progressive amendments that prior generations of Americans added to expand democracy, social justice and equality; it hopes to undermine through legislation, conservative judicial activism and direct repeal important parts of the Fourteenth Amendment and the civil rights legislation enacted under it; and while it uses the language of freedom for all American citizens, the principal “freedom” that the Tea Party actually defends is that of giant corporations to escape public regulation.

The Tea Party movement arose in March 2009 shortly after the American people repudiated eight years of misrule by President George W. Bush, a big-government conservative and close ally of corporate America who came to power through an unprecedented outburst of judicial activism by a politically sympathetic Supreme Court. The Bush administration charged two multi-trillion dollar wars to the national credit card, while sabotaging our ability to pay the bill by repeatedly reducing taxes on the wealthiest Americans. Although it inherited a budget surplus from the Clinton era, the Bush administration presided over the worst deficits in American history, systematically undermined the American middle class, and brought the nation a staggering economic collapse based on deregulation and complicity with corporate corruption.

None of this fiscal recklessness motivated a reaction from the people who are organizing today’s Tea Party. Nor did they rebel against the notorious civil liberties abuses of the Bush

administration. When torture was made public policy and habeas corpus attacked, when Americans were arrested for wearing the wrong tee-shirt or when President Bush asserted the power to arrest and lock up American citizens with no due process of law, we heard nary a peep of protest from the future organizers and funders of the Tea Party. And yet in 2009, these sudden champions of fiscal restraint and civil liberty designated the newly inaugurated President Obama as an unprecedented threat to American freedom and moved quickly to blame America’s woes on his administration and the all-purpose whipping posts of “big government” and “regulation.”

The 2010 congressional elections should have been centered, at least in the domestic sphere, on three freshly minted corporate catastrophes made possible by industry regulatory capture and systematic deregulation: the subprime mortgage crisis that caused a multi-trillion dollar collapse on Wall Street and the destruction of millions of peoples’ jobs, incomes, pensions and housing security; the BP oil spill, which wrecked an entire regional ecosystem in the Gulf of Mexico and registered as the worst environmental disaster in U.S. history; and the collapse of the Massey Coal corporation mines in West Virginia that killed 25 mine workers after the company had been cited dozens of times for unaddressed regulatory violations.

In the wake of these disasters, the Tea Party skillfully mobilized public anxiety about the direction of American politics but turned it against President Obama’s efforts to deal with the mounting crises of the society. Tea Party activists drew Hitler mustaches on photographs of the president and decried health care reform, which they called “Obamacare” and described as a totalitarian plot. They railed against President Obama’s efforts to get BP to set up a \$20 billion fund to pay the victims of the British company’s recklessness and unlawful conduct: Rep. Michele Bachmann (R-MN), a Tea Party hero, denounced Obama’s “redistribution of wealth fund” and Rep. Joe Barton (R-TX) apologized to BP for being “subjected” to “a 20 billion dollar shakedown” by the president. And, in the debate over financial reform, the Tea Party joined other conservative Republicans in seeking to give Wall Street a free pass for the appalling predatory actions and crimes that brought our economy to its knees. Today, many Republicans, flush with Wall Street money, are calling for a severe dilution or outright repeal of the Dodd-Frank Act and have placed a bull’s-eye target on the newly created Consumer Financial Protection Bureau, the entity charged with protecting the public against fraudulent and deceptive financial practices.

In general, Tea Party figures across America continue to

obscure the major problems facing the country, from the destruction of trillions of dollars in home equity in the sub-prime mortgage scam to the dramatic economic inequality caused by runaway corporate power and executive bonuses to the horrific effects of global warming, a scientifically established reality that is now being routinely denied by Tea Party leaders. The movement, aided by Fox News and right-wing radio, helps to create a thick fog of corporate-sponsored propaganda that questions the citizenship and religion of the president and blames his administration for all that ails us.

The Tea Party movement dresses up its agenda in populist, constitutional and libertarian rhetoric but these gestures are almost always in service of a conservative corporate agenda. Who really stands behind the curtain pulling the levers was made clear in Jane Mayer's scrupulously documented article in the *New Yorker*, "Covert Operations: The Billionaire Brothers Who Are Waging War Against Obama," (August 30, 2010). Mayer showed that right-wing oil barons David and Charles Koch--whose vast industrial and energy empire is worth \$35 billion--have pumped tens of millions of dollars into funding the Tea Party's activities, always steering the foot soldiers in a pro-corporate and anti-regulatory direction. As President Obama's adviser David Axelrod told Mayer, "this is a grassroots citizens' movement brought to you by a bunch of oil billionaires."

Americans who still love the promise of political democracy, the real Constitution and Bill of Rights, and the progress of human liberty and equality should carefully read the fine print, as well as between the lines, before they drink the tea being served at this party.

The Un-Populists

In outlets from National Public Radio to Time Magazine, the Tea Party movement has been called "populist," but this description only fits if we affix it to *any* movement that seeks to organize people, which is to say: every movement. If we ground the concept of populism in American history, we see that the Tea Party rejects all the major purposes and goals advanced by the Populist movement of the nineteenth and early-twentieth century: popular election of U.S. Senators, progressive income and corporate taxation, trust-busting and regulation of large corporations and utilities, an increase in the money supply to help people in debt, large public works projects to address unemployment and strengthen our infrastructure, and the formation of a political alliance between working-class Americans and small farmers against the might of big business.

Populists of a century ago participated in a "cooperative

crusade" against the "coercive potential of the emerging corporate state," in the words of historian Lawrence Goodwyn (*Democratic Promise*, 1976). They fought hard for the Constitution to be a charter of democratic rights, freedoms and powers that could enable the people to achieve collective social progress.

Return of the "Corporation Senators": Revoking the Seventeenth Amendment and Popular Election of U.S. Senators

The Tea Party today seeks to undo not only the progressive policies that the Populists championed, like utility regulation, but the Populist-backed constitutional amendments that structurally expanded popular democracy and strengthened congressional power to promote public welfare. The "Tea Party" hopes to erase key parts of the modern Constitution.

To take a crucial example, nearly a century after the adoption of the Seventeenth Amendment (1913), which shifted the mode of election of U.S. senators from the state legislatures to the people themselves, Tea Party candidates all across America in 2010 were, amazingly, calling for *repeal* of this hard-won populist victory. Joe Miller, the GOP's nominee for the U.S. Senate in Alaska, told voters that he would "absolutely support the repeal of the Seventeenth Amendment," as did Colorado GOP Senate nominee Ken Buck and many other Senate and House candidates (although some would, comically, come to say that they had misspoken, as if advocating the repeal of constitutional amendments is a casual verbal slip that just happens sometimes). Utah Senator-elect and Tea Party favorite Mike Lee went on national television and called the Seventeenth Amendment a "mistake" and, when asked how he reconciled his opposition to it with his populist rhetoric, answered that "the Tea Party movement is all about empowering the people by empowering the states."

This surprising ambush against the Seventeenth Amendment a century after the fact is instructive. The Populists and Progressives who fought for direct popular election of U.S. senators were not only insisting upon popular democracy as the core American ideal but combating a specific evil, which was pervasive big-business control over the selection of U.S. senators. In the absence of any serious campaign finance law, the railroads, banks and other large industries spread money fast and large around the state capitals to elect their favorite candidates. Muckraker William Allen White in his autobiography

described Senate elections as backroom contests in which railroad trusts freely paid off legislators. When it came time to pick senators, he wrote, “the people had nothing to do with it.” The senators owed their offices to “a class-conscious, organized plutocracy” and “had no obligation to the people of their state.” White saw that the “people had no way to break up the plutocratic control of their state, except to join with other states and change the federal Constitution to provide for the direct election of United States Senators.”

A key moment in the campaign to pass direct election came in 1906, when William Randolph Hearst’s *Cosmopolitan* magazine published “The Treason of the Senate,” a series of shocking articles about big-money corruption, including widespread bribery of state legislators, in the selection and conduct in office of U.S. senators. The author, muckraking journalist David Graham Phillips, described how specific “corporation Senators,” such as Sen. Nelson Aldrich of Rhode Island or Sen. William A. Clark of Montana, came to Washington to serve industrial giants, big banks and railroads. This series influenced public opinion and inspired the movement to eliminate the threat of corporate corruption by shifting the selection of senators to popular voting. Sen. Joseph Bristow, author of the Seventeenth Amendment, declared to his colleagues that the “great financial and industrial institutions” were spending “enormous amounts of money in corrupting legislatures to elect to the Senate men of their own choosing.” Standing on the Senate floor in 1911, he asked: “Shall the people of this country be given an opportunity to elect their own Senators, or have them chosen by legislatures that are controlled by influences that do not many times reside within the State that those Senators are supposed to represent?”

Amazingly, Tea Party activists and leaders want to go back to the old system. What does this have to do with populism?

Attacking the 16th Amendment, the Income Tax, and Progressive Monetary Policy

This reactionary ethos pervades the Tea Party’s attitude towards nearly everything that the real Populists stood for, which was based on political democracy, economic equality and social justice. As with the Seventeenth Amendment, so with the Sixteenth, which was ratified, also in 1913, in order to reverse an outburst of plutocratic judicial activism in the Supreme Court. Until the Court’s bitterly contested 5-4 decision in *Pollock v. Farmers’ Loan and Trust Company* (1896), it had been well-accepted

that Congress’ sweeping Article I, Section 8 power to “lay and collect Taxes, Duties, Imposts and Excises” included the power to adopt an income tax. Indeed, just five years earlier the Supreme Court had affirmed such power in *Springer v. United States* (1891). In that case, a unanimous Court rejected the claim that the Article I, Section 9 provision barring a “Capitation, or other direct” tax—a provision that had been added to the Constitution to prevent a *head tax* on slaves—prevented Congress from generally imposing a tax on income. Yet, the conservative majority in *Pollock v. Farmers’ Loan and Trust Company* did a U-turn and determined that a 2% federal tax on both persons and corporations ran afoul of the prohibition on “Capitation” taxes.

This sinister decision, motivated by sympathy for giant corporations facing federal taxes, struck at the heart of both Populist and Progressive economic policy, which insisted on controlling the increasingly lawless power of large corporations and promoting true civic and political equality. When the Sixteenth Amendment was finally adopted to undo the Supreme Court’s handiwork, it enabled Congress to enact income taxes—yes, *progressive* income taxes included—without apportioning them among the states. This became the progressive restoration in the Constitution of the original powers Congress had enjoyed before the Court had its way with them.

Yet, today, Tea Party activists across America, from Nevada Republican Senate nominee Sharron Angle to newly-elected Kentucky Senator Rand Paul, call on America to *repeal* the Sixteenth Amendment and thereby effectively abolish federal income and corporate taxes—which also happens to be the most ardent desire of many right-wing business interests.

It would belabor the point to document how Tea Party activists campaign against pretty much everything else the Populists championed. Suffice it to say that the main point of Populism was to *regulate business in the interest of the common good* while the point of the Tea Party seems to be to *deregulate business in the interest of private wealth*. But one other notable contrast between the movements deserves mention. The Populists saw how a tight money supply crushed the dreams of working people and farmers who labored under heavy debts to the banks. They advocated “free silver” and a loosening of the money supply to improve the fortunes of working people. Popular opposition to a strict gold standard crystallized in William Jennings Bryan’s famous “cross of gold” speech at the 1896 Democratic Convention, in which he thundered: “Having behind us the producing masses of this nation and the world, supported by the commercial interests, the laboring interests and the toilers everywhere, we will answer their demand for a gold standard by saying

to them: ‘You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold.’”

It is a remarkable historical irony that the self-flattering “populists” of the 21st century are now demanding a *return* to the gold standard, which was abandoned in 1914. This is populism in service not of William Jennings Bryan’s “producing masses” and “toilers” but the creditors and big banks.

Constitutionalists Fighting the 14th Amendment

By railing against the Sixteenth and Seventeenth Amendments, the Tea Party makes clear that it is not at peace with our written Constitution, and its hostility to democratic constitutional purposes runs even further back than its opposition to Populist and Progressive-era amendments. The Tea Party has problems with the Fourteenth Amendment’s fundamental protection of equal civil rights, the very anchor of modern democratic constitutionalism. Tea Party activists may dress themselves up in colonial garb and swear their devotion to the Constitution. But the Constitution they revere is not the real one, but only a projection of their own reactionary desires.

Tea Party leaders have a tortured relationship with the Fourteenth Amendment. They have been attacking its very first sentence, which grants citizenship to all people born in the United States: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” This sentence overturned the *Dred Scott* decision, which had determined that descendants of slaves could never be citizens of the United States with equal rights. Rep. Ron Paul (R-Tex.,) and other activists have been calling for a constitutional amendment to repeal this language in order to solve the crisis they perceive in the advent of Americans they call “anchor babies,” babies born in the United States to undocumented immigrants. At the same time, other conservative activists without the intellectual honesty of Rep. Paul and the constitutional repealers are claiming that this language does not establish birthright citizenship at all, despite the fact that it has always been understood that way. Ignoring the plain text, they contend that Congress can deny citizenship to the “anchor babies” through a simple bill, and they have proposed to do just that in the Birthright Citizenship Act, introduced by Rep. Lamar Smith (R-Tex.), the new chairman of the House Judiciary Committee.

This difference in opinion on whether to repeal this

provision of the Fourteenth Amendment or simply deny its existence and legislate over it is a tactical skirmish, yet both sides essentially agree that it is time to subtract a long-standing and fundamental liberty from the Constitution. The last time we tried this was with Prohibition and we could expect similar chaos and division resulting from this kind of repressive effort if it succeeds today.

Beyond the first sentence, the Tea Party has even bigger fish to fry when it comes to the Fourteenth Amendment, which its leaders see, paradoxically, not as the legitimate and authoritative constitutional source for the civil rights revolution of the 1950s and 1960s, but rather as the illegitimate pretext for a massive assault on the civil rights and liberties of *private business owners* ever since then. This extraordinary controversy over the meaning and uses of the Fourteenth Amendment, the Reconstruction effort that gave rise to it, and the Civil War that made it possible, tells us everything we need to know about the boastful and ubiquitous claim that the Tea Party speaks for liberty and freedom.

Weak Tea: Libertarianism Without Liberty

Libertarians are the intellectual heavyweights of the Tea Party, but the kind of “liberty” they promote is oddly pinched and irrelevant to most people. Even the most authentic and well-developed “libertarian” figures and intellectuals boosted by the movement, such as the seriously cerebral Rep. Ron Paul (R-Tex.) and his son, Senator-elect Rand Paul (R-Ky.), align themselves against the principal freedom movements of our history, including abolitionism, the emancipation of slaves through the Civil War, and the modern Civil Rights movement and the anti-discrimination laws it saw to passage.

This is the great irony of the movement that calls itself “libertarian” in the 21st century. The concepts of “slavery” and “government oppression” are not abstractions in a country that began as a slave republic and authorized a brutal traffic in kidnapped Africans and their progeny. The great struggles for freedom in our history have been against the enslavement of millions of black people and then, in the last century, to dismantle Jim Crow apartheid and integrate African Americans and other minority groups into the mainstream of American life. And yet the modern civil rights struggle plays no positive role whatsoever in the political consciousness of the Tea Party.

It is not just that prominent Tea Party leaders and activists seem to have no record of having participated in the Civil Rights movement of the 1960s and ‘70s (which is indeed

too harsh a standard upon which to judge anyone in politics today). The point is that, *even now*, conservative Tea Party luminaries vilify Abraham Lincoln and the Union side in the Civil War, denounce Reconstruction, rail against parts of the Fourteenth Amendment, and attack key parts of the Civil Rights Act of 1964 as unconstitutional.

For example, Senator-elect Rand Paul (R-Ky.), who was perhaps the biggest Tea Party success story in the 2010 election, provoked national controversy in his campaign when he questioned the constitutionality of the Civil Rights Act of 1964's provisions banning race discrimination in hotels, motels, restaurants and other places of public accommodation. He argued, in direct opposition to the Supreme Court's landmark decision in *Heart of Atlanta Motel v. United States* (1964), that Congress lacked the authority to forbid race discrimination in *private* as opposed to public institutions. According to the *Wall Street Journal*, Paul also "repeatedly" said that he would have voted against the legislation. Although Paul quickly back-pedaled and changed the subject in the face of a public firestorm, he clearly aligned himself with Sen. Barry Goldwater (R-Ariz.), who took the same "libertarian" position a half-century before when voting against the Civil Rights Act of 1964, and right-wing hero Robert Bork, who infamously railed against civil rights laws for interfering with private freedom when he was a professor at Yale Law School in the 1960s.

Senator-elect Paul's views on the Civil Rights Act of 1964 are not idiosyncratic but reflect a deep antipathy in the Tea Party's leadership to the federal government's instrumental role in promoting civil rights and, stunningly, even in ending slavery. During his 2008 presidential campaign, Rep. Ron Paul denounced President Abraham Lincoln for "starting" a war against the South (an intriguing perspective given that seven southern states seceded from the Union before Lincoln was even sworn into office) and for causing the deaths of "600,000 Americans who died in the senseless Civil War." Rep. Paul took the position that the real purpose of the Civil War was to "get rid of the original intent of the Republic."

These sincere and long-held positions, which strive to merge the cause of anti-government "libertarianism" with proto-Confederate states' rights nostalgia, demonstrate that today's "populist libertarianism" harbors only a passing interest, at best, in the progress of liberty as real Americans have experienced it. Indeed, most Tea Party leaders evince hostility or indifference towards the other civilizing liberation movements of our times, such as the labor movement and its championship of workers' right to organize and to be free of danger and oppression in the workplace; the movement for women's equality in the workplace, which has uplifted opportunities for millions

of Americans; the movement for reproductive freedom and abortion rights, which has been integral to achieving equality and opportunity for half the population; and the ongoing movement for equal rights for gays and lesbians.

The vast majority of Tea Party candidates in 2010 took anti-choice positions, opposed giving millions of gay Americans the right to marry, and had nothing to say about permitting gay Americans to serve in the armed forces. An illustrative example is Rep. Michele Bachmann (R-Minn.), Chair of the Tea Party Caucus and the Constitutional Conservative Caucus. According to a study by People For the American Way, Bachmann is an "anti-choice, anti-gay, and anti-evolution" activist who fought for a state constitutional amendment to ban same-sex marriage and championed the teaching of creation-science in her state's public schools. Rep. Steve King (R-Iowa), who told a Tea Party rally to instigate a Velvet Revolution against the government, believes that allowing gay people to marry would lead to the breakdown of the family, religion, and the Constitution. Marco Rubio, the senator-elect from Florida who the *New York Times Magazine* described as "The First Senator From the Tea Party," denounced what he referred to as the "the so-called constitutional right to privacy" and supported a measure to force women seeking an abortion to undergo an ultrasound procedure. South Carolina Republican Jim DeMint, known as the "Tea Party Power Broker" in the Senate, demanded that pregnant single women and gays be banned from teaching in schools.

One might be forgiven for assuming that a "libertarian" movement would align itself with the nation's leading civil liberties group, the American Civil Liberties Union, which since 1920 has defended the people's freedoms against government attack. But despite the ACLU's eagerness to form alliances with other groups across the political spectrum in defense of the Bill of Rights, there appear to be no signs of any collaboration with the Tea Party. On the contrary, Rep. Bachmann has denounced the ACLU from the floor of the House of Representatives for trying to "purge the marketplace of ideas of any semblance of religious expression," which is a demonstrably false claim. As for the rest of the ACLU agenda, such as protecting reproductive choice, the rights of political expression and dissent, workplace and Internet privacy, and so on, the Tea Party is, at best, completely missing in action.

The much-trumpeted passion for "liberty" in the Tea Party has little to do with promoting the actual freedom of citizens--except with respect to the rights of individual gun ownership, which in fairness does seem to be a sincere cause for large numbers of *people* in the ranks. Yet, in general, the sentiment called "libertarianism" essentially reduces here to sweeping opposition to public regulation of large

corporations in the energy, pharmaceutical, health care, insurance, agribusiness, investment banking, and military contracting industries. The freedom being advanced is not the freedom of people; it is overwhelmingly the freedom of corporate capital. This is a kind of freedom whose manifold costs and crises the American people are still reeling from. We can hardly afford another giant dose of it.

If the Tea Party's political project is populism, it is *corporate populism*; if it is libertarianism, it is *corporate libertarianism*; and if it is constitutionalism, it is *corporate constitutionalism*. These are strange hybrids that prior generations of Americans fighting for popular democracy and freedom would recognize as laughable contradictions in terms.

True Heirs to the Boston Tea Party or Impostors?

People are free to choose their own heroes, but it is a matter of striking historical irony that today's corporate populists and corporate libertarians have chosen to call themselves the "Tea Party" at all.

The original Boston Tea Party was a mass popular movement against the special favors and subsidies that the British parliament conferred upon the East India Company, a rapacious corporation that cultivated cozy relations with politicians and an official monopoly on trade with the Far East. When the managers of the East India Company found themselves on the verge of bankruptcy because of their wild and predatory behavior, the Parliament bailed them out by passing the Tea Act of 1773, which exempted the company from having to pay any and all of the taxes that England imposed on colonial merchants, thus essentially extending the company's monopolistic favor to North America. This act of corporate welfare and favoritism on behalf of a corporate giant with no connection to the towns and farms of the local communities --not unlike the sweetheart deals and bail-outs regularly cooked up in our time for major corporations--harmed local merchants and was an assault on fair trade in the colonies. It aroused an enormous public fury. Opposition to the bloated subsidies for the East India Company exploded in a spectacular outbreak of anti-British and anti-corporate civil disobedience on December 16, 1773 when patriots disguised as Mohawk Indians boarded three of the company's ships and poured the ample contents of the tea chests into Boston Harbor. This was the Boston Tea Party.

Today's "Tea Party" movement arises in a moment of far greater corporate misfeasance and political corruption.

However, it remains curiously silent on even the most shocking corporate crimes and depredations. These misdeeds have been made possible by deregulation, weak oversight, cozy relationships among government officials and lobbyists and executives, and the capturing of regulatory agencies by the regulated industries. A Tea Party that lived up to its honorable name today would have spent the 2010 election demanding that the government bring to justice the large corporations that caused far more harm to Americans over the last decade than the East India Company ever did.

It would have insisted on criminal prosecution of the CEOs and executives who engineered the sub-prime mortgage crisis through securities fraud and predatory consumer practices and brought millions of Americans to the brink of foreclosure, homelessness, unemployment, and financial ruin—and then pushed them over.

It would have demanded the prosecution of the arrogant, profit-crazed BP oil executives who thumbed their noses at American law and produced along the Louisiana coastline the worst environmental catastrophe in our history.

It would have called for prosecution of the politically active CEO and executives of the Massey Mining corporation, which was apparently so busy intervening in West Virginia's judicial elections with millions of company dollars that they had no time or energy to comply with the hundreds of safety and health citations that it had been issued for its dangerous mines, a choice of priorities that ended up costing the lives of more than two dozen Americans.

A real Tea Party would have been demanding an investigation of the way that powerful corporations captured the offices of government securities, energy and mining regulators and brought them to heel. It would be demanding not the fool's gold of more "deregulation" but the creation of meaningful regulatory oversight that is not shot through with financial corruption and capture by the regulated companies.

But instead the Tea Party candidates spent their campaign money promoting demonstrably false and trivial claims. Their television ads falsely asserted that the new health care reform law would cut Medicare benefits for seniors, slash Medicare funding, launch a government-run health care system, distribute drugs for erectile dysfunction to registered sex offenders, kill jobs, use taxpayer funding for abortion, and produce an army of IRS agents looking to throw uninsured individuals in jail. SEE PFAW's Report,"Citizens Blindsided."

To be sure, some of the Tea Party politicians have mentioned the TARP bailout as an example of what is wrong with Washington, but their seriousness is called into question when they falsely attribute TARP to President Obama, when it was an initiative of the outgoing Bush administration. Even when they do mention TARP, they tend quickly to change the subject to health care reform. Every effort has been made to channel righteous public indignation about the crimes of private investment bankers into an attack on President Obama and “Obamacare.” It’s quite a trick to turn the anti-Wall Street feelings aroused by TARP and the subprime mortgage crisis into anger against a “public option” that would lower health care costs and expand coverage for millions of people. But, with the Tea Party firmly in the pocket of big business, TARP was nothing more than a casual talking point used to promote the agenda of the large health insurance companies.

The Tea Party’s Fight Against Health Care Reform and Federal Power: What Will the Courts Do?

It seems certain that the Tea Party’s declared war on federal power will surely come to penetrate the consciousness of the federal judiciary, which has shown itself for many years now to be in an activist and conservative mood. The Rehnquist Supreme Court dramatically cut back on Congress’ powers under the Commerce Clause when it struck down the Gun-Free School Zones Act in *Lopez v. United States* (1995) and dismantled a key part of the Violence Against Women Act of 1994 in *U.S. v. Morrison* (2000).

Now the attack on federal power continues with the red-hot culture war against the nation’s new health care reform law. When Congress finally passed the Patient Protection and Affordable Care Act, the Tea Party and affiliated conservatives decried the legislation as an outrageous assault on civil liberty and constitutional rights. Texas Governor Rick Perry even floated talk of “secession.” Multiple lawsuits were filed by Republican state attorneys general against the legislation, asserting that Congress had trespassed constitutional boundaries in passing the law. Twenty state attorneys general joined a suit filed by Florida Attorney General Bill McCollum asserting that the legislation tramples state sovereignty, violates federalism and exceeds Congress’ powers under the Commerce Clause. Virginia Attorney General Ken Cuccinelli, a Tea Party favorite, brought his own suit in Virginia, which became the first to bear fruit after two other courts in different parts of the country rejected attacks on the new law.

On December 13, 2010, U.S. District Court Judge Henry E. Hudson in Virginia found that the health reform’s provision of an “individual mandate” for citizens to purchase insurance by 2014 was unconstitutional. He ruled that congressional power under the Commerce Clause did not extend so far as to lawfully require individual citizens to participate in a national health plan. The decision contradicted an October 8, 2010 ruling by a federal court in Michigan rejecting the same argument, thus setting the stage for an eventual Supreme Court resolution. Michigan U.S. District Court Judge George Caram Steeh found that Congress had power to pass the law because the health care crisis clearly affects interstate commerce and the individual mandate is a necessary part of a broader regulatory scheme.

The Michigan ruling is rooted in a thick body of jurisprudence that recognizes the expansive powers of Congress to advance the public welfare and regulate interstate commerce in the national economy. The key case here may be *Wickard v. Filburn* (1942), in which the Supreme Court upheld the power of Congress to limit wheat production on domestic farms in order to stabilize wheat prices during the Great Depression. The farmer challenging the federal law in the case, Roscoe Filburn, was a sympathetic figure who went over his allotted wheat harvest quota to grow extra wheat to feed his chickens; he was not selling it on the open market, and his action, when considered in isolation, was not commerce. But the Supreme Court still upheld the government’s order forcing him to abide by the acreage quota. The Court reasoned that Congress was properly responding to a national economic crisis and that the “aggregate” effect of individual farmers all over the country violating the law would be to dramatically reduce demand for wheat on the open market and thereby thwart the purpose of the legislation, which was to help farmers by protecting their ability to make a fair return. In other words, Congress has the power to regulate interstate commerce in such a way as to ask individuals to participate in a national plan regulating activities that, when considered in isolation, may not be acts of interstate commerce but, when aggregated together, clearly and substantially do affect interstate commerce.

This precedent should obviate the Virginia lawsuit since citizens are clearly being required to purchase health insurance as a way to make the comprehensive national health plan work for everyone. It would be impossible to forbid insurers to deny people coverage on the basis of preexisting medical conditions if they could simply wait to get sick and then buy a policy. The individual mandate provision is thus necessary and essential to the viability of the whole law and benefits everyone, including whichever

uninsured people might be rounded up to claim that they are being injured by being compelled to have access to health insurance. The fact is that uncompensated care in public and private hospitals costs America billions of dollars a year and has become a significant drain on the health care system. The cumulative effect of millions of people having no health insurance plans substantially affects interstate commerce.

Yet, as all legal realists know, nothing in the law is automatic, foreordained or inevitable. Anyone who has lived through the last decade of conservative judicial activism—beginning with *Bush v. Gore* (2000) and ending with *Citizens United v. FEC* (2010)—knows that constitutional law is not only plastic but eminently pliable and yielding in the hands of ideologically driven conservative justices. Is it possible that the Tea Party assault on the progressive exercise of federal power, including the new health reform legislation, will command the assent of at least five Supreme Court justices? Of course. It would be an astounding and indefensible thing, but in the Roberts Court, hey, why not?

A Contest for American Ideals

The Tea Party movement invokes many of the most

beautiful ideals of American history: populism, the Constitution and liberty. In the new Republican-majority House of Representatives, members on the first day of business are, commendably, reading aloud the Constitution, even the dread amendments—the 14th, 16th and 17th—that Tea Partiers would love to repeal in whole or in part.

Rhetorical gestures aside, the real-world political program of the movement and its elected officials—who are now busily collecting millions of dollars in campaign contributions at downtown restaurants from the same Washington “special interests” they denounced in the campaign—is all about tightening the stranglehold of corporate power over American political institutions. It is now up to Americans who remember what the real Populists fought for, who love the real Constitution and Bill of Rights, and who cherish real liberty to reclaim these words and defend the ideals of America. We cannot rely on the Supreme Court or anyone else to do it for us. ■

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