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The Tea Party, Conservatism, and the Constitution

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The following is adapted from a speech delivered on October 21, 2013, at Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship in Washington, D.C., sponsored by the AWC Family Foundation Lecture Series.

The Tea Party movement is named, of course, for the famous event in late 1773 when cases of tea were dumped unceremoniously into the Boston harbor. The Boston Tea Party—a carefully orchestrated strike against a commodity that was being taxed and sold by a monopoly provider—was intended as a one-time thing, though it ended up being an important link in the chain of events that led to the American Revolution. Today's Tea Party, on the other hand, has ambitions to become an ongoing force—maybe even the major force—in American conservatism. And it strives for a revolution of its own, a return to a more limited, more constitutional form of government. If I had to judge its performance so far, I would say that it has been courageous and right in its diagnosis of the problems facing American politics, but somewhat off in its prescriptions.

When I say the Tea Party is correct in its diagnosis, I mean it is correct in its very clear sense that Obamacare is not just another costly, bureaucratic, top-down,

regulatory scheme, of which we have, alas, so many. There is something genuinely tyrannical (despite the good intentions of many of its supporters) about Obamacare. It threatens not only to ruin our medical care system, but indirectly and directly—and sooner as well as later—to subvert our form of government and our way of life, fundamentally changing the relation between citizens and government.

Hubris and Nemesis

In a way, you can see how dangerous Obamacare is by noticing how it has brought out the worst in liberals—which is evident in how they have responded to the Tea Party. Liberal impatience with partisanship—that is, with people who oppose their plans—arises from the fact that in contemporary liberalism, there is no publicly acknowledged right of revolution. That may seem like a strange thing to say, but if one looks at some of the political theorists who were most important to modern or statist liberalism—Kant and Hegel in Germany, say, or Woodrow Wilson here in the United States—they are usually quite explicit in rejecting a right of revolution. In their view, a people always has in the long run the government it deserves. So there's no right of the people to “abolish,” as the Declaration of Independence proclaims, the prevailing form of government and substitute a better one. In particular, there is no conceivable right

to overturn contemporary liberalism itself; as liberals today are so fond of saying, there is no turning back the clock. To liberals the Tea Party appears, well, bonkers, precisely because it recalls the American Revolution, and in doing so implies that it might not be such a bad thing to have another revolution—or at least a second installment of the original—in order to roll back the bad government that is damaging both the safety and happiness of the American people.

This is the position, for instance, of Sam Tanenhaus, former editor of the *New York Times Book Review* and author of *The Death of Conservatism*. For Tanenhaus, conservatism is good insofar as it consolidates and preserves the liberal order. If conservatism turns revolutionary, i.e., attempts to roll back the liberal order, then it exceeds its commission—it goes off the reservation, so to speak—because liberalism stands for progress and progress is final. President

Obama himself made this point a few years ago regarding national health care: “I am not the first president to take up this cause,” he said, “but I am determined to be the last.” But in fact, Obamacare's strained and narrow victory in 2010 looked not so much inevitable as desperate. It passed by a party line vote, with rampant side deals to buy out the relevant interest groups, and against bitter resistance that has not gone away. Then came its disastrous rollout and its failure to meet any of its own targets for success. All of which suggests overextension and hubris on the part of liberalism,

Imprimis (im-pri-mis),
[Latin]: in the first place

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and in the wake of this hubris the Tea Party has confirmed itself as Obama's, and Obamacare's, devoted nemesis.

What the Tea Party needs now is a strategy—something it has so far conspicuously lacked—to allow it to achieve its worthy ends. Thinking through a strategy will help clarify those ends: What is it, exactly, that the Tea Party means by limited government? Limited to what? And limited by what? Clearly the Tea Party's form of conservatism points back to the Constitution as the basis for restoring American government. But how practically to move in that direction?

The Tea Party rightly concluded from the battles over Obamacare that what we are seeing in our politics these days is not two clashing interpretations of the same Constitution, but increasingly two different Constitutions in conflict: the old Constitution of 1787 and a "living" Constitution that is not just a different approach to the original, but an alternative to it. The extraordinary fight the Tea Party was willing to put up arose from this fact—that Obamacare amounted to a colossal battle between two different ways of government. And it was the Tea Party and President Obama who shared a clear understanding of the stakes; mainstream Republican leaders understood them with much less clarity and intensity.

Matching Means to Ends

The failure of the Supreme Court to strike down Obamacare and the individual mandate played into the Tea Party's suspicions. The Court, after all, had come close to striking down the act. There were five votes to rule it unconstitutional under the Commerce Clause before Chief Justice Roberts changed the subject to the taxing power. When the Court punted on the main question and allowed Obamacare to become law, it suggested to Tea Party leaders in and out of government that

the old constitutional mechanisms of judicial review and separation of powers did not seem capable of defending the Constitution against this fundamental challenge, and that the only recourse would be a direct appeal to the American people—to the ultimate source of authority for any constitution. To them, John Roberts's about-face revealed the failure, maybe even the treachery, of the governing establishment—including the establishment Republicans who had nominated and backed Roberts as chief justice. That judgment might be unfair—at the very least it is not completely true—but in any case, the Tea Party concluded that it was now urgently necessary to raise the consciousness of the American people to this new threat.

At this point we should note the paradoxical character of the Tea Party: It is a populist movement to defend the Constitution, but the Constitution is meant, among other things, to *limit* populism in our politics—to channel, moderate, and refine popular passion through constitutional forms, such as elections, officeholding, and the rule of law. The point was to ensure, as *The Federalist* put it, that the reason, not the passion, of the public would control and regulate the government. So it was incumbent on the Tea Party to try to keep its populist means in line with its constitutional ends. And it is in this respect that the Tea Party has sometimes fallen short.

Last fall, the Tea Party seized upon the latest Continuing Resolution to try to bring down Obamacare. Granted, Continuing Resolutions, the multi-thousand page omnibus spending bills that pass for appropriations bills these days, are abdications of Congress's own budget process and derelictions of its constitutional duty to protect the public purse. Yet bad things can sometimes be used for good purposes. But mainstream Republican leaders warned that the Tea Party senators never had a realistic plan to obtain the votes to defund Obamacare in the Senate, or

beyond that to overcome Obama's veto pen. President Obama needed to fund the government, but he felt, rightly it turned out, that he could hold out longer than the GOP could. The architects of the government shutdown could never answer the question of how victory might be achieved.

Apparently their hope was that an outraged American public—fresh from voting in 2012 to re-elect Obama and to increase the Democratic majority in the Senate by two seats—would rise up and put such pressure on recalcitrant Democrats that they would defund the program that their party had been longing for since Franklin Roosevelt. In relying on such an unlikely outcome, the Tea Party showed its own populist brand of impatience with the separation of powers, bicameralism, and the legislative process that the Constitution prescribes. In imagining that the American public could be persuaded to reconsider the results of an election hardly a year old, the Tea Party surrendered to its own version of the “leadership theory” that liberals have long preferred to legislative-executive politics of the constitutional sort. The implicit argument was that by going over the heads of party leaders and constitutional officeholders to appeal directly to the people, the Tea Party could generate its own mandate to trump the mandate just awarded in the election.

Appealing to the people, of course, is a time-honored tactic: Ronald Reagan was famous for saying that if you can't make politicians see the light, you can at least make them feel the heat! But Reagan appealed directly to the people from the bully pulpit of the presidency, not from the Senate floor, and he made sure to explain the issue in pellucid and persuasive terms. We learned from Speaker of the House Newt Gingrich in the 1990s that it really is impossible to run American government from Congress. So as the Tea Party's unreasonable hopes faded, it had to settle for less and less: delaying the individual mandate rather

than defunding it; verifying the subsidies of policyholders in the insurance exchanges; abolishing the medical devices tax; delaying the medical devices tax; and so on. The Tea Party leaders were pushed back and back and were forced to ask for less and less, until they ended up with virtually nothing.

The Need for Political Thinking

To summarize, the Tea Party has been right about the threat posed to the fabric of constitutional government by Obamacare and by other brazen assaults on the Constitution, such as President Obama's asserted prerogatives to choose which laws to enforce and to make recess appointments when there was no recess. But the establishment Republicans were right about the outcome of the effort to defund Obamacare by tying it to the Continuing Resolution. One might conclude then that these two groups need each other—not only in the sense that they need each other to get to a majority in the House of Representatives, but also, at least for the time being, in the sense that each supplies the other's defects. In that light it is neither wise nor moderate for members of either group to lambaste members of the other as political enemies—something of which both sides have been guilty.

The Tea Party could do itself and the country a great service by working out what a return to constitutional government might really mean, and thus the strategy and tactics appropriate to that. What is needed is less populism and more political thinking on its part, or on the part of its trusted advisors. Political thinking and constitutional thinking are not opposed, of course, any more than putting together a political majority and defending the Constitution are opposed. Indeed, these two great duties, properly understood, are implicit in each other. It's doubtful that the Republican party can

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succeed without doing both.

After a century of Progressive mining and sapping of the Constitution, the great document we count on to defend us now needs our defense, and the form of government issuing from the

Constitution is itself in need of restoration and renewal. Let me end by giving a few examples of how to bring the spirit of the Constitution and the spirit of conservatism closer together.

Tea Party leaders are eloquent on

the point that the Constitution does not make the Supreme Court its final arbiter. Let them apply that insight to Obamacare. The problem with Obamacare is not merely that it will ruin health care, but that it undermines the whole notion of rights—natural rights—that come not from government but from our own nature and from God. Yes, it is unfair, unworkable, and unaffordable. But to leave the argument at that leaves the Constitution out of the picture. So when denouncing Obamacare, let's hear more about its unconstitutional aspects.

The fattest target is the Independent Payments Advisory Board (IPAB), which is unconstitutional on its face. IPAB consists of 15 members who are not elected by the people but appointed by the president. Their job is to make recommendations to limit Medicare's budget by reducing reimbursements to doctors. Unless both houses of Congress overrule IPAB by passing their own equal or greater cuts to Medicare, IPAB's proposals automatically become law. What's worse, Obamacare conspires to make IPAB permanent by mandating that no resolution to repeal it can be introduced before January 1, 2017, or after February 1, 2017. In other words, the Constitution would be operational for one month only—and even then the repeal must pass by August 15, 2017, in order to be valid, and it could not take effect until 2020!

Congress could presumably unravel these restrictions and undo IPAB anytime it wanted. Nonetheless, the spirit and the letter of this kind of regulation suggest just how averse (and adverse) to the Constitution Obamacare really is. To think that Congress couldn't repeal it, except for one month, and that even then repeal wouldn't take effect for three years afterwards, is astounding. Why don't Tea Party leaders talk more about *that* in condemning Obamacare? I think the American people

would be indignant over this attack on their liberty to govern themselves. But they won't be angry if conservatives don't inform them about this travesty.

Conservatives should be calling for other kinds of reforms as well, in order to apply the consent of the governed to regulations which form so much of the substance of modern government. Let's call for a vote by Congress on all regulations costing \$100,000,000 or more. That's one idea already in circulation. Or why not require the Appropriations Committee, or some combination of committees and committee chairmen in Congress, to approve all regulations, approved by any agency, so that there has to be some democratic say-so before any regulations become law? That does not require changing the Constitution, only a change in the law. We should also require Congress to follow its own budget rules. This doesn't require an amendment either, only vigorous partisanship on the part of Republicans of every variety. We should insist on 13 appropriations bills for the 13 departments, which would give both parties a chance to fight it out, make what cuts we can make, and decide what is more essential and what is less essential. These kinds of reforms, well short of constitutional amendments, would help to reinvigorate congressional accountability and constitutional government.

If conservative officeholders don't start to correct these structural deformations in our government, and if the Tea Party doesn't turn its formidable patriotism and energy to enlightening the American people about how we are losing control of our own destiny,

then no matter how many good policies we enact, or how low we set tax rates, the body politic will continue to sicken, and self-government will slip through our fingers. ■



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