
Tea Party Constitutionalism: Does the “Astroturf” Have Roots in the History of the Constitution?

by RYAN D. MURPHY*

I. Introduction

On February 19, 2009, the Tea Party was born.¹ MSNBC reporter Rick Santelli, standing on the floor of the Chicago Mercantile Exchange, castigated the newly elected Obama administration for supporting federal policy that subsidized the errors of marketplace losers with the earnings of others.² Santelli ranted that the federal government’s bailout of the collapsed housing market should not be enacted because, “This is America!”³ This speech is widely regarded as the birth of the Tea Party.⁴ It marked the beginning of the prominence of Tea Party values in American politics—the White House publicly condemned the speech within twenty-four hours.⁵ Consideration of the Santelli speech is necessary to gain an understanding of the Tea Party because critics and supporters alike recount the emergence of the Tea Party with this legendary episode.

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1. KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* 13 (2010).

2. See Heritage Foundation, *CNBC’s Rick Santelli’s Chicago Tea Party*, YOUTUBE (Feb. 19, 2009), <http://www.youtube.com/watch?v=zp-Jw-5Kx8k> (originally aired on a CNBC television broadcast, Feb. 19, 2009).

3. *Id.*

4. See DICK ARMEY & MATT KIBBE, *GIVE US LIBERTY: A TEA PARTY MANIFESTO* 19–20 (2010). See also ZERNIKE, *supra* note 1, at 13; see also Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 *ARIZ. L. REV.* 827, 833 (2011).

5. THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 7 (2012).

The Tea Party is a controversial force in contemporary American politics. Some argue the Tea Party is nothing new, just another movement in a long tradition of insurgencies that have challenged the moderate tendencies in the Republican Party.⁶ Others assert that the group acts at the behest of its billionaire political contributors.⁷ This criticism views the organic nature of the Tea Party movement as a myth—look closer, and you will see that the grassroots are actually “astroturf.” But the Tea Party deserves to be taken seriously on its own terms. It has a large member base comprised of numerous chapters spanning the geography of the United States.⁸ It has enjoyed tremendous political successes, from replacing the long-held Senate seat of Democrat Ted Kennedy with a Republican in late 2009 to the capture of as many as 700 state legislature seats in the 2010 elections.⁹ These victories prove that, regardless of its “authenticity,” the Tea Party can compete for the most prestigious prizes in politics. Much ink has been spilled regarding the merits and demerits of the Tea Party movement and the eccentricities of its members, but the Tea Party’s constitutional claims have only been superficially analyzed.

This paper asserts that the Tea Party’s constitutional claims about economic liberty are rooted in the tradition of Jacksonian populism. Contrary to the claims of Tea Party-affiliated groups, it is not an originalist movement. At the same time, contrary to the claims of critics, the Tea Party’s roots in Jacksonian populism mean that its political and constitutional values are not incoherent or totally devoid of historical precedent. This conclusion emerges from an analysis of the Tea Party’s rhetoric about limited government in the context of their constitutional theory regarding liberty of contract. Liberty of contract refers to the idea of “the freedom of two or more people to make any agreement that they might desire.”¹⁰ As can be inferred by the group’s name, the Tea Party proclaims an unflinching allegiance to the vision of the Founding Fathers and an originalist interpretation

6. GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* 387 (2012).

7. SKOCPOL & WILLIAMSON, *supra* note 5, at 5. *See also* JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* 9 (2010).

8. SKOCPOL & WILLIAMSON, *supra* note 5, at 22.

9. LEPORE, *supra* note 7, at 9.

10. PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 104 (1990).

of the Constitution.¹¹ Economic liberty is central to its constitutional identity.¹² The Tea Party's view of economic liberty translates into a theory of liberty of contract with clear parallels to the Supreme Court's decisions of the *Lochner* era. However, a close comparison of the Tea Party's economically libertarian convictions against revisionist *Lochner* scholarship reveals that Tea Party constitutionalism is not a veil masking greedy corporate interests. Rather, it justifies its vision upon Jacksonian constitutional principles—anti-privilege, fervent opposition to government corruption, and political equality.

The Tea Party is neither a “top-down” organization with clearly defined party leadership, nor simply a subset of the Republican Party.¹³ A lack of a formal structure poses problems ascertaining uniform Tea Party policy positions and the group's constitutional values. To form a definition of Tea Party constitutionalism, this note's research began with the work of journalists and academics that have written about the Tea Party. These studies were useful for gleaning core messages from Tea Party groups. More importantly, these works provided leads to additional sources of prominent Tea Party chapters, supporters, and leaders. Analyzing the policy platforms and press releases of groups such as the Tea Party Patriots and Tea Party Express, as well as the views of prominent Tea Party “celebrities,” like Dick Armey and Congresswoman Michele Bachmann, were essential to constructing a theory of Tea Party constitutionalism that fit with the ethos of chapters across the country. A recent study by Harvard political scientists Theda Skocpol and Vanessa Williamson provided essential insights into the minds of Tea Party supporters through poll research.¹⁴ Skocpol's and Williamson's analysis of the extensive survey work of Tea Party groups is useful because it brings the views of the Tea Party's grassroots membership base into focus.

This paper is divided into three sections. Section II defines the principles of Tea Party constitutionalism, including its claim regarding

11. SKOCPOL & WILLIAMSON, *supra* note 5, at 48.

12. It is important to state from the outset that this note's focus on the constitutional consequences of the Tea Party's economic viewpoints is by no means a comment on the validity of other interpretations of the group. For example, some authors have emphasized that the Tea Party's focus on individual liberties is coded language for a fundamentally racist and nationalist ideology. ZERNIKE, *supra* note 1, at 51. *See also* SKOCPOL & WILLIAMSON, *supra* note 5, at 68–71.

13. SKOCPOL & WILLIAMSON, *supra* note 5, at 12.

14. *See generally* SKOCPOL & WILLIAMSON, *supra* note 5.

a constitutional right to contract. Section III connects the Tea Party to the *Lochner* era's reliance on the liberty of contract and foreshadows the Jacksonian principles that undergird both. Section IV explores the defining legacies of President Andrew Jackson's laissez-faire constitutional outlook by examining at his crusade against undue special privilege in government. Special attention is paid to the vision of limited government shared by both Jackson and the Tea Party. Finally, section V argues that, despite the claims of its proponents, Tea Party constitutionalism should not be considered an originalist movement.

II. A Definition of Tea Party Constitutionalism

The Santelli speech, quoted above, is important because it captures the essence of Tea Party constitutionalism: a laissez-faire vision that emphasizes individualism, economic liberty, an extremely circumscribed role for the federal government, and a strong gesturing against all forms of elitism. One prominent group, the Tea Party Patriots, describes the Tea Party movement as a grassroots organization formed to promote ideas of fiscal responsibility, constitutionally limited government, and free markets.¹⁵ Likewise, the Tea Party Congressional Caucus, in the words of its leader, Congresswoman Michele Bachmann, states that the Tea Party “is issue-based in nature, promoting the principles of fiscal responsibility, limited government and a strict adherence to the Constitution.”¹⁶ United States Senator Rand Paul, a prominent Tea Party supporter, articulated Tea Party views in his response to President Obama's 2012 State of the Union speech: “American people want the government to get out of their way. They want to be left alone. They want to run their businesses as they please without job-killing regulations and taxes suffocating their prosperity.”¹⁷ Tea Party critics agree that the movement is ardently pro-market and anti-federal government power.¹⁸ The relationship between these Tea Party values permits an inference of the group's belief in a fundamental right to contract protected by the Constitution.

15. TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/about/> (last visited Mar. 30, 2012).

16. TEA PARTY CAUCUS, <http://teapartycaucus-bachmann.house.gov/about-me/mission> (last visited Mar. 30, 2012).

17. RAND PAUL, UNITED STATES SENATOR, http://paul.senate.gov/?p=press_release&id=427 (last visited Mar. 30, 2012).

18. Goldstein, *supra* note 4, at 844.

A central quality of Tea Party constitutionalism is its prioritization of economic freedoms.¹⁹ The following quote by President Ronald Reagan, cited by the Tea Party Patriots, captures the importance of economic liberty to the Tea Party vision:

We who live in free market societies believe that growth, prosperity and ultimately human fulfillment, are created from the bottom up, not the government down. Only when the human spirit is allowed to invent and create, only when individuals are given a personal stake in deciding economic policies and benefitting from their success—only then can societies remain economically alive, dynamic, progressive and free.²⁰

This quote highlights the idea that economic freedom is central to political liberty; government necessarily frustrates economic freedom, and therefore, democracy requires policies that limit government in order to promote economic liberty. “Tea Partiers are prickly about any use of government regulations to limit the pure autonomy of businesses and owners of private property,” write political scientists Skocpol and Williamson.²¹

Inferring a constitutional right to contract from these abstract principles is not a stretch. At least one Tea Party-affiliated group expressly advocates the existence of a fundamental right to contract contained in the Constitution:

[The Independence Caucus] subscribes to the self-evident principle that the United States is a Constitutional Republic that is subject to the Rule of Law and the Right to Contract. . . . The ‘Right to Contract’ is the freedom of individuals to bargain among themselves the terms of their own contracts, without government interference.²²

19. *Id.* See also Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and The Fight Over Health Care*, 27 J.L. & POL. 177, 185 (2011).

20. MARK MECKLER & JENNY BETH MARTIN, *TEA PARTY PATRIOTS: THE SECOND AMERICAN REVOLUTION* 42–43 (2012).

21. SKOCPOL & WILLIAMSON, *supra* note 5, at 56.

22. See INDEPENDENCE CAUCUS, http://icaucus.org/index.php?option=com_content&view=article&id=548-&Itemid=327 (last visited Mar. 20, 2012). The Independence Caucus is a group that provides support to Tea Party groups. ZERNIKE, *supra* note 1, at 69.

This quote showcases a constitutional vision that roots economic liberty in a natural right to property. It is another example of the Tea Party's worship of private economic decision-making.²³ This vision relies upon the power of market forces, as opposed to government action, to properly allocate social and economic wealth and status in civil society.²⁴

A second key component of Tea Party constitutionalism is the emphasis on a limited federal government.²⁵ The Tea Party is more extreme in its view of limited government than its Republican counterpart. The following mission statement of a Tea Party group captures the connection between its support of individualism and its opposition to federal power:

Constitutionally limited government means power resides with the people and not with the government. Governing should be done at the most local level possible where it can be held accountable. America's founders believed that government power should be limited, enumerated, and constrained by our Constitution. Tea Party Patriots agree. The American people make this country great, not our government.²⁶

In this quote, individualism is the bulwark against federal power. In many respects, it is difficult to separate Tea Party economic values from the group's passionate views about limited government because limited government is viewed as necessary in order to give individuals greater control over the economy.²⁷ "Members of the Tea Party movement are focused on defending individual freedoms and economic liberty because one does not exist without the other," declare the founders of FreedomWorks, another prominent Tea

23. MECKLER & MARTIN, *supra* note 20, at 33.

24. SKOCPOL & WILLIAMSON, *supra* note 5, at 57.

25. *See generally* TEA PARTY PATRIOTS, *supra* note 15; *see also* LEPORE, *supra* note 7, at 112.

26. TEA PARTY PATRIOTS, *supra* note 15.

27. FREEDOMWORKS, <http://www.freedomworks.org/about/about-freedomworks> (last visited Mar. 20, 2012). Another Tea Party affiliated group, Americans for Prosperity, defines itself as "an organization of grassroots leaders who engage citizens in the name of limited government and free markets on the local, state and federal levels." AMERICANS FOR PROSPERITY, <http://www.americansforprosperity.org/about> (last visited Mar. 20, 2012).

Party-affiliated group.²⁸ Like other conservative organizations, the Tea Party's vision of limited government emerges from its understanding of federalism as commanded by its originalist interpretation of the Constitution.²⁹ This leads to strong advocacy for states' rights.³⁰

Another essential component of Tea Party constitutionalism is its anti-elitist message.³¹ Opposition to elitism is not new to the modern Republican Party.³² Most recently, Rick Santorum appealed to Republican anti-elitism during his 2012 presidential campaign: "President Obama once said he wants everybody in America to go to college. What a snob."³³ Like other populist movements, the Tea Party shares a belief that each citizen can understand foundational texts, such as the Constitution, without reference to expert opinion.³⁴ The Tea Party is skeptical of the authority of educated "elites" to make decisions regarding what is best for other citizens.³⁵ The Tea Party romanticizes the virtues of the individual contrasted against perceived unqualified power. The ire of the Tea Party is equally distributed amongst politicians, civil servants, the Republican establishment, and the "educated," just to name a few. The common thread among these groups is that the Tea Party perceives them to be taking advantage of the powers of government when, in fact, these powers should be reserved to the people by the Constitution. Scott

28. ARMEY & KIBBE, *supra* note 4, at 66.

29. ZERNIKE, *supra* note 1, at 66.

30. SKOCPOL & WILLIAMSON, *supra* note 5, at 49. "In Arizona, Tea Party members invoked the Constitution to reinforce state sovereignty and highlight the sanctity of any and all gun rights, while in Virginia, the emphasis was on the state's capacity to opt out of health care reform. Of course, whatever any Tea Partier wants to do with his or her private property is everywhere justified in exalted Constitutional terms." *Id.*

31. *See generally* Goldstein, *supra* note 4.

32. In 2008, Presidential and Vice Presidential candidates, John McCain and Sara Palin discussed the meaning of elitism in an interview with NBC News's Brian Williams. Available at <http://www.youtube.com/-watch?v=Uw5SA7Hks9s> (last visited Mar. 30, 2012).

33. Felicia Sonmez, *Santorum: Obama is 'a snob' because he wants 'everybody in American to go to college,'* WASHINGTON POST ELECTION 2012 BLOG (Feb. 25, 2012, 08:31 PM ET), http://www.washingtonpost.com/blogs/election-2012/post/santorum-obama-is-a-snob-because-he-wants-everybody-in-america-to-go-to-college/2012/02/25/gIQATJffaR_blog.html.

34. SKOCPOL & WILLIAMSON, *supra* note 5, at 51. *See also* Goldstein, *supra* note 4, at 845.

35. MECKLER & MARTIN, *supra* note 20, at 46–47. Many Tea Party members share a disdain for educated people who try to devise plans or try to tell other citizens what to do. SKOCPOL & WILLIAMSON, *supra* note 5, at 53.

Brown framed his 2009 United States Senate victory speech in anti-elitist language by declaring that his supporters had sent a clear message to entrenched political leaders whose interests had diverged from those of the people.³⁶ The Tea Party viewed political newcomer Christine O'Donnell's victory in the 2010 Republican primary for Pennsylvania's seat in the United States Senate as a success because of its challenge to the Republican establishment, even though O'Donnell had no chance of actually winning the seat in the general election.³⁷

The pillars of Tea Party constitutionalism drive the group's platforms on major political issues. Tea Party opposition to excessive government spending and taxation, including the bailout of the national banking system in the wake of the 2008 financial crisis, opposition to the 2010 Affordable Healthcare for America Act ("Obamacare," in the eyes of its Tea Party detractors) and, finally, support for the value of American labor, all showcase the three pillars of Tea Party constitutionalism. Each of these issues is illustrative of the passion Tea Party members feel against perceived unconstitutional intervention by the federal government into the lives of individual citizens. These contemporary examples will serve as useful comparisons to Jacksonian constitutional values described below.

Opposition to federal taxation, spending, and "big" government were organizing principles of the modern Tea Party movement from the beginning. "The impetus of the Tea Party movement," writes Mark Meckler and Beth Martin, founders of the Tea Party Patriots, "is excessive government spending and taxation."³⁸ Increased debt will haunt the United States because of the burden it will impose on future generations in the form of increased taxes.³⁹ A politician's support of the Troubled Asset Relief Program ("TARP") made him or her a target of Tea Party opposition.⁴⁰ Tea Party groups distinguish themselves from other Republicans by their uncompromising opposition to increased federal government spending and taxation.⁴¹ The extremity of this position was on display when Tea Party

36. ZERNIKE, *supra* note 1, at 92.

37. KABASERVICE, *supra* note 6, at 390.

38. MECKLER & MARTIN, *supra* note 20, at 21. Some have stated that the "Tea" in Tea Party is an acronym for "Taxed Enough Already." LEPORE, *supra* note 7, at 37.

39. MECKLER & MARTIN, *supra* note 20, at 22.

40. *Id.* at 73.

41. *Id.* at 21.

congressional members preferred to shut down the federal government rather than approve new taxes in August 2011.⁴² Opposition to spending programs also serves the Tea Party objective of eviscerating the power of the federal government.⁴³

Opposition to taxes and government debt is one of the strongest Tea Party values. The Tea Party discusses its objections to high government debt levels as an impermissible taking of property from one group of citizens to benefit another group.⁴⁴ Eighty percent of Tea Party members oppose taxation against the super wealthy, even though the stated goal of such a policy is aimed to create a more equitable system and to improve the economy as a whole.⁴⁵ Journalist Kate Zernike quoted a Tea Party member expressing this vision of taxation: “it feels like a knife in my heart when I know that I have to pay more revenue to pay somebody else’s salary and somebody else’s benefits.”⁴⁶ Skocpol and Williamson also describe this Tea Party value: “For Tea party people, it is illegitimate to use taxes and public spending to redistribute wealth from productive taxpayers like themselves to people who have not earned their way.”⁴⁷ The Tea Party has redefined the word “redistribution” as a form of taxation that is an assault on a citizen’s most important property right—the right to work.

Distrust in the elites’ ability and desire to make good decisions on behalf of citizens also motivates the Tea Party stance against excessive government spending. FreedomWorks conveys this anti-elitist message, while also criticizing redistribution:

The biggest error made by advocates of government planning, from Marx to Keynes to Obama, is the assumption that bureaucrats and elected officials possess both the detailed knowledge and right motives to be able to solve the economic problems of a nation . . . In reality, public choices are driven by the interests of those making the choices—the politicians who draft, promote, and vote on legislation; and the special

42. SKOCPOL & WILLIAMSON, *supra* note 5, at 28.

43. *Id.* at 171.

44. MECKLER AND MARTIN, *supra* note 20, at 30, 42.

45. SKOCPOL & WILLIAMSON, *supra* note 5, at 31.

46. ZERNIKE, *supra* note 1, at 130.

47. SKOCPOL & WILLIAMSON, *supra* note 5, at 66.

interests that work to influence the political decision-making process.⁴⁸

From this perspective, economic intervention is unconstitutional because it transfers power from the citizenry to inept, or perhaps sinister, government officials acting upon their own self-interest.⁴⁹

Tea Party constitutional values also appear prominently in their critique of “Obamacare.” In some respects, Tea Party opposition to national healthcare legislation goes beyond its constitutional values:

At the very core of the ideals that make up this nation is the truth that our rights are God-given, and government should protect, rather than take away, our freedoms. Under Obamacare, the government has been given the power to punish any American for not buying something they do not want. This is not only unconstitutional, it is wrong.⁵⁰

The Tea Party critique of the law’s individual mandate is certainly a product of its constitutional vision that liberty of contract is a fundamental right.⁵¹ In an argument with Vermont Senator Bernie Sanders, newly elected Kentucky Senator and physician, Rand Paul articulated his opposition to the individual mandate portion of the health care law by likening the bill to slavery because it would permit the federal government to force him to perform work in his capacity as a medical provider.⁵² In the same vein as the group’s opposition to federal taxation, spending, and debt, Tea Party opposition to health care reform characterizes the mandate as an impermissible taking of a citizen’s property because the law forces the purchase of insurance without consent.

The anti-elitist element of Tea Party constitutionalism is also present throughout the group’s critique of national health care reform. The Tea Party rejects the idea that unelected and illegitimate bureaucrats should make decisions regarding the health, safety, and

48. ARMEY & KIBBE, *supra* note 4, at 94.

49. *See generally id.* at 47.

50. *See* CONGRESSWOMAN MICHELE BACHMANN, <http://bachmann.house.gov/news/documentprint.aspx?DocumentID=256883> (last visited Mar. 30, 2012).

51. *See generally* Leitch, *supra* note 19.

52. Michael Tennant, *Rand Paul: Right to Health Care is “Slavery,”* THE NEW AMERICAN (May 15, 2011, 9:30), <http://thenewamerican.com/usnews/health-care/7480-rand-paul-right-to-healthcare-is-slavery>.

lives of citizens.⁵³ Harsh language is used to condemn an administrative agency created by the Affordable Healthcare Act to make health care decisions: “undemocratic,” “unaccountable,” “secretive,” and “prone to corruption.”⁵⁴ “You don’t have to call it a ‘death panel’ to know it’s immoral,” FreedomWorks declares.⁵⁵ There is deep resentment toward government intrusion into citizens’ lives.⁵⁶ Opposition to health care reform reflects Tea Party prioritization of the individual above society. It is immaterial to many members of the Tea Party that in enacting national healthcare reform, Congress aimed to benefit the public at large through reduced federal spending and to provide help to the most vulnerable.⁵⁷

Tea Party constitutional values are expressed in the group’s support of the American worker. “A well-marked distinction between workers and non-workers—between productive citizens and the freeloaders—is central to the Tea Party worldview and conception of America,” write Skocpol and Williamson.⁵⁸ The federal government’s redistribution of resources from “earners” to “freeloaders” is illegitimate in the eyes of Tea Party members as misguided policy making.⁵⁹ The distinction between “unearned” and “earned” entitlement programs is necessary to understanding Tea Party constitutionalism.⁶⁰ Skocpol and Williamson’s study found that Tea Partiers distinguish between government-run benefit programs that have been “earned,” such as Social Security, Medicare, and veterans’ programs from those that simply go to “freeloaders” and run up the public debt.⁶¹ In polls, Tea Party proponents continue to view programs providing reimbursement of work they have already put into the programs favorably and not as “hand-me-out[s].”⁶² This stance on government entitlement programs makes sense if one understands the abstract exaltation of the American worker inherent in the Tea Party’s vision of liberty of contract as a fundamental right.

53. Dean Clancy, *Top Ten Reasons to Repeal IPAB Health Rationing Board*, FREEDOMWORKS (Mar. 25, 2012), <http://www.freedomworks.org/blog/dean-clancy/top-ten-reasons-to-repeal-ipab-rationing-board>.

54. *Id.*

55. *Id.*

56. *See generally* ZERNIKE, *supra* note 1, at 127.

57. *Id.*

58. SKOCPOL & WILLIAMSON, *supra* note 5, at 65.

59. *Id.* at 66.

60. *Id.* at 59.

61. *Id.* at 60.

62. *Id.* at 61.

A constitutional theory of liberty of contract is prevalent throughout the Tea Party's political campaigns. Congresswoman Michelle Bachmann publicly denounced the federal minimum wage as a regulation that hinders job creation.⁶³ From the Tea Party's vantage point, the federal minimum wage creates benefits for some while hindering benefits for others, most notably the unemployed. Liberty of contract also undergirds Tea Party opposition to public employee unions.⁶⁴ The Tea Party views public employees as receiving more favorable treatment compared to workers in the private sector.⁶⁵ The Tea Party believes the free market is fair and equal; therefore, parties bargaining on their own behalf create the best outcomes.⁶⁶ These ostensibly anti-labor positions are motivated by a vision of an egalitarian state that does not permit government favoritism of one group over another.

If the Tea Party message sounds familiar, this is because we have heard it before. The laissez-faire posture of Tea Party constitutionalism, culminating in a belief in an individual's fundamental right to contract, is not new to American constitutional discourse. There is a transparent connection between Tea Party claims about liberty of contract and the Supreme Court's development of the liberty of contract doctrine during the *Lochner* era. The decisions of the *Lochner* era and the Tea Party's conception of liberty of contract emerge from the Jacksonian concern that elitist government policymaking can only function as a corrupting influence upon individuals in civil society.

III. Liberty of Contract During the *Lochner* Era

From the turn of the nineteenth century until the onset of the Great Depression, the Supreme Court molded a liberty of contract doctrine similar to that promoted by the Tea Party. Liberty of contract, also sometimes known as economic substantive due process, refers to the constitutionally protected right of two or more parties to have the freedom to make agreements of their choosing without

63. Alex Wayne, *Bachmann Says She Would Eliminate Minimum Wage to Stimulate U.S. Economy*, BLOOMBERG NEWS, June 26, 2011, available at <http://www.bloomberg.com/news/2011-06-26/bachmann-says-she-would-eliminate-minimum-wage-to-spur-growth.html>.

64. David M. Patten, *Outrage: Government Workers Earn Up to \$18,000 More Than Private Sector Counterparts*, NEWSMAX, Mar. 1, 2011, available at <http://www.teaparty.org/article.php?id=494> (last visited Mar. 30, 2012).

65. Patten, *supra* note 64.

66. See *supra* notes 18–23 and accompanying text.

governmental interference.⁶⁷ The period during which liberty of contract was still good law is referred to as the *Lochner* era.⁶⁸ The Court found this substantive right in the Due Process clause of the Fourteenth Amendment.⁶⁹ Substantive due process refers to the right of the judiciary to invalidate legislation in order to protect vested property rights.⁷⁰ During the *Lochner* era, the Supreme Court found a state's use of its police powers unconstitutional if the law was not related to the health, safety, morals, or the general welfare of the public at large.⁷¹ One could describe the Court's decisions that defined the boundary between permissible police powers and impermissible abrogation of liberty to contract as unprincipled because the Court derived different conclusions from seemingly identical factual circumstances. Liberty of contract jurisprudence during the *Lochner* era was motivated in large part by a Jacksonian opposition to class legislation. This fact is useful for understanding the contradictory cases that comprise the *Lochner* era and the core tenets of Tea Party constitutionalism.

Lochner v. New York, decided in 1905, is essential for understanding Tea Party constitutionalism because the decision relied on the theory of a constitutionally protected liberty of contract.⁷² In *Lochner*, the Supreme Court invalidated a New York law that forbade employers from permitting bakers to work more than ten hours in a given workday.⁷³ The Court was not persuaded by the attenuated reasoning used by the New York legislature to justify the hours law as necessary to protect the health and welfare of the general public.⁷⁴ Instead, the majority was receptive to an alternative narrative: the law was class legislation enacted to support labor

67. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

68. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 10 (1993).

69. *Allgeyer*, 165 U.S. at 589.

70. RONALD D. ROTUNDA & JOHN E. NOWAK, *JUDICIAL CONTROL OF LEGISLATION PRIOR TO THE CIVIL WAR 2* Treatise on Constitutional Law §15(e) (2011). See also MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES. VOLUME II: FROM 1877 TO PRESENT* 504 (2d ed. 2002).

71. GILLMAN, *supra* note 68, at 10–11.

72. DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 2* (2011).

73. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

74. *Id.* at 60.

unions at the expense of non-unionized bakeries.⁷⁵ Under this theory, labor unions sought protective legislation knowing that small, non-unionized bakeries did not have the labor force necessary for compliance with the hours law. Failure to comply would result in fewer non-unionized bakeries, and therefore, a better bargaining position for unions. Necessary to the decision, the Court relied on the assertion that bakers as a group were competent of advocating on their own behalf as individuals to determine their working conditions.⁷⁶ The majority opinion refused to uphold legislation that benefitted one class, union workers, at the expense of others, individual workers and small bakery owners, without a suitable link to the needs of the community as a whole.⁷⁷

The *Lochner* decision meant that in 1905, eight justices of the Supreme Court agreed about a fundamental right to contract, but disagreed about the scope of a state's police powers capable of limiting its exercise. Justice Oliver Wendell Holmes's famous dissenting opinion forcefully argued that the majority was reading popular libertarian ideas about economics into the Fourteenth Amendment.⁷⁸ Though not quite as legendary as Holmes's dissenting opinion, Justice John Marshall Harlan also authored a dissent agreeing with the majority about the existence of liberty of contract as a fundamental right, but disagreeing with the Court's view of the reach of judicial review to invalidate laws found to be necessary by a state's legislature.⁷⁹

The *Lochner* Court's vision of economic liberty is similar to Tea Party constitutionalism because both share a conflicted conception of federalism. This consequence arises necessarily from the prioritization of economic liberty over the limited powers of the federal government. On one hand, since the federal government cannot be allowed to usurp a fundamental right, it is also inappropriate for the state to do so.⁸⁰ On the other hand, the conclusion that the Tea Party is comfortable with the *Lochner* decision is not readily apparent as Tea Party groups tout the virtues of federalism and chastise judicial intervention as repugnant and

75. MAYER, *supra* note 72, at 70.

76. *Id.* at 57.

77. GILLMAN, *supra* note 68, at 129.

78. *Lochner*, 198 U.S. at 75.

79. *Id.* at 65, 73.

80. *See supra* notes 18 through 23 and accompanying text.

undemocratic.⁸¹ Nevertheless, the Tea Party conviction of a fundamental right of liberty of contract is so essential to the group's goals that it would be comfortable with the judiciary overturning state legislation on that basis. There are several examples to illustrate this point.

First, the Tea Party formed as a protest to congressionally approved government spending.⁸² Spending, taxation, and debt remain illegitimate even though they were policies enacted by political majorities. Second, the Tea Party is vehemently opposed to national health care legislation on the basis that the government is empowered to make choices that should be left to individuals.⁸³ This bears a striking similarity to the *Lochner* court's refusal to uphold legislation that benefitted a class that could take care of itself.⁸⁴ Third, one of the arguments against the conservative credentials of 2012 Republican Party presidential nominee Mitt Romney is the Massachusetts health care law he enacted while governor of that state, sometimes called "Romneycare" because of its similarities to the Democrats' 2010 healthcare law. Congresswoman Bachmann declared the individual mandate contained in the Massachusetts legislation unconstitutional even though it was enacted by a state legislature.⁸⁵ This position is nearly indefensible under modern conceptions of federalism, but this critique against Romney's credentials reflects the strength of the appeal of liberty of contract to group members as a substantive and enduring freedom.

The Tea Party may believe in a stronger constitutional right to contract than the *Lochner* court would have approved. The Tea Party is more extreme than the *Lochner* court because of its narrower conception of a suitable "public" purpose for justifying state economic intervention under its police powers. An example supporting this claim can be seen in the Tea Party's claims about the power to tax. The Tea Party is opposed to the government's power to raise revenues in order to confer public benefit on the ground that it is redistribution.⁸⁶ Just as the *Lochner* majority sharply scrutinized

81. MECKLER & MARTIN, *supra* note 20, at 158.

82. *See supra* notes 37 through 42 and accompanying text.

83. *See supra* notes 49 through 56 and accompanying text.

84. *See supra* note 74.

85. Adam J. White, *When It Comes To Liberty, Michele Bachmann Knows It When She Sees It*, THE WEEKLY STANDARD, Sept. 6, 2011, available at http://www.weeklystandard.com/blogs/when-it-comes-liberty-michele-bachmann-knows-it-when-she-sees-it_592725.html.

86. *See supra* notes 37 through 42 and accompanying text.

the decisions of the New York legislature, a Tea Party Supreme Court, should it ever come to exist, would be expected to use the same level of scrutiny based on their skepticism of government. The reader may or may not find this scrutiny favorable, but it is reflective of the Tea Party's instinct to be deeply skeptical of any exercise of government power.

The similarities between the *Lochner* era Court and the Tea Party are not difficult to draw because both value a constitutional right to contract. However, the comparison must not end here. To do so would render the Tea Party's claims as an originalist movement untrue. Therefore, it is important to explore the origins of liberty of contract that predate the *Lochner* era. The origins of substantive due process, and with it the origins of liberty to contract, remain controversial. There is support for the contention that liberty of contract existed before the Civil War and the adoption of the Fourteenth Amendment.⁸⁷ Some historians argue that the Magna Charta signals the birth of substantive due process because it was the first time a constitution codified an individual's right to property free from expropriation.⁸⁸ Labor has been considered a property right as early as the 1600s.⁸⁹ The Supreme Court first addressed its authority to invalidate legislation on the basis of natural law very early in its history. In their famous exchange in *Calder v. Bull*, Justice Chase and Justice Iredell debated whether the Court could appeal to natural law in order to overturn congressional legislation.⁹⁰ Justice Chase wrote that there were certain inviolable rights of citizens no government could abrogate.⁹¹ Justice Iredell disagreed—he advocated judicial restraint by arguing that the Court did not have the authority to overturn a law “contrary to principles of natural justice” if the law complied with the federal Constitution.⁹²

87. MAYER, *supra* note 72, at 13.

88. FRANK R. STRONG, SUBSTANTIVE DUE PROCESS: A DICHOTOMY OF SENSE AND NONSENSE 3 (1986).

89. MICHAEL LES BENEDICT, *Laissez-Faire and Liberty: A Re-Evaluation of The Meanings and Origins of Laissez Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 315 (1985). “By the early 1600s Englishmen considered men's labor one of their property rights, and in an era when the common law was conceived to be the protector of the subject's property, it was inevitable that men would argue that it protected this right too. Even a royalist member of the Commons conceded by 1610 that ‘the Kinge [sic] cannot take away the meanes [sic] of any Man's living nor grant the one man shall have the sole trade of an occupation to the overthrow of others.’” *Id.*

90. *Calder v. Bull*, 3 U.S. 386 (1798).

91. *Id.* at 388.

92. *Id.* at 399.

The idea of substantive due process appeared in state courts before the Civil War. In *Wynehamer v. New York*, decided in 1850, a New York court invoked its state constitution to invalidate a statewide ban on alcohol on the basis that the ban was an impermissible expropriation of citizens' property.⁹³ The New York court reasoned that since all property was alike and since the legislature does not have the power to destroy property generally, it lacked the power to destroy specific property.⁹⁴ Echoing Justice Chase in *Calder*, the New York court stated it would be "absurd" to rule that due process commands that no person shall be deprived of property or rights, except in the event that the legislature determines to deprive a person of those rights.⁹⁵

Substantive due process also has origins in the history of American slavery. In *Dred Scott v. Sanford*, 60 U.S. 393 (1856), Justice Taney, a Jackson appointee, relied on substantive due process to rule that the Missouri Compromise could not abrogate vested property rights.⁹⁶ A dissent agreed that a government taking of property constituted a violation of the Due Process Clause.⁹⁷ Like *Wynehamer*, the *Dred Scott* decision conceived of broad property rights and a narrow power of a legislative body to abridge them. Abolitionism may also be responsible for the origin of the liberty of contract doctrine because of the movement's belief that government did not have the right to interfere in the making of private contracts.⁹⁸ The pre-Civil War "Free Labor" movement defined itself by its opposition to Southern slavery and was the heart of Republican ideology.⁹⁹ Slavery was antithetical to Republican ideology because

93. *Wynehamer v. People*, 13 N.Y. 378 (N.Y. 1856). See also UROFSKY & FINKELMAN, *supra* note 70 at 504.

94. *Wynehamer*, 13 N.Y. at 393.

95. *Id.* at 404.

96. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 10 (2011). See also GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 736 (6th ed. 2009). See also UROFSKY & FINKELMAN, *supra* note 70, at 504.

97. BERNSTEIN, *supra* note 96, at 10. "Abraham Lincoln, like *Scott* dissenting justice John McLean, argued that the problem with Taney's opinion was not its protection of property rights, but Taney's erroneous belief that for federal constitutional purposes slaves were mere property, like hogs or horses." *Id.*

98. Charles W. McCurdy, *Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, *Sup. Ct. Hist. Soc. Y.B.* 20, 26 (1984).

99. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11 (1995).

the system denied men the right to sell their own labor.¹⁰⁰ Most Republicans at the time felt that government should not regulate conditions of labor and that workers should protect themselves.¹⁰¹ This belief persisted even as industrialization changed the landscape of social relations in the United States.¹⁰² Central to this pre-industrialization ideology was the assumption that opportunity was invariably available to any able-bodied workingman.¹⁰³

Contemporary studies of the *Lochner* era use this historical foundation to support a theory of a “lost” constitutional liberty to contract. This theory should sound familiar—the Tea Party believes liberty of contract has a firmly rooted historical foundation.¹⁰⁴ Proponents of the “lost” theory argue that *Lochner* was correctly decided because the Court relied on precedent to invalidate a constitutionally impermissible New York state law.¹⁰⁵ Understanding these interpretations of *Lochner* are important to understanding the Tea Party because they lend support to the Tea Party’s fervent belief in a fundamental right to contract.

One such proponent, the Cato Institute’s David N. Mayer, argues that liberty of contract has an established history as a fundamental right protected by the federal Constitution.¹⁰⁶ To support his claim, Mayer argues that many of the rights in the Constitution can be viewed as a rejection against paternalism.¹⁰⁷ Mayer sees liberty of contract as an entrenched civil liberty that was replaced by a progressive vision of government armed with an expansive set of police powers.¹⁰⁸ Mayer argues the *Lochner* majority was deeply concerned with liberty and the need to protect against expropriation of property, including labor.¹⁰⁹ This vision conceives a strong Fourteenth Amendment capable of protecting fundamental economic rights from the reach of the states.¹¹⁰ Mayer characterizes *Lochner era* jurists as deeply fearful of a regression from “contract” back to

100. *Id.* at 41.

101. *Id.* at 26.

102. McCurdy, *supra* note 98, at 26.

103. FONER, *supra* note 99, at 27.

104. *See supra* notes 18 through 23 and accompanying text.

105. MAYER, *supra* note 72, at 117.

106. *Id.* at 117.

107. *Id.* at 13.

108. *Id.* at 95.

109. *Id.* at 53.

110. *Id.* at 42.

“status.”¹¹¹ Finally, Mayer argues that *Lochner era* decisions upholding the use of the police power were not intended to alter the fundamental right to contract, but rather reflected the Court’s fear of destroying principles of federalism.¹¹²

Another *Lochner* scholar, David Bernstein, also argues liberty of contract has a strong historical foundation and, for this reason, *Lochner* was decided correctly.¹¹³ This theory supports the Tea Party stance that a fundamental right to contract was envisioned by the Founding Fathers. Bernstein takes direct aim at the position that *Lochner* justices were merely crude apologists for capitalist excess and laissez-faire economics.¹¹⁴ To Bernstein, the *Lochner era* justices were primarily concerned with protecting civil liberties and contemporary academics have obfuscated this essential attribute of their jurisprudence.¹¹⁵ Bernstein argues that liberty of contract developed in order to provide a bulwark against an overreaching “progressive” police power.¹¹⁶ The impact of the Court’s upholding state exercises of police powers throughout the *Lochner era* was hugely consequential: “Opposition to libertarian notions of limited government united trust busters, labor reformers, eugenicists, prohibitionists, and others under the banner of progressive reform.”¹¹⁷

Lochner era liberty of contract cases relied as much on an opposition to class legislation as they did on a conception of natural law.¹¹⁸ A brief discussion of some of the most famous cases of the *Lochner era* is necessary to understanding the relationship between Tea Party constitutionalism and its historical antecedent: Jacksonian hostility to class legislation. In the *Slaughter-House Cases*, decided in 1873, New Orleans area butchers lost their challenge to a Louisiana law that created a monopoly in the meat industry for the purpose of improving sanitary conditions.¹¹⁹ Justice Field’s dissent impacted subsequent cases of the *Lochner era* because it adopted many of the butchers’ arguments about liberty of contract and opposition to class

111. MAYER, *supra* note 72 at 13, 51, 55.

112. *Id.* at 40.

113. BERNSTEIN, *supra* note 96, at 9.

114. *Id.* at 127.

115. *Id.* at 44.

116. *Id.*

117. *Id.*

118. GILLMAN, *supra* note 68, at 10.

119. *Slaughter-House Cases*, 83 U.S. 36, 56 (1872).

legislation.¹²⁰ Field believed the Fourteenth Amendment bestowed a right to contract capable of overturning Louisiana's creation of a monopoly that benefited a select, privileged minority.¹²¹ Field saw nothing less than the health of the Republic at stake and was offended that the Court would permit Louisiana to abrogate the most sacred of property rights—the right to work—and vest it in another citizen.¹²²

In *Holden v. Hardy*, decided in 1898, the Supreme Court defined the line between permissible abrogation of liberty to contract and impermissible use of police power by looking to whether the effect of the regulation served the public or unduly impacted a single class.¹²³ *Holden* involved a challenge to a Utah law regulating labor conditions in the mining industry.¹²⁴ The Court held that Utah had the right to regulate labor conditions of a dangerous occupation despite the fact that the law imposed costs on one class, mine owners, for the benefit of another, miners.¹²⁵ Safety concerns regarding a class engaged in a dangerous occupation were sufficient to uphold the exercise of police power despite the Court's recognition that the legislation bestowed unequal benefit.¹²⁶ In a contrary 1915 decision, *Coppage v. Kansas*, the Court invalidated a Kansas statute making "yellow-dog" agreements, a type of contract restricting an employee's ability to join a union, unenforceable.¹²⁷ The Court struck down the Kansas law because it interfered with the constitutional right to contract between employers and individual employees.¹²⁸ The Constitution prohibited interference with the economic relationship between "equal" parties unless the law was related to benefiting public health, safety, morals, or the general welfare.¹²⁹ Likewise, in *Adkins v. Children's Hospital*, decided in 1925, the Court struck down a Washington, D.C. minimum

120. GILLMAN, *supra* note 68, at 64–66.

121. *Slaughter-House*, 83 U.S. at 89.

122. *Id.* at 88–89.

123. *Holden v. Hardy*, 169 U.S. 366, 383 (1898).

124. *Id.* at 367.

125. *Id.* at 392.

126. *Id.*

127. *Coppage v. Kansas*, 236 U.S. 1, 13. (1915).

128. *Id.* at 11.

129. *Coppage*, 236 U.S. at 16.

wage regulation on the grounds that it only considered the needs of one party to a contract.¹³⁰

One can take issue with the logic the Court employed in the decisions of the *Lochner era*, but concerns about class legislation and undue privilege no doubt played a prominent role in each of these landmark opinions. Liberty of contract jurisprudence during the *Lochner era* cannot be understood without understanding the Court's hostility to class legislation. This begs the question: What was the origin of the Court's sensitivity to class legislation during this era? To find the source of this essential attribute of the *Lochner era*, we must return to the presidency of Andrew Jackson. In doing so, the true origins of Tea Party constitutionalism are unearthed.

IV. The Importance of Jacksonian Constitutionalism

President Andrew Jackson's constitutional legacy is defined by his crusade to remove artificial and economic privilege from government in order to create a democracy that more accurately represented popular interests.¹³¹ Jackson's veto of the Bank of the United States, delivered on July 10, 1832, exemplifies his constitutional vision:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . [E]very man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government.¹³²

This quote exhibits Jackson's opposition to privileged groups using the powers of government to their own advantage. Hostility to

130. *Adkins v. Children's Hospital*, 261 U.S. 525, 557 (1923). See also GILLMAN, *supra* note 68, at 169–70.

131. GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* 11 (2007). See also HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 48 (1990).

132. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 77 (2006).

government intervention in civil society is a Jacksonian principle the Tea Party promotes today. “The main tenet of the [Jacksonian] critique,” Jackson historian Gerald Magliocca writes, “was that the federal government threatened individual freedom because it was too powerful and controlled by unaccountable elites.”¹³³ The constitutional consequence of this view was to disfavor all forms of class legislation: laws that did not allocate benefits equally but instead served one class above an equally situated group.¹³⁴ Two events occurring during Jackson’s presidency, the veto of the Maysville Road project and his crusade against the Bank of the United States, are emblematic of his constitutional legacy against class legislation. These episodes showcase the reasons for the Jacksonian laissez-faire constitutional vision that later came to undergird *Lochner era* jurisprudence. In addition, Jackson’s crusade against the Bank and his opposition to public spending serves as a useful comparison to Tea Party constitutional claims made nearly two hundred years later.

In 1830, Congress approved federal funding to extend a sixty-mile road through Kentucky between the cities of Maysville and Lexington.¹³⁵ The entirety of the Maysville Road project would be confined to a single state, but proponents viewed the project as a step toward the development of a national system of roads throughout the United States and therefore as a benefit to the nation as a whole.¹³⁶ Despite the potential national benefit, President Jackson vetoed the legislation on the grounds that it impermissibly used federal funds to benefit a private corporation supplying capital improvements to a single state.¹³⁷

The Maysville Road veto message captures the contours of Jackson’s opposition to government concessions to special interests and provides insight into the justifications for Jackson’s laissez-faire constitutionalism. Jackson was unequivocal that he did not oppose all federal spending for economic development, but rather, he opposed federal spending benefiting parochial interests.¹³⁸ Jackson would not support economic progress if it meant a conferral of unequal benefits

133. MAGLIOCCA, *supra* note 131, at 11.

134. WATSON, *supra* note 131, at 145–47.

135. *Id.* at 135–36.

136. SEAN WILENTZ, *ANDREW JACKSON* 71 (2005).

137. MAGLIOCCA, *supra* note 131, at 29–30. *See also* WATSON, *supra* note 131, at 135–36.

138. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 327–28 (2005). *See also* Watson, *supra* note 131, at 137.

to some citizens at the expense of others.¹³⁹ The Maysville Road veto was the culmination of a fear that the potential benefit to be conferred upon a single state would lead to political corruption and an unequal distribution of national resources.¹⁴⁰ The veto also represents Jackson's interest in maintaining a limited federal government and his hostility toward increasing the national debt to fund myopic development projects.¹⁴¹

President Jackson's opposition to the existence of the Bank of the United States best exemplifies his laissez-faire constitutionalism, his populist vision, and his advocacy for a government free from corruption. The Bank was a divisive political issue from the time it was first chartered in 1787.¹⁴² It was established to serve numerous functions, including becoming the main depository of government funds, issuing currency, regulating smaller banks, and stimulating the flow of capital throughout the country.¹⁴³ The Bank was unique because it was a private corporation bestowed with the special privilege of access to public funds.¹⁴⁴ More importantly, the Bank was tremendously powerful because of its control over the nation's currency and credit supply.¹⁴⁵ The Bank's first charter expired in 1811.¹⁴⁶ After its absence throughout the War of 1812, the need for the Bank was recognized as necessary to order the finances of the United States.¹⁴⁷ Congress granted a new charter for the Bank, set to expire in 1836.¹⁴⁸ Andrew Jackson, first elected President in 1828, made the constitutionality of the Bank a central point of his 1832 reelection campaign.¹⁴⁹ Congress approved an extension of the

139. WATSON, *supra* note 131, at 135.

140. JOHN MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 137 (2009).

141. GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA* 52 (1959).

142. MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES. VOLUME I: FROM THE FOUNDING TO 1890* 133 (2d ed. 2002).

143. UROFSKY & FINKELMAN, *supra* note 142, at 132.

144. ARTHUR SCHLESINGER, *THE AGE OF JACKSON* 10 (1945). *See also* WATSON, *supra* note 131, at 138.

145. SCHLESINGER, *supra* note 144, at 75.

146. UROFSKY & FINKELMAN, *supra* note 142, at 218.

147. *Id.* at 218.

148. *Id.* at 219.

149. *Id.* at 283.

Bank's charter in 1832, but Jackson used his presidential veto power to strike the bill down.¹⁵⁰

Jackson was vehemently opposed to the Bank because he viewed it as an unjust manifestation of wealth and privilege at the expense of democracy. “[Jackson did not see] any constitutional authority for a federal bank,” writes Jackson historian Harry L. Watson, “regardless of what John Marshall’s Supreme Court may have said about the subject.”¹⁵¹ To Jackson, the Bank was a business undeserving of special treatment.¹⁵² Therefore, the grant of special privilege by the federal government did not serve any public benefit but only functioned as a lucrative government policy that lined the pockets of the Bank’s officers and shareholders.¹⁵³ Moreover, the Bank was antithetical to democracy because it undermined popular sovereignty and majority rule through its power to interfere in political and economic affairs.¹⁵⁴ The Jacksonian critique considered the Bank to be nothing less than a burgeoning aristocracy, incompatible with the American system of government.¹⁵⁵ Moreover, the Bank posed a threat to equal opportunity, the central tenet of Jacksonian constitutionalism.¹⁵⁶ Jackson’s veto of the Bank’s recharter represents his laissez-faire constitutionalism because it signified the removal of the federal government from private and business affairs.¹⁵⁷ The public viewed Jackson’s veto of the Bank’s recharter favorably because of the democratic and populist values espoused in Jackson’s veto message.¹⁵⁸

After the veto, Jackson’s critique of the Bank shifted to a more general critique of the banking system’s control over the money supply. The working classes shared Jackson’s feeling that ordinary citizens were cheated by paper money.¹⁵⁹ Jackson’s Bank veto

150. *Id.* at 284.

151. WATSON, *supra* note 131, at 140.

152. *Id.* at 143–44.

153. *Id.*

154. WILLENTZ, *supra* note 138, at 361, 365, 370.

155. SCHLESSINGER, *supra* note 144, at 125.

156. *Id.*

157. WILLENTZ, *supra* note 138, at 438.

158. WATSON, *supra* note 131, at 149.

159. SCHLESSINGER, *supra* note 144, at 120.

articulated his critique that the Bank's control over the money supply was invalid class legislation detrimental to the ordinary citizen:

If a State bank in Philadelphia owe the Bank of the United States and have notes issued by the St. Louis branch, it can pay the debt with those notes, but if a merchant, mechanic, or other private citizen be in like circumstances he can not by law pay his debt with those notes.¹⁶⁰

Jackson sought a policy of hard currency out of a concern that unscrupulous employers were cheating workers and consumers through use of worthless paper currency.¹⁶¹ Jackson's currency policy was the result of hostility to financial powers that could use paper money to exploit citizens for their own benefit.¹⁶² It is consistent with his view that government is used to serve the interests of those in power, namely the wealthy. Jackson also feared currency speculators capable of manipulating the value of money to obtain positions of power absent legitimate qualifications.¹⁶³ The hard money policy is in line with Jackson's general critique that a smaller government is preferred in order to limit the influence of powerful interests exercising privilege at the expense of the population.

The important lesson to draw from these select episodes of Jackson's presidency is the justification for hostility to government action. Jackson feared an expansive federal government as a threat to individual liberty because government was corrupted and controlled by elites.¹⁶⁴ Intervention in the economy was antithetical to republican government because it was an example of such corruption.¹⁶⁵ The existence of the Bank was all the evidence Jackson needed to prove that wealthy interests used government to wield power on their own behalf. As such, Jackson reasoned that a limited government was better suited to bestow equal protection under the law.¹⁶⁶ Free enterprise was viewed favorably because it was conceptualized in contrast to government power obtained through the

160. THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/ajveto01.asp (last visited Apr. 27, 2012).

161. WILLENTZ, *supra* note 138, at 163.

162. SCHLESSINGER, *supra* note 144, at 119.

163. SCHLESSINGER, *supra* note 144, at 167.

164. MAGLIOCCA, *supra* note 131, at 11. *See also* WATSON, *supra* note 131, at 84.

165. WATSON, *supra* note 131, at 81–82.

166. BENEDICT, *supra* note 89, at 319–20.

exercise of privilege.¹⁶⁷ Jacksonians strove for limited government to eliminate privilege and unleash natural economic forces that would spur economic development.¹⁶⁸

The principle values of Jacksonian constitutionalism extended beyond the years Jackson was in office. For example, in the 1830s, both sides of labor disputes characterized the fight in terms of equality in contrast to privilege.¹⁶⁹ Workers argued that they should be able to determine the cost of their labor instead of their employers; capitalists argued that workers should not be granted special privileges in their demands against the functioning of the free market.¹⁷⁰ Before the Civil War, nearly all states enacted constitutional measures to prevent the adoption of special privileges or monopolies.¹⁷¹ The fervor of opposition to class legislation is also demonstrated by the fact that subsequent policy makers, motivated by Jacksonian ideas, did not suggest greater indulgence toward class legislation, even on behalf of the poor.¹⁷² Similarly, Tea Party constitutionalism has merged economic prosperity into its critique of government.¹⁷³ The government, in their view, only serves negative functions: suppression of freedom, poor allocation of resources, and exploitation of the earnings of citizens.

The Supreme Court adopted Jacksonian hostility to class legislation during the *Lochner* era. Like Jackson, the *Lochner* court was sensitive to laws that appeared to be class legislation even as industrial development and income inequality made a theory of equal bargaining between parties increasingly untenable.¹⁷⁴ The Supreme Court adopted Jacksonian laissez-faire principles through the judicial invention of individual economic rights protected by a constitutional liberty of contract. *Lochner era* decisions struck down laws perceived as “unfair” to the business class, such as *Coppage*, while upholding laws that could be conceived as in the public’s interest, such as *Holden*. The incongruent opinions regarding state regulation of labor contracts, including the slim majority in the *Lochner* opinion, reflect the difficulty the Supreme Court had crafting this distinction but also

167. GILLMAN, *supra* note 68, at 36–37.

168. FONER, *supra* note 99, at 19.

169. GILLMAN, *supra* note 68, at 43.

170. GILLMAN, *supra* note 68, at 43.

171. BENEDICT, *supra* note 89, at 321.

172. *Id.* at 319–20.

173. *See supra* notes 24 through 29 and accompanying text.

174. GILLMAN, *supra* note 68, at 10.

affirm the role of a Jacksonian hostility class legislation present in its jurisprudence.

Tea Party constitutionalism is strongly influenced by *Lochner era* jurisprudence, just as *Lochner era* jurisprudence was driven by a Jacksonian fear of corrupt government intervention in the lives of citizens. Economic liberty is a cornerstone of both Tea Party constitutionalism and *Lochner era* jurisprudence. Jacksonian constitutional concerns about government interference have arisen again in the Tea Party's support for a return to a liberty of contract regime. Examples of parallels between the Tea Party and Jackson's constitutional vision are abundant.

Opposition to the Maysville Road project and the Bank of the United States serve as useful examples to illustrate the presence of Jacksonian constitutionalism inherent in the Tea Party's core values. Jackson vetoed the Maysville Road project because he opposed increasing the national debt to fund parochial interests. The Maysville Road project was vetoed not because of doubts regarding the extent of the benefits of the capital improvement, but because it was not sufficiently connected to the needs of the public as a whole.¹⁷⁵ The comparison to the Tea Party is clear. The Tea Party opposes government spending that ostensibly serves the public on the grounds that it burdens one class of citizens, "earners," with increased taxes and government debt.¹⁷⁶

Jackson opposed the Bank on the grounds that it permitted bankers to abuse their privileged positions by unduly co-opting democratic institutions to cheat their way into benefits unavailable to the private citizen.¹⁷⁷ Like in the Jackson era, the modern banking industry has once again shaped political ideology. Animosity to the privileges bestowed to the banking industry was the spark that lit the fuse of the Tea Party. The Tea Party critique of the banking industry is essentially identical to Jackson's, put forth nearly 200 years ago. But for the action of the federal government, the banks should have suffered the consequences of their (bad) economic choices. The Tea Party remains unconvinced that the bailout was necessary for the good of the public because of the need to prevent an economic catastrophe. It is another example of the Tea Party's mistrust of government on the grounds that it only serves to benefit one particular group, not society as a whole.

175. WATSON, *supra* note 131, at 135.

176. See *supra* notes 37 through 46 and accompanying text.

177. UROFSKY & FINKELMAN, *supra* note 142, at 318–21

Many of the Tea Party's political positions can be seen as opposition to class legislation. For instance, the following quote from a Tea Party-affiliated group, the Independence Caucus, demonstrates Tea Party opposition to taxation the grounds that it is impermissible class legislation:

It is the contention of [the Independence Caucus] that the Federal Government has fundamentally changed the original intent and purpose of our national tax policies to be little more than an endless writing and re-writing of favorable tax treatment of one arbitrary group over another. Our nation's tax policies must be returned to their original purpose.¹⁷⁸

The Tea Party opposes taxation because such policies only serve to benefit those who have the power to control it. Likewise, Tea Party groups oppose government intervention into the economy on the grounds that it perverted the "natural" incentives created by the free market.¹⁷⁹ The Tea Party and Jacksonian populism dislike the favorable treatment bestowed by the government upon bankers. This emerges from the shared assumption that government is to be feared as a threat to liberty because of how easily powerful interests can easily co-opt its power.

The idea that a laissez-faire policy reflects populist values may come as a surprise to modern readers who associate the term laissez-faire with only right-wing or pro-business policies. However, for Jackson and his contemporaries, free enterprise was not conceived as pro-business, but rather in contrast to artificial privilege.¹⁸⁰ In Jackson's time, the Industrial Revolution, and its concomitant concentration of capital, was barely underway. The United States had yet to develop into an industrialized economy composed of a society of wage earners. The laissez-faire constitutional outlook was a populist sentiment because it signified the removal of artificial privilege in a preindustrial society where opportunity for working men remained a real possibility. For example, Jackson's vice president, Martin Van Buren, viewed poor wages as the result of government intervention at the hands of privileged parties.¹⁸¹

178. INDEPENDENCE CAUCUS, *supra* note 22.

179. MECKLER & MARTIN, *supra* note 20, at 40.

180. GILLMAN, *supra* note 68, at 37.

181. *Id.* at 42.

Government intervention was viewed as contrary to working class interests, similar to the Tea Party characterization today. Michele Bachmann's critique against the federal minimum wage rate serves as an example.¹⁸² The theory is that the federal minimum wage confers a benefit to a group of wage earners while simultaneously reducing opportunity to another class, the unemployed willing to work for lower wages.¹⁸³ Both perceptions reflect a fear that government will allocate benefits to serve parties that have not contributed to earning them. Government does not serve the people; it supports the people serving in government.

In sum, Tea Party opposition to government spending and debt levels is in line with the Jacksonian values that run through the *Lochner* era cases. Government spending geared toward improving the economy through increased debt is opposed because it burdens future generations.¹⁸⁴ Spending programs are a burden on the Tea Party's grandchildren because they represent an unequal conferral of government resources from one class to benefit another: reckless bureaucrats, the undeserving lower class, or bankers. Tea Party opposition to Obamacare reflects distrust in a class of elites that will make decisions in the government's interest rather than leaving decisions in the realm of personal choice.¹⁸⁵ Jacksonian values are even present in the central message of Santelli's famous rant—the government should not use its powers to benefit an “undeserving” class of individuals who made poor economic choices.¹⁸⁶ Jackson viewed the undeserving as the wealthy classes that used privileges to form a new aristocracy—the conferral of privilege was unearned. Similarly, the Tea Party sees interest groups who use government, bankers, the unemployed and other “freeloaders,” as undeserving of accepting governmental funds. Liberty of contract is implicated because it is the constitutional expression of laissez-faire governance. This is firmly Jacksonian and marks the return of constitutional arguments the Court gave great weight throughout the *Lochner* era.

182. See Wayne, *supra* note 63.

183. *Id.*

184. See *supra* notes 37 through 46 and accompanying text.

185. See *supra* notes 49 through 56 and accompanying text.

186. See ZERNIKE, *supra* note 2.

V. Tea Party Constitutionalism As Anachronism

The Tea Party claims to be an originalist movement because its constitutional values—liberty of contract, limited government, and populism—are directly derived from the authors of the Constitution.¹⁸⁷ The Tea Party is not shy about its originalist claims.¹⁸⁸ One chapter, the South Florida Tea Party, writes that the group, “stands with our founders, as heirs to the republic, to claim our rights and duties which preserve their legacy and our own.”¹⁸⁹ The Tea Party espouses ultra free-market values, including a constitutional right to contract.¹⁹⁰ Exercising one’s economic freedom, free from obstruction, is the patriotic duty of all citizens.¹⁹¹ Fox News Channel’s Glenn Beck, formerly a megaphone for Tea Party ideas, helped convey the message that these views about economic liberty were at the forefront of the vision of the Founding Fathers.¹⁹²

The fact is, the development of constitutional thought from the founders to the Tea Party is not so linear as asserted. Therefore, the Tea Party’s claims are inherently suspect. The founders did not subscribe to a constitutional theory of liberty of contract, nor did they deify individual rights quite like the Tea Party. In the debates surrounding the adoption of the Constitution, the United States engaged in a debate about the proper role of individual rights in the republic.¹⁹³ In *The Federalist*, James Madison wrote about the need for a republic to counteract the wayward passions of concerted individuals acting together for political gain.¹⁹⁴ For this reason, Madison argued for a more expansive federal government capable of controlling the passions of the citizenry.¹⁹⁵ This is markedly different from Jackson’s vision of the government. Jackson viewed government as perpetually poisoned by wealthy and powerful interests. For this reason, Jackson sought a limited government that was more responsive to popular desires. Jackson’s vision more closely resembles the laissez-faire constitutionalism of the Tea Party,

187. See SKOCPOL & WILLIAMSON, *supra* note 11.

188. *Id.*

189. SOUTH FLORIDA TEA PARTY, <http://southfloridateaparty.net/content/about> (last visited Apr. 29, 2012).

190. See *supra* notes 18–23 and accompanying text.

191. *Id.*

192. Goldstein, *supra* note 4, at 840.

193. See generally UROFSKY & FINKELMAN, *supra* note 142, at 109–13.

194. *Id.* at 111.

195. *Id.*

not that of Madison's government, which functioned to limit the effects of popular movements. Perhaps Tea Party members should trade in their tricorne hats and breeches for the high-collared shirts, frock coats, and tall hats of the 1830s—the fashionable attire during the era of Jackson.

Tea Party constitutionalism is not only flawed because of its basic misunderstandings of its heritage, Tea Party constitutionalism is also anachronistic. The Tea Party began proselytizing its ultra-free market views in 2009.¹⁹⁶ Social relations in the United States are remarkably different than they were in 1789, 1865, or even 1937. Most Americans today depend on wages for their earnings. This was not true at the time of the Constitution's ratification when the United States was still a preindustrial economy.¹⁹⁷ At this time in American history, opportunity on the American frontier remained a possibility, at least for able-bodied white men.¹⁹⁸ The seeds of liberty of contract were planted during this period.¹⁹⁹ The doctrine's judicial development during the *Lochner* era reflects the Court's struggle to apply Jacksonian principles against class legislation during a time of rapid industrialism.²⁰⁰ The concomitant explosion of a wage dependent class led to a schizophrenic jurisprudence that, at times, was forced to acknowledge the need for government to support workers who held an inferior bargaining position in the formation of labor contracts.²⁰¹ The Tea Party exists in a radically different era. The United States is no longer a pre-industrial economy—meaningful opportunity on the “frontier” outside of wage labor does not exist. Further, the Tea Party does not make its claims in a period of unprecedented economic expansion like that which was taking place during the *Lochner* era. The calls for liberty of contract emerge from the “Great Recession,” but the theory of liberty of contract belongs to a different era. It is simply foreign to the present-day United States.

VI. Conclusion

The discussion above has shown that Tea Party constitutionalism shares numerous similarities to Jacksonian populism. But what would

196. ZERNIKE, *supra* note 1.

197. GILLMAN, *supra* note 68, at 39–40.

198. SKOCPOL & WILLIAMSON, *supra* note 5, at 56.

199. See McCurdy, *supra* note 98.

200. GILLMAN, *supra* note 68, at 10.

201. *Id.*

Jackson think of the Tea Party if he were alive today? Jackson opposed the Bank of the United States because he was fearful of the expansive powers granted to it by the federal government.²⁰² He opposed the financial behemoth because its power enabled it to subvert the principle of equal protection under the law.²⁰³ Ostensibly, the Tea Party advocates the same equal treatment under the banner of economic liberty—for workers, small-time entrepreneurs, and large-scale corporations.²⁰⁴ But the consequences of Jacksonian principles and Tea Party constitutionalism could not be more different. The consequence of the former was to eliminate the possibility of unequal distributions of wealth by destroying the most visible form of its accumulation. The consequence of the latter is to expedite accumulation because that is the objective of liberty. Jackson opposed class legislation because he sought a society with an equitable distribution of power. Tea Party opposition to class legislation is motivated out of a fear that government will suppress the inequalities that “naturally” arise from individuals exercising their constitutional right to economic liberty. Jackson opposed unequal power distribution; the Tea Party opposes government.

This paper shows that the Tea Party’s constitutional claims about individual economic liberty are rooted in the tradition of Jacksonian populism and opposition to class legislation. The reader may remain skeptical about the authenticity of the Tea Party movement. Regardless, this note sought to expose the underlying historical precedent girding Tea Party constitutionalism. The conclusion that Tea Party values emerge from Jacksonian populism is apparent upon an analysis of the justifications for the Tea Party’s far-right rhetoric about liberty of contract. A close comparison of the Tea Party’s economically libertarian convictions against revisionist *Lochner* scholarship helped to illustrate that Tea Party constitutionalism is undergirded by the ideals that motivated Jacksonian political ideology—anti-privilege, anti-government corruption, and political equality. Like the Tea Party, Jackson also articulated a laissez-faire constitutional vision emphasizing the rights of the individual in contrast to the interests of elitist government bureaucrats. Critics of the Tea Party who are convinced that Tea Party claims are nonsensical, lacking historical precedent, and merely a pretext for policies supporting the super-rich may be surprised by this history.

202. See *supra* notes 149 through 56 and accompanying text.

203. *Id.*

204. See *supra* text accompanying notes 18 through 23.

Even assuming as truth the claim that the Tea Party does play on “astroturf,” it should come as no surprise that the Tea Party is able to attract voters and compete in the league of constitutional ideas because of its foundations in Jacksonian ideology.

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