

THE CONSTITUTIONAL POLITICS OF THE TEA PARTY MOVEMENT

Richard Albert*

The Tea Party movement and its constitutional vision for the United States is perhaps the hottest topic in American public law today. The rising tide of popular support for the Tea Party movement has transformed what was once cast aside as a fleeting faction into a formidable force in American politics—one that could augur significant consequences for the contours of American constitutional law in the years ahead.

Few could have predicted that the Tea Party movement would become what it has. When voters elected Massachusetts Republican candidate Scott Brown to the United States Senate on the strength of Tea Party principles in early 2010,¹ it was not yet clear whether the Tea Party message would produce quantifiable results elsewhere in the country.

But since then, Tea Party-backed candidates have scored unexpected victories in prominent contests around the country, including in Alabama,² Alaska,³ Colorado,⁴ Delaware,⁵ Florida,⁶ Kentucky,⁷ Maryland,⁸ Nevada,⁹

* Assistant Professor, Boston College Law School; Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.). This is an introduction to the *Colloquy*'s series on the Tea Party movement, which follows from a panel I organized and moderated at the 2011 Annual Meeting of the Association of American Law Schools on the subject of *The Constitutional Politics of the Tea Party Movement*. I am grateful to each of the panelists—Randy Barnett, Jared Goldstein, Sanford Levinson, Nate Persily, and Ilya Somin—for accepting my invitation to participate in what, quite predictably, turned out to be both a useful and valuable complement to the Conference program. It gives me great pleasure to thank Jane La Barbera, Tracie Thomas, Sean Prichard, and Erik Brown of the Association of American Law Schools for their care and attention in helping to make the panel a success. I am also delighted to thank Brian Caster, Thomas Kost and the *Colloquy* team for their outstanding work in preparing this series for publication.

¹ Jason Zengerle, *Bagging It: The Tea Party's Now in a Big Tent*, N.Y. MAG., Jan. 22, 2010, <http://nymag.com/news/intelligencer/63254> (link).

² *Brooks Wins Race Over Ala. Party-Switching Griffith*, FOX NEWS, June 2, 2010, <http://www.foxnews.com/politics/2010/06/02/brooks-wins-race-ala-party-switching-griffith> (link).

³ David R. Sands, *Murkowski Concedes to Miller in Alaska Primary*, WASH. TIMES, Aug. 31, 2010, <http://www.washingtontimes.com/news/2010/aug/31/murkowski-concedes-miller-alaska> (link).

⁴ Allison Sherry, *Buck Defeats Norton in Bruising GOP Primary for Senate Seat*, DENVER POST, Aug. 11, 2010, http://www.denverpost.com/ci_15737667 (link).

⁵ Kenneth R. Bazinet & Richard Sisk, *Tea Party-Backed Christine O'Donnell's Delaware Senate Primary Victory Triggers GOP Infighting*, N.Y. DAILY NEWS, Sept. 16, 2010, http://www.nydailynews.com/news/politics/2010/09/16/2010-09-16_gop_backers_are_teasing_off_on_division_within_the_ranks.html (link).

and South Carolina.¹⁰ Indeed, that there now exists a Tea Party caucus only confirms how earnestly some Americans have embraced the Tea Party's views on limited government, free markets, and individual rights and responsibilities.¹¹

Given the potentially sweeping constitutional consequences of the Tea Party's rise to prominence—namely the narrowing of national powers in favor of expanded state authority, the demise of what remains of the New Deal, and more generally a return to a confederalist vision on the United States—it is no surprise that the Tea Party movement's constitutional views have been the focus of headlines in major newspapers¹² and broadcasts on network television news.¹³

That is precisely why I convened a panel discussion on the Tea Party movement at the 2011 Annual Meeting of the Association of American Law Schools, the yearly mega-conference that brings together law professors to deliberate upon and debate the issues of the day.

As moderator and organizer for the panel, my tasks were twofold: first, to assemble a cast of scholars for a lively, enlightening, and intellectually robust conversation about the Tea Party movement; and second, to facilitate an exchange among the panelists themselves and between panelists and the audience in attendance, which was quite literally standing-room only. What resulted was commentary so meaningful in reflection, thoughtful in analyti-

⁶ Susan Page, *Conservatives See "Right Values" in Rubio*, USA TODAY, Sept. 20, 2010, http://www.usatoday.com/news/politics/2010-09-20-teapartytest20_ST_N.htm?csp=34 (link).

⁷ Kate Zernike, *Paul's Victory Poses Test for Tea Party on Defining Principles*, N.Y. TIMES, May 19, 2010, http://www.nytimes.com/2010/05/20/us/politics/20teaparty.html?_r=1 (link).

⁸ Rick Manning, *Charles Lollar is Pinning Down Hoyer*, THE HILL, Oct. 19, 2010, <http://thehill.com/blogs/pundits-blog/campaign/124767-charles-lollar-is-pinning-down-hoyer-> (link).

⁹ Kyle Hansen & Emily Richmond, *Sharron Angle Vows to "Take Back" Harry Reid's Senate Seat*, LAS VEGAS SUN, June 8, 2010, <http://www.lasvegassun.com/news/2010/jun/08/sharron-angle-grabs-early-lead-us-senate-race> (link).

¹⁰ Robbie Brown, *S.C. Candidate Challenges Status Quo*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/us/politics/10haley.html> (link).

¹¹ See Jordan Fabian, *House Tea Party Caucus Approved*, THE HILL, July 19, 2010, <http://thehill.com/blogs/blog-briefing-room/news/109567-house-tea-party-caucus-approved> (link).

¹² See, e.g., Kathleen Hennessey, *Rekindling Debate About Constitutional Amendments*, L.A. TIMES, Aug. 18, 2010, <http://articles.latimes.com/2010/aug/18/nation/la-na-tea-party-amendment-20100818> (link); Dana Milbank, *Tea Party May Snuff Out a Chance to Shrink Government*, WASH. POST, Oct. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100106221.html> (link); Kate Zernike, *Tea Party Set to Win Enough Races for Wide Influence*, N.Y. TIMES, Oct. 14, 2010, <http://www.nytimes.com/2010/10/15/us/politics/15teaparty.html> (link).

¹³ See, e.g., *This Week: Roundtable: Tea Party Politics* (ABC television broadcast Oct. 10, 2010), available at <http://abcnews.go.com/ThisWeek/video/roundtable-tea-party-politics-sarah-palin-christine-odonnell-bill-maher-witch-nazi-reenactment-george-will-paul-krugman-amy-walter-tavis-smiley-christiane-amanpour-11844743> (link); *Today Show: Has the Tea Party Lost Momentum?* (NBC television broadcast Oct. 12, 2010), available at http://www.msnbc.msn.com/id/3032619/ns/nightly_news/#39628063 (link).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

cal precision, and rich in political implication that more than one audience member took the time to remark to me personally that this panel discussion was the best and most informative they had attended in all of their years in the legal academy. That is high praise, indeed.

But one could have anticipated such glowing reactions when the panel was first assembled. The panel is staffed by leading voices in public law whose body of work is as impressive in quality as it is in quantity—a group whose composition exhibits a great range of diversity with respect to seniority, geography, political philosophy, and institutional affiliation: Randy Barnett,¹⁴ Jared Goldstein,¹⁵ Sanford Levinson,¹⁶ Nathaniel Persily,¹⁷ and Ilya Somin.¹⁸

Persily, a nationally recognized expert on constitutional and election law, began our panel by surveying the landscape of the Tea Party movement. He reported the findings from his 2010 public opinion survey of Tea Party supporters. Persily described their attitudes about current constitutional controversies and discussed what that can tell us about the group's coherence as a social movement of constitutional significance.

Goldstein, himself also a constitutional law expert, continued our panel with a discussion of what he regards as “The Tea Party’s Constitution.” What principles underpin the Tea Party movement, what is its mission, and what are the consequences of the Tea Party’s constitutional rhetoric? Goldstein challenged us to consider whether the Tea Party movement could actually be harmful to democracy and constitutionalism in the United States.

Then Somin, a leading theorist on the study of popular political participation and its implications for constitutional democracy, evaluated the Tea Party movement as an example of “popular constitutionalism.” Somin’s presentation assessed the Tea Party movement against the larger backdrop of the trend toward reviving constitutional limits on federal power.

Next to the stage was Barnett, perhaps the leading conservative constitutional theorist in the nation. Barnett situated the Tea Party movement within the national debate on health care and federalism, and also discussed his work with Tea Party leaders on a constitutional “Repeal Amendment”

¹⁴ *Randy E. Barnett*, GEORGETOWN L., http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=2124 (last visited Feb. 24, 2011) (link).

¹⁵ *Jared A. Goldstein*, ROGER WILLIAMS U. SCH. L., <http://law.rwu.edu/jared-goldstein> (last visited Feb. 24, 2011) (link).

¹⁶ *Sanford V. Levinson*, U. TEX. AUSTIN SCH. L., <http://www.utexas.edu/law/faculty/profile.php?id=sv155> (last visited Feb. 24, 2011) (link).

¹⁷ *Nathaniel Persily*, COLUMBIA L. SCH., http://www.law.columbia.edu/fac/Nathaniel_Persily (last visited Feb. 24, 2011) (link).

¹⁸ *Ilya Somin*, GEORGE MASON U. SCH. L., http://www.law.gmu.edu/faculty/directory/fulltime/somin_ilya (last visited Feb. 24, 2011) (link).

that would give a supermajority of state legislatures the power to repeal any federal law or regulation.

Finally, the audience heard from Levinson, perhaps America's foremost progressive constitutional theorist. Levinson took the view that we should applaud the Tea Party movement's attention to the deep interconnections among basic constitutional structures and political outcomes—a theme that has been the focus of much of Levinson's own scholarship. Levinson was clear, though, to express his disagreement with the Tea Party movement's broader constitutional vision and, more specifically, with the "Repeal Amendment" championed by Barnett.

What will follow on the pages of the *Colloquy* in the weeks ahead are the prepared remarks of each of the panelists. I also understand that the leadership of the Association of American Law Schools has graciously agreed to make available an audio podcast of the panel to the *Colloquy* and its patrons.

It was a thrill and an honor for me to moderate this program and to sit alongside these giant constitutional scholars.

I am confident that *Colloquy* readers will enjoy this series on *The Constitutional Politics of the Tea Party Movement*.