



# Setting the Record Straight:

## The Tea Party and the Constitutional Powers of the Federal Government

Issue Brief No. 4 • July 16, 2010  
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### Introduction

The emergence of the Tea Party movement as an increasingly persistent presence in the media and in politics has focused national attention on the Constitution, as Tea Party members invoke our Nation’s Founding in their rhetoric and claim to root their agenda in the Constitution. As an organization dedicated to the text and history of the Constitution, Constitutional Accountability Center applauds this focus on the Constitution, at least in theory. The Constitution should frame our political debates and be followed faithfully by our country’s leaders, regardless of their political affiliation. But as the Tea Party and its standard bearers continue to make claims about the meaning of our Nation’s charter—including in the debates over Solicitor General Elena Kagan’s confirmation to the Supreme Court—it is important that this national conversation engage the real Constitution of the United States and not the “Constitution According to the Tea Party.”

A close look at the Tea Party’s version of the Constitution shows that it bears little resemblance to our *actual* Constitution, departs sharply from the Founders’ vision for America, and could threaten some of the constitutional values Americans cherish most. In this Issue Brief, we take on the Tea Partiers’ central claim: that our country’s Founders established a sharply limited, weak national government, incapable of addressing national problems like the health care crisis in America. This claim doesn’t stand up to the test of text and history.

This Issue Brief documents first that the Founders established the federal government to act whenever the states were “separately incompetent” and granted the federal government broad power to, among other things, regulate interstate commerce and tax and spend to promote the general welfare. To be sure, our Constitution established a national government of enumerated and not unlimited powers, as affirmed by the Tenth Amendment and recognized by the Supreme Court in cases such as *United States v. Lopez*. But while these powers are enumerated, they are also broad and substantial.

Second, we chronicle how most constitutional amendments ratified by “We the People” in the last two centuries have expanded the enumerated powers of the federal government, building on the already robust powers granted to Congress in the 1789 text of the Constitution. These amendments gave vast powers to the federal government to protect equality, civil rights, and voting rights and to raise funds through taxes on income.

## The Constitution According to the Tea Party and Its Allies

Tea Partiers and their friends have made a great many bold statements about the Constitution and the role of the federal government. While Tea Party activists and their conservative friends and allies do not agree on everything, they are united in their view that the federal government is exercising powers today that are beyond the limits of our Constitution. From the Heritage Foundation-led "[Mount Vernon Statement](#)" to Tea Party-affiliated organizations like [Liberty Central](#), the claim is made that our Constitution created a sharply limited national government and that the modern federal government vastly oversteps those limits. In the colorful recent [words](#) of Rush Limbaugh, there have been a "series of wicked, unconstitutional experiments from the New Deal to the 'Big F-ing Deal.'"

As Limbaugh's remark indicates, health care reform has become a political flashpoint for the Tea Party, standing in for the myriad federal actions—including civil rights laws, environmental protection, corporate regulations, and the maintenance of the Department of Education and safety net programs such as Social Security—that at least some Tea Partiers believe are unconstitutional exercises of federal power. The crisis in the health care and insurance industries, which encompass roughly twenty percent of the U.S. economy, seems like a classic example of an interstate commerce problem states cannot solve on their own. But conservatives and Tea Party activists are making this their Waterloo. At the Kagan confirmation hearings, Senator John Cornyn argued that if the health care reform legislation is constitutional, "it seems to me there is no limit to the federal government's authority and we've come a long, long way from what our founders intended." Ken Cuccinelli, Virginia's elected Attorney General who has sued the federal government over the health care law, agrees, [telling](#) a Tea Party gathering that the health care reform bill is "the greatest erosion of liberty in my adult lifetime."

Citizens and elected officials like Cuccinelli are of course free to try to make the case for their constitutional claims in the courts, where most legal scholars, including conservatives such as Orin Kerr and Charles Fried, agree such claims will fail. However, the sweeping statements by Tea Party members and their friends about the overreaching of the federal government should not go unchallenged outside the courthouse doors. Statements about the Constitution such as those noted above are not only inaccurate, but also potentially dangerous: some extreme members of the Tea Party movement have suggested that the solution for a government that allegedly strays from the Constitution is violence and rebellion. Sharron Angle, the Tea Party-endorsed Republican Senate candidate in Nevada, stated in a [radio interview](#) that citizens should look to "Second Amendment remedies"—in other words, armed insurrection—"if this Congress keeps going the way it is." Rick Barber, a Tea Party congressional candidate from Alabama, ran an [ad](#) suggesting Tea Partiers should "gather your armies," as a response to "progressive taxation." After the passage of the health care bill, Sarah Palin [sent](#) this message to "Commonsense Conservatives & lovers of America": "Don't Retreat, Instead - RELOAD!"

Such veiled threats of violence thankfully have been condemned by some conservatives. Conservative columnist Michael Gerson, for example, [called out](#) Angle for her reference to

congressional tyranny and “Second Amendment remedies” and dismissed the Tea Party’s talk of armed rebellion as “so far from the moral weightiness of the Founders that it mocks their memory.” But the ideas about the Constitution that underlie the perceived need for such drastic measures have not been given a sufficiently critical look. While 1776 may have been all about revolution, by the time our Founders took up the task of drafting our Constitution a decade later, they were focused on creating an adequate, working government with a strong federal power. This is exactly what our Constitution establishes.

## The Founders Created A Strong National Government

Tea Partiers declare that they want to go back to the ideas of the Constitution, but what they really want is to return to the Articles of Confederation. The Tea Party’s principal claim that our country’s Founders established a sharply limited, weak national government fits more with the failed, discarded Articles of Confederation than with the Founders’ second and lasting attempt to craft a national charter, our Constitution.

It is telling, in this regard, that the “Tea Party” invokes the revolutionary fervor of the Boston Tea Party, which occurred in 1775, and that the [Mount Vernon Statement](#) refers to the “self-evident truths of 1776,” the year the Declaration of Independence was adopted, and never mentions that the Constitution itself was drafted in 1787, eleven very eventful years later. The Articles of Confederation, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a “firm league of friendship” between thirteen independent states. There was only a single branch of national government, the Congress, which was made up of state delegations. Congress under the Articles of Confederation had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it had no express power to make law that would be binding in the states’ courts and no general power to establish national courts, and it could raise money only by making requests to the states.

In a [video](#) posted on the website of Liberty Central, Professor Robert George waxes eloquently about how the founders of our Constitution had “lived under the tyranny of the British Crown.” True enough, but by 1787 they had also lived for ten years under the dysfunction of the Articles, which [according](#) to George Washington, almost cost them victory in the Revolutionary War. By 1787, the Confederation was in shambles and it was clear that a new system of government was necessary—one with a stronger and broader role for the central government. The Framers of our Constitution certainly recalled British tyranny, but they also learned from the mistakes of the Articles of Confederation and in the succeeding charter gave significant power to the new federal government.

Specifically, as detailed by Professor Akhil Amar in his comprehensive work of constitutional scholarship, *America’s Constitution: A Biography*, the delegates to the Constitutional Convention instructed the Committee of Detail, which drafted the enumerated powers of Congress in Article I, that Congress should have authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.” Article I thus grants Congress power to, among other things, regulate interstate

commerce and tax and spend to promote the general welfare. Congress's authority, of course, has its limits—as the Constitution's Tenth Amendment reaffirms, our federal government is one of enumerated powers—but the powers expressly granted to Congress are nonetheless broad and substantial.

The congressional powers written into the Constitution by the Founders are even stronger when coupled with Article I, section 8's sweeping grant of authority to Congress to make laws that are "necessary and proper" for carrying out the other powers granted by the Constitution. The great Chief Justice John Marshall explained in *McCulloch v. Maryland* (1817) that Congress should be shown significant deference regarding what laws it considers to be appropriate in carrying out its constitutional duties.

Contrary to Tea Party claims, the Founders [created a federalism](#) that allowed for a significant role for states and local governments, but created a strong central government with sufficient power to govern a united country. Far from being "[very afraid](#)" of federal government, the Founders were quite concerned with protecting the United States from invading foreign armies and trusted the federal government to protect the citizenry against the evils of "factions," as famously elaborated by James Madison in *Federalist Paper* No. 10. As made clear in the Constitution's soaring Preamble, our Founders invested federal lawmakers with broad powers to promote the "common defense" and "general welfare" of "we the people of the United States."

## **"We the People" have Expanded the Federal Power Through a Series of Constitutional Amendments**

The Tea Party story about our sharply limited national government is not only inconsistent with the words and intentions of our Founding generation, but it also requires a form of selective amnesia about the important changes made to the Constitution by successive generations of Americans. Since the Founding, the American people, at critical moments in our country's history, have amended the Constitution and added to Congress's express constitutional powers, ensuring Congress has all the tools it needs to address national problems and protect the constitutional rights of all Americans. Indeed, most of the amendments added to the Constitution during the 19<sup>th</sup> and 20<sup>th</sup> Centuries expanded the power of the federal government. The Tea Party's reading of the Constitution depends on ignoring or repealing these critical amendments.

At least here, however, there has been recognition by some Tea Party members of the radical nature of their ideas. [Rand Paul](#), the Republican Senate candidate from Kentucky, Rep. [Duncan Hunter](#) of San Diego, and others have called for repeal of the 14<sup>th</sup> Amendment's guarantee of citizenship at birth for all children born in the United States. [Sharron Angle](#), the Nevada Senate candidate, has called for repeal of the 16<sup>th</sup> Amendment, which allows for a federal progressive income tax. And many Tea Party activists are [pushing for repeal of the 17<sup>th</sup> Amendment](#), which shifted the selection of U.S. Senators from state legislatures to the state's voters. As Jim Linn, a Tea Party member from San Diego explained to the *Washington Post*,

returning to his understanding of the Founders' intent "would mean scrapping a lot of the Amendments."

### **The Civil War Amendments**

After fighting a bloody civil war over slavery and broad notions of state sovereignty, "We the People" made sure that protecting the constitutional rights of all Americans was among the express powers of the federal government. The 13<sup>th</sup> Amendment abolished slavery—the cornerstone of the Confederacy—striking out of the Constitution the oppressive system that made a mockery of our founding ideals. The 14<sup>th</sup> Amendment guaranteed all Americans substantive fundamental freedoms and made equality of all persons a constitutional right. The 15<sup>th</sup> Amendment extended the promise of the 14<sup>th</sup> Amendment, securing the right to vote to the newly freed slaves. All three Amendments granted broad power to Congress, providing a "[shield of national protection](#)" to ensure that our country's founding promise of freedom and equality applied to all.

Written against the backdrop of *Dred Scott v. Sandford*, the Supreme Court's ruling that helped bring on the Civil War, these Amendments were ratified to change the balance of powers between the states and the federal government and to provide Congress with the tools to protect the rights of all Americans. The framers who wrote these Amendments did not trust the states to protect liberty, equality, and the right to vote, and were more than a little suspicious of the Supreme Court, which had, after all, profoundly erred in *Dred Scott*, announcing that African Americans "had no rights which the white man is bound to respect." To ensure these new constitutional protections were effective, Congress was empowered to step in when states threatened constitutional rights and when states failed to protect Americans from violence and discrimination by private actors.

### **The Progressive Era Amendments**

During the Progressive Era of the early 20<sup>th</sup> Century, the American people amended the Constitution again, adding once more to the power of the federal government. The 16<sup>th</sup> and 17<sup>th</sup> Amendments, ratified in 1913, sought to ensure that the federal government had the authority to restrain the power of corporations, whose outsized influence was threatening the American people.

The 16<sup>th</sup> Amendment gave Congress power to impose a progressive income tax, overturning a badly reasoned 1896 Supreme Court opinion that had invalidated a federal corporate income tax, and, as the dissent explained, "cripple[d] the just powers of the government in the essential matter of taxation." The 16<sup>th</sup> Amendment settled the question of the constitutionality of progressive income taxation, giving the federal government the power to "lay and collect income taxes, from whatever sourced derived . . ." To the Progressive Era framers, progressive taxation was not a form of tyranny to be stringently checked, but an essential and fair means for the federal government to promote the general welfare of all Americans, and of the Nation itself.

The 17<sup>th</sup> Amendment ended the power of state legislatures to appoint U.S. Senators, giving the right to vote directly to the people and striking a blow against corporate domination of the electoral process. As Akhil Amar has shown, the framers of the 17<sup>th</sup> Amendment understood that giving the vote to the people “would result in cleaner, less corrupt government, and would counter the undue effects of large corporations, monopolies, trusts, and other special interest groups in the Senate election process.” Together, the two Amendments expanded the powers of the federal government and helped pave the way for a whole host of modern financial, economic, and civil rights legislation aimed at protecting the rights and interests of Americans from abuse by corporations and other businesses.

### **The Voting Rights Amendments**

The 15<sup>th</sup> Amendment was the first to secure the right to vote as a constitutional right, and several more voting rights amendments were added during the 20<sup>th</sup> Century, each giving Congress the primary role in securing the rights of Americans to cast a ballot, and adding to the express powers of the federal government.

In 1920, the 19<sup>th</sup> Amendment gave women the right to vote; in 1964, the 24<sup>th</sup> Amendment abolished the use of poll taxes in federal elections; and in 1971, the 26<sup>th</sup> Amendment gave the right to vote to men and women aged eighteen years or older. Like the 15<sup>th</sup> Amendment, each of these Amendments entrusts the power to enforce the right to vote to Congress, giving the federal government broad power to secure the right to vote and ban discrimination in voting. The Amendments together make voting a fundamental right of Americans and give Congress the express authority to ensure that Americans, in fact, have the ability to exercise this fundamental right.

### **Conclusion**

The Tea Party and its standard bearers continue to assert in the media, in Congress, and in the courts that the federal government is sharply limited by the Constitution and too weak to act in crucial areas of policy, including civil rights protection, health care reform, environmental protection, and corporate regulation. The text and history of the Constitution show these claims to be false. From the broad and substantial powers granted to Congress in the 1787 Constitution, to the sweeping enforcement powers added to the Constitution in the last two centuries, our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution or when fundamental rights are infringed.

There will always be good-faith disagreements about the proper interpretation or application of provisions of the Constitution, but if Tea Partiers and their elected allies want to be the standard bearers for the Constitution, as they claim, they should be required to represent the *actual* Constitution, not the Articles of Confederation or the strange brew of a “Constitution According to the Tea Party.” When the Tea Partiers’ constitutional claims do not stand up to the test of the Constitution’s text and history, Americans should not hesitate to speak up and prevent such potentially dangerous distortions of our Nation’s charter.