



What if the Tea Party Wins?

They Have a Plan for the Constitution, and it Isn't Pretty

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Introduction

In the Tea Party's America, families must mortgage their home to pay for their mother's end-of-life care. Higher education is a luxury reserved almost exclusively to the very rich. Rotten meat ships to supermarkets nationwide without a national agency to inspect it. Fathers compete with their adolescent children for sub-minimum wage jobs. And our national leaders are utterly powerless to do a thing.

At least, that's what would happen if the Tea Party succeeds in its effort to re-imagine the Constitution as an antigovernment manifesto. While the House of Representatives pushes Rep. Paul Ryan's (R-WI) plan to phase out Medicare, numerous members of Congress, a least one Supreme Court justice, and the governor of America's second-largest state now proudly declare that most of the progress of the last century violates the Constitution.

It is difficult to count how many essential laws would simply cease to exist if the Tea Party won its battle to reshape our founding document, but a short list includes:

- Social Security and Medicare
- Medicaid, SCHIP, and other health care programs
- All federal education programs
- All federal antipoverty programs
- Federal disaster relief
- Federal food safety inspections and other food safety programs
- Child labor laws, the minimum wage, overtime, and other labor protections
- Federal civil rights laws

Indeed, as this paper explains, many state lawmakers even embrace a discredited constitutional doctrine that threatens the union itself.

What's at stake

The Tea Party imagines a constitution focused entirely upon the Tenth Amendment, which provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”—which is why their narrow vision of the nation’s power is often referred to as “tenthism.”¹ In layman’s terms, the Tenth Amendment is simply a reminder that the Constitution contains an itemized list of federal powers—such as the power to regulate interstate commerce or establish post offices or make war on foreign nations—and anything not contained in that list is beyond Congress’s authority.

The Tea Party, however, believes these powers must be read too narrowly to permit much of the progress of the last century. This issue brief examines just some of the essential programs that leading Tea Partiers would declare unconstitutional.

Social Security and Medicare

The Constitution gives Congress the power “to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States,” thus empowering the federal government to levy taxes and leverage these revenues for programs such as Social Security and Medicare. A disturbingly large number of elected officials, however, insist that these words don’t actually mean what they say.

In a speech to the conservative American Legislative Exchange Council, Texas Gov. Rick Perry listed a broad swath of programs that “contradict the principles of limited, constitutional government that our founders established to protect us.”² Gov. Perry’s list includes Medicare and “a bankrupt social security system, that Americans understand is essentially a Ponzi scheme on a scale that makes Bernie Madoff look like an amateur.” And Perry is hardly the only high-ranking elected official to share this view.

Sen. Mike Lee (R-UT) mocked President Franklin Delano Roosevelt for calling upon the federal government to provide “a decent retirement plan” and “health care” because “the Constitution doesn’t give Congress any of those powers.”³ Rep. Bob Goodlatte (R-VA), who engineered the House of Representatives’s dramatic reading of the Constitution earlier this year, claimed that Medicare and Social Security are “not in the Constitution” and are only allowed to exist because “the courts have stretched the Constitution to say it’s in the general welfare clause.”⁴ Sen. Tom Coburn (R-OK) said we should eliminate Medicare because “that’s a family responsibility, not a government responsibility.”⁵

Because this erroneous view of our founding document is rooted in an exaggerated view of the Tenth Amendment’s states rights’ provision, many so-called tenters claim that

eliminating Social Security and Medicare wouldn't necessarily mean kicking millions of seniors out into the cold because state governments could enact their own retirement programs to pick up the slack. This proposal, however, ignores basic economics.

Under our current system, someone who begins their career in Ohio, moves to Virginia to accept a better job offer, and then retires in Florida pays the same federal taxes regardless of their residence. These taxes then fund programs such as Medicare and Social Security. If each state were responsible for setting up its own retirement system, however, the person described above would pay Ohio taxes while they worked in Ohio, Virginia taxes while they lived in Virginia, and would draw benefits from the state of Florida during their retirement. The state which benefited from their taxes would not be the same state that was required to fund their retirement, and the result would be an economic death spiral for states such as Florida that attract an unusually large number of retirees.

For this reason, tenther proposals to simply let the states take over Social Security and Medicare are nothing more than a backdoor way to eliminate these programs altogether. If the Tea Party gets its way, and our nation's social safety net for seniors is declared unconstitutional, millions of seniors will lose their only income and their only means to pay for health care.

Medicaid, the State Children's Health Insurance Program, and other health care programs

The Tea Party's constitution has plenty of bad news for Americans below the retirement age as well. Rep. Virginia Foxx (R-NC), for example, recently claimed that any federal involvement in health care whatsoever is unconstitutional because "the words 'health care' are nowhere in the Constitution."⁶

Sen. Coburn lumped Medicaid in with Medicare when he claimed that providing for the frailest Americans is a "family responsibility,"⁷ and Gov. Perry includes Medicaid on his list of programs that "contradict[] the principles of limited, constitutional government."⁸ Sen. Mike Lee's (R-UT) claim that "the Constitution doesn't give Congress" any authority over health care is a blanket statement encompassing all federal health programs.⁹

If this vision were to be implemented, all federal health care programs would simply cease to exist and millions of Americans would lose their only access to health insurance.

Education

Education is also on the Tea Party's chopping block. Rep. Scott Garrett (R-NJ) routinely grills education secretaries at congressional hearings, insisting that the

Constitution does not authorize any federal involvement in education.¹⁰ Similarly, Rep. Foxx insists that “we should not be funding education” because she insists doing so violates the Tenth Amendment.¹¹ And Sen. Coburn does not “even think [education] is a role for the federal government.”¹²

In its strongest form, this position wouldn’t just eliminate federal assistance for state-run public schools. It would also eliminate programs enabling Americans to pay for their college education. Millions of students would lose their Pell Grants and federal student loans if the Tea Party’s full vision of the Constitution were implemented.

Some tenthers, however, offer a slightly less drastic position. It is commonplace for the federal government to grant money to the states if those states agree to comply with certain conditions. Federal law, for example, provides generous public education grants provided that states gather data on student achievement and comply with other such conditions. Many Tea Partiers argue that these conditions violate the Constitution. Thus, Rep. Blake Farenthold (R-TX), claims that the Constitution only permits the federal government to provide states with “block grants.”¹³

The truth, however, is that the federal government has never told states how to educate their children—and it could not do so if it tried. Under a Supreme Court decision called *Printz v. United States*,¹⁴ federal laws ordering a state to take a specific action actually do violate the Tenth Amendment. So, the state of Texas is perfectly free to turn down federal grants if they do not like the conditions attached to them.

Moreover, it is not clear how federal grants of any kind can exist if Congress is not allowed to attach conditions to them. If Congress cannot constitutionally require states to spend grant money on standardized testing, for example, how can they require that it be spent on education and not on building a new wing for the governor’s mansion? Thus, even the slightly more moderate position advocated by people like Rep. Farenthold would likely eliminate the federal government’s ability to provide educational assistance to low-income students or otherwise help fund public schools.

Antipoverty programs, federal disaster relief, and other help for the less fortunate

Sen. Lee would go even further in cutting off assistance for low-income Americans. In an interview with a Utah radio host, Lee claimed that the framers intended all anti-poverty programs to be dealt with exclusively at the state level.¹⁵ This would not only eliminate programs like income assistance and food stamps, it could threaten unemployment insurance, federal job training, and other programs intended to provide a bridge out of poverty.

In the same interview, Sen. Lee claimed that federal relief for hurricane, earthquake, tornado, and other disaster victims is “one of many areas where we ought to focus on getting that power back to the states,”¹⁶ a position that would kill the Federal Emergency Management Agency and prevent the nation as a whole from rallying to the support of a state whose financial resources are overwhelmed by a major natural disaster.

Food safety

Sen. Lee also claims that “the framers intended state lawmakers deal with” food safety in this same radio interview.¹⁷ This position would not simply endanger the residents of states with inadequate regulation of their food supply, it would also create costly and duplicative state inspection programs and impose logistical nightmares on food-importing states.

If a cow is raised in Texas, slaughtered in Oklahoma, and then sold as steaks in New York, which state is responsible for inspecting the meat? The likely answer is that all three states would have their own system of laws, tripling the regulatory compliance costs for the meat producer.

Moreover, if New York decides that Oklahoma’s inspections’ regime is inadequate, its only recourse would be to require meat producers to submit their products to a customs check at the border before it could be sold in that state. The result would be higher taxes for New Yorkers forced to pay for these customs stations, and higher costs for businesses forced to submit to inspections every time they brought food across a state border.

Child labor laws, the minimum wage, overtime, and other labor protections

Nearly 100 years ago, the Supreme Court declared federal child labor laws unconstitutional in a case called *Hammer v. Dagenhart*.¹⁸ Twenty-two years later, the Court recognized that *Hammer*’s holding was “novel when made and unsupported by any provision of the Constitution,” and unanimously overruled this erroneous decision.¹⁹

Sen. Lee, however, believes that, while *Hammer* might “sound harsh,” the Constitution “was designed to be that way. It was designed to be a little bit harsh,” and thus we should return to the world where federal child labor laws are unconstitutional.²⁰ Moreover, Lee has a very powerful ally prepared to sweep away nearly all national protections for American workers.

Under existing Supreme Court doctrine, Congress’s authority to “regulate commerce . . . among the several states” includes the power to regulate the roads and railways used to transport goods in interstate commerce, as well as the goods themselves and the vehicles

that transport them. Additionally, Congress may regulate activities that “substantially affect interstate commerce.”²¹ This “substantial effects” power is the basis of Congress’s authority to make labor laws universal throughout all places of employment.²²

Yet Justice Clarence Thomas claimed in three separate cases—*U.S. v. Lopez*, *U.S. v. Morrison*, and *Gonzales v. Raich*—that this “substantial effects” test is “at odds with the constitutional design.”²³ It is possible that Thomas’s vision would still allow some limited federal labor regulation—such as a law prohibiting children from becoming railway workers—but anything resembling the essential web of federal laws that protect American workers today would be impossible.

Civil rights laws

Shortly after he won his party’s nod to be a U.S. Senate candidate, Sen. Rand Paul (R-KY) revealed that he opposes the federal bans on whites-only lunch counters and race discrimination in employment. In a rambling interview with MSNBC’s Rachel Maddow, Paul explained that, while he believes that Congress may ban discrimination from “public institutions,” he does not support antidiscrimination laws that regulate private business.²⁴

As Sen. Paul suggested in that interview, these basic civil rights laws—like national laws banning child labor and establishing a minimum wage—can be snuffed out of existence if Congress’s power to enact commercial regulations is read too narrowly.

In 1964, the Supreme Court unanimously upheld the federal ban on whites-only lunch counters—once again relying on the “substantial effects” test to do so.²⁵ For this reason, it is likely the Justice Thomas would strike down this and other federal laws protecting civil rights.

The union

Gov. Perry suffered well-deserved ridicule when he suggested in 2009 that Texas may secede from the union if “Washington continues to thumb their nose at the American people.”²⁶ But Gov. Perry’s ill-considered remark is merely a distraction compared to a much larger movement to effectively secede from the union one law at a time.

Gov. Perry joins lawmakers from New Hampshire,²⁷ Montana,²⁸ Virginia,²⁹ Idaho,³⁰ Florida,³¹ and many other states in backing unconstitutional state laws purporting to “nullify” a federal law. Many state legislatures have passed, and a few governors have signed, laws claiming to nullify part of the Affordable Care Act, and Perry signed a law that partially nullifies federal light bulb standards.³²

Nullification is an unconstitutional doctrine claiming that states can prevent a federal law from operating within their borders. Although nullification conflicts directly with the text of the Constitution, which provides that Acts of Congress “shall be the supreme law of the land ... anything in the Constitution or laws of any State to the contrary notwithstanding,” it has experienced a significant revival among state lawmakers eager to second-guess national leaders’ decisions.

This doctrine is not simply unconstitutional, it is a direct attack on the idea that we are the *United States* of America. As James Madison wrote in 1830, allowing states to simply ignore the laws they don’t want to follow would “speedily put an end to the Union itself.”³³

Conclusion

America has long endured the occasional politician eager to repeal the entire 20th Century, but, as President Dwight Eisenhower observed nearly 60 years ago, “Their numbers [were] negligible and they are stupid.”³⁴ Sadly, this is no longer the case. Tenters increasingly dominate conservative politics and their numbers are growing.

If this movement succeeds in replacing our founding document with their entirely fabricated constitution, virtually every American will suffer the consequences. Seniors will lose their Social Security and Medicare. Millions of students could lose their ability to pay for college. And workers throughout the country will lose their right to organize, to earn a minimum wage, and to be free from discrimination.

Worse, because the Tea Party believes their policy preferences are mandated by the Constitution, they would do far more than simply repeal nearly a century of essential laws. Once something is declared unconstitutional, it is beyond the reach of elected officials—and beyond the voters’ ability to revive simply by tossing unwise lawmakers out of office.

For this reason, the Tea Party’s agenda is not simply one of the most radical in generations, it is also the most authoritarian. They do not simply want to eliminate decades of progress; they want to steal away “We The People’s” ability to bring it back.

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Endnotes

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- 17 *Ibid.*
- 18 247 U.S. 251 (1918).
- 19 *United States v. Darby*, 312 U.S. 100, 116 (1941).
- 20 Millhiser, *supra* note 9.
- 21 *Gonzales v. Raich*, 545 U.S. 1, 23 (2005).
- 22 *Darby*, 312 U.S. at 119.
- 23 *Raich*, 545 U.S. at 67 (Thomas, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J. concurring: "I write separately only to express my view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress's powers and with this Court's early commerce clause cases.); *United States v. Lopez*, 514 U.S. 549, 584 (1995) ("I believe that we must further reconsider our 'substantial effects' test" . . .).
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