

TARP, the Constitution, and Economic Liberty

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Constitutional Fundamentals, the Tea Party, and the Governance Party

The Tea Party movement represents an important development in American politics. Two generations from now, history’s verdict may say that the Tea Party was just a flash in the pan, but it may also turn out that the Tea Party was the beginning of the first successful effort to replace one of the two major parties since the Republican Party replaced the Whigs in the 1850s. In the meantime, the Tea Party is doing a significant favor for those of us who teach political theory or constitutional law. The Tea Party is bringing contemporary political debates back to fundamentals.

In September 2010, the Republican Conference of the U.S. House of Representatives issued a “Pledge to America.” This Pledge is a partisan document in the best sense of the term “partisan”: It declares the principles and policies that

one segment of the American body politic believe to be in the best interest of the entire body politic. If voters elect a Republican majority to the House in the fall 2010 federal election, House Republicans pledge to return to two fundamentals. One is the U.S. Constitution. Republicans pledge to “require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.” The other is the U.S. Declaration of Independence. Citing the unalienable rights declared in the Declaration, the Pledge warns: “Whenever the agenda of government becomes destructive of these ends, it is the right of the people to institute a new governing agenda and set a different course.”¹

Both of these developments are striking. Republican House candidates, it seems, are betting they can extract political advantage by critiquing contemporary political practices in relation to the Constitution and the Declaration. While it remains to be seen whether this advantage really does exist, the Tea Party is responsible at least for making it seem to exist. Consider in particular the Pledge’s appeal to the Declaration. The Pledge alters the Declaration’s cadences slightly: “Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new government, laying its foundations on such principles and organizing its powers in such forms, as to them shall seem most likely to effect their Safety and Happiness.”² The Declaration

proclaims the natural right of revolution; the Pledge assumes that right has been tamed and brought within to a system of republican constitutional government. Evidently, however, Republican House candidates think it is advantageous to promise that they will assert voters' rights of democratic governance as spiritedly as if those citizens were exercising rights of revolution. Those candidates are appealing to the votes of members of the "Tea Party."

Even more revealing, these appeals threaten elite opinion makers. Richard Cohen, an opinion journalist, calls the Pledge's appeal to the Constitution a "fatuous infatuation . . . clearly the work of witches, wiccans, and wackos." On the same day on which the Pledge was published, the New York Times published an editorial column by Ron Chernow. Chernow complains about attempts by some members of our body politics -- one presumes, Tea Partiers and those wacko enough to curry their favor -- "to seize the moral high ground by explicitly identifying with the Founders." "No single group should ever presume," Chernow warns, "to claim special ownership of the founding fathers or the Constitution they wrought with such skill and ingenuity."³

Cohen's criticisms deserve little comment. His name-calling simply confirms that some elite opinion makers are repulsed and threatened by the Tea Party movement. By contrast, while Chernow's argument is mistaken, his mistakes are interesting.

The first mistake is this: When some partisans appeal to our Declaration, Constitution, and political traditions, there is no reason why they are trying to exclude other partisans. To the contrary -- these appeals keep the argument within the political family. Such partisans assume that all Americans have stakes in the Declaration, Constitution, and our political traditions. We can settle our differences, they assume, by channeling them through our shared authorities and traditions.

As Chernow surely knows, this practice goes back to the Founding and earlier. In the English Petition of Right (before the English Civil War), the English Bill of Rights (before the Glorious Revolution), the Summary View of the Rights of British America and the Declaration (before the United States' Revolutionary War), Englishmen and then Americans justified revolution by appealing to natural rights respected by long and customary English practice. In 1800, Federalists and Republicans made similar appeals while arguing about the National Bank, foreign policy, and the Alien and Sedition Acts. In 1800, however, the appeals to natural rights channeled arguments that *could* have provoked revolution into the constitutional order and a polarizing national election. As Harry Jaffa explains, 1800 was when ballots started to replace bullets.⁴ The Pledge fits squarely within that tradition.

The Structural Constitution and Economic Liberty

The second problem with Chernow's argument is more subtle. Chernow has a point when he warns that the Constitution, Declaration, and our political traditions leave room for many different contemporary institutions and policies. Yet Chernow's argument goes further; Chernow is using the argument to suggest it is somehow uncivil or out of bounds to ask whether our contemporary system of governance is consistent with our fundamental texts and traditions. That extension does not follow unless our foundational texts and traditions unequivocally ratify our current system of government.

Not necessarily. This essay illustrates how the Constitution and The Federalist have and could inform both a defense and a critique of contemporary national interventionist administrative government. This essay focuses on the relation between constitutional government and economic liberty. Why economic liberty? Here, I follow Federalist No. 2. Ordinarily, a political community cannot exist unless its citizenry comes from "one united people," united especially common principles of religion and religious toleration and "the same principles of government." With those fundamental questions settled, economic regulation is and probably must remain the most disputatious topic in our politics. Federalist No. 10 singles out as "the most durable and common source of factions . . . the various and unequal distribution of property."⁵

The Constitution cannot eliminate disputes about property or economic liberty. Nevertheless, our constitution (in the broad sense encompassing not only the Constitution but the Declaration and our political tradition) can channel the disputes away from bullets into ballots. In Federalist No. 10's words, the Constitution "refine[s] and enlarge[s] the public views."⁶

To illustrate how the Constitution refines and enlarges debates over economic liberty, I will focus on a few key doctrines of federalism and one key doctrine relating to separation of powers. Now, I recognize, other passages of the Constitution treat economic liberties much more explicitly than federalism or separation of powers. Yet what Federalist No. 51 calls the Constitution's "double dose" of divided government probably does more than these more subject-specific doctrines.⁷

To put the structural Constitution in current context, this essay works out political arguments for two different sets of partisans in contemporary debates about economic regulation. I have already identified one set of partisans—those who sympathize with the Tea Party. As for the other set, I will group them here under the name "Governance Party." I use this distinction because it transcends ordinary Republican-versus-Democrat politics. A few Democrats may sympathize with the Tea Party; many Republicans sympathize with the Governance Party.

Members of the Governance Party assume that the national government must establish complex administrative schemes to control and broker settlements to broad national disputes. They also assume that the Constitution does not stand significantly in the way of their doing so. Recently, when a journalist asked Speaker of the House Nancy Pelosi on what constitutional authority Congress was trying to establish a national health care program, she asked in response, “Are you serious? Are you serious?” Pelosi assumed as true what most judges and most academics in disciplines related to politics and law assume about constitutional law. Some of the earliest proponents of such regulation, it should be noted, thought the Constitution was hostile to modern administrative regulation. Frank Goodnow, first President of the American Political Science Association, recognized as much in 1911 and complained that “the people of the United States ... regard[ed] with an almost superstitious reverence the [Constitution] into which [their] general scheme of government was incorporated.”⁸ For the last three generations, however, the Governance consensus has been that the Constitution had always provided authority for national interventionist regulation, and the New Deal merely made patent what had always been latent. As Cohen explains, “The Constitution is a wonderful document, quite miraculous actually, but only because it has been wisely adapted to changing times.” “[I]f taken too seriously,” he warns, the Constitution’s text “would cause an economic and political calamity.” Cohen’s

arguments and not Goodnow's restate common sense among contemporary policy or opinion makers in the Governance Party.⁹

This essay will illustrate how the Constitution can refine and enlarge debates over economic liberty by contrasting the Tea and Governance Parties' critiques of a single example, the Troubled Asset Relief Program, here "TARP." TARP instituted a program under which federal officials may buy troubled mortgages or mortgage-backed securities in the interest of preventing crises in credit markets. Although TARP's statutory language focuses on mortgages and mortgage-backed securities, once enacted the program was also used to purchase assets of and support non-financial institutions, the most notorious of which are General Motors and Chrysler.¹⁰

TARP illustrates how many regulatory schemes cut across traditional party affiliations. A Republican President (George W. Bush) and a Democratic Congress cooperated to pass TARP. TARP also illustrates the divide between these officials, interested in what they believe to be responsible governance, and the populist voters who make up the Tea Party. The first Tea Party was a protest against TARP. In February 2009, cable personality Rick Santelli ranted on CNBC: "This is America. How many of you people want to pay for your neighbors' mortgage that has an extra bathroom and can't pay their bills, raise your hand!"

Again appealing to voters who share Santelli's sentiments, the Pledge commits House Republicans to repealing TARP.¹¹

TARP and Two Views of Economic Liberty

TARP's authorizing statute is long. Although it covers many topics, however, most seem adornments. Some parts clearly provide in-kind incentives for legislators to have voted for the bill. One section, for example, exempts toy wooden arrows from a federal excise tax on wooden arrows. Others provided political cover for left-liberal politicians who otherwise would not have supported bailing out investment houses. Thus, another section created a program assisting mortgagees having trouble making their payments, and still another required entities accepting TARP assistance to submit to regulation of their executives' compensation packages. Nevertheless, the core of TARP is fairly simple: section 101(a)(1), and a few related prefatory sections. If one understands why partisans of the Tea Party find these sections "a moral abomination" and members of the Governance Party find them necessary medicine, one understands a deep fissure in contemporary politics.¹²

Section 101 of TARP reads:

The Secretary [of the Treasury] is authorized to establish the Troubled Asset Relief Program (or "TARP") to purchase, and to make and fund commitments to purchase, troubled assets from any financial

institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary.

This Section vests in the Treasury Secretary broad discretion to intervene in the financial sector. He may buy troubled assets or not as he “determines the purchase of which is necessary to promote market stability.” There are some limits on this discretion, but not many. The statute limits him to buying troubled assets only from “financial institutions,” but that limitation covers a lot of companies (and the Treasury Secretary has construed it, dubiously, to cover car companies). And when the Secretary chooses to purchase troubled assets, under TARP he may do so “on such terms and conditions as are determined by the Secretary.”¹³

To understand how the structural Constitution could refine and enlarge debates over TARP, we should probably make ourselves minimally familiar with both partisans’ views on TARP’s underlying merits. Let me start with the views of partisans for the Governance Party. In their view, citizens cannot enjoy economic liberty unless government establishes institutions providing them a minimal amount of security. An uncontroversial example: The Constitution empowers Congress to establish a uniform law of bankruptcy. Bankruptcy rules limit the rights of creditors to collect from debtors, in the hope that an orderly system of

wind-ups will encourage responsible risk-taking.¹⁴ TARP could be justified along similar lines.

Congress passed TARP in 2008 to respond to a lending crisis. For roughly a decade before 2008, mortgage lending standards had been relatively lax. Many individuals who would have been deemed credit risks in other times received loans; many of them defaulted in the mid-2000s. During the same decade, many investment firms repackaged loans, or partial interests in loans, into novel mortgage-backed securities. These securities seemed good investments as long as mortgagees continued to pay; they seemed risky -- and worse, difficult to value -- when mortgagees started to foreclose in large numbers. By 2008, many financial institutions were stuck with securities they could not value accurately. As long as these institutions held uncertain liabilities in their securities, they could not transact other business, and their uncertainty caused the liquidity of capital to contract in American markets. Members of the Governance Party argued that the federal government needed to intervene to restore capital and confidence. Absent both, investors might have robust economic liberty on paper -- but empty liberty in actual practice. Without government intervention, investors would be too scared to invest and lenders too scared to lend.¹⁵

Let me turn to the case made by Tea Partiers. In their view, TARP does not secure economic liberty, and it undermines the moral conditions necessary for the

legitimate exercise of such liberty. At its core, economic liberty refers to freedom of action individuals have to pursue activities likely to contribute to their own prosperity or happiness. As Federalist No. 10 explains, “the first object of government” is the “protection” of men’s diverse faculties for acquiring property. Law must structure similar domains of non-interference so different people can use similar freedom to deploy different skills to different individual needs and goals.

Judged by that standard, TARP constituted not a protection of property but a wealth transfer. When government genuinely protects property, individuals should to the greatest extent possible be free from government restraints not tied closely to the prevention of violence or fraud to others or the basic ordering of rights and markets. It follows as a corollary of this imperative that individuals must own not only the upside of their economic pursuits but also the downsides. Property and commercial rights must be structured to make economic actors responsible for the consequences attributable to their exercises of their own faculties.¹⁶ TARP did not satisfy, Tea Party partisans argued and still argue, but rather defied these imperatives. TARP authorized the government to buy mortgages without necessarily inquiring whether the borrowers had borrowed recklessly. It also authorized the government to buy securities composed of mortgage interests without necessarily inquiring whether the security holders had purchased those interests recklessly.

From that standpoint, bankruptcy provides an extremely revealing counterexample. Although bankruptcy discharges debts that have not been repaid in full, the bankruptcy process still makes the debtor take drastic steps by declaring himself to be a bankrupt and giving a bankruptcy court jurisdiction to manage his assets. Similarly, when the country went through another credit crisis two decades ago when many savings and loans collapsed, Congress's response required "existing management and shareholders [to] get wiped out" for a savings and loan to get federal assistance. As one critic explained, "There is no reason that we could not have let the banks go down in the cesspool of junk loans that they had fostered and then flooded the system with liquidity after the fact to boost the economy."¹⁷

In this interpretation, TARP went far beyond what was necessary to secure the conditions of economic liberty. It instituted a legal scheme encouraging some homeowners, lenders, and investors to abuse economic liberty rightly understood. Indeed, TARP also abridged the economic liberty of other citizens, in their capacities as taxpayers. Understood sensibly, economic liberty does not excuse citizens from but rather requires them to pay taxes—as long as the taxes pay for government services that keep the playing field level. TARP did not keep the playing field level; it used federal dollars to transfer wealth to those who invested recklessly in mortgage-backed securities.

Federalism

With that background, we can appreciate the constitutional arguments both sets of partisans would make about TARP. For partisans of the Tea Party, the Constitution reflects the U.S. citizenry's best attempt to spell out and lock in (in the Declaration's words) the foundations and institutions "as shall seem to [the people] to effect their safety and happiness." The Constitution represents a three-way compact among the federal government and its officers, the states, and the peoples of the several states. So to determine what the federal government's proper interests are, one must read the Constitution like a contract, or a pledge. On this view, one may take cognizance of prior precedents construing the Constitution—but only to the extent that they construe the Constitution minimally plausibly. After all, the Constitution gave the judges or other officers who set those precedents authority to do so; if they grossly exceeded their authority under the Constitution, the Constitution takes priority over their precedents.

The Pledge to America and many Tea Partiers are quick to insist that the federal government's powers are limited by the Tenth Amendment in the Bill of Rights. This assertion is right but not helpful. Right, because the Tenth Amendment does stress that the federal government's powers are limited. Not helpful, because it limits the federal government from exercising any powers "not

delegated to the United States by the Constitution.”¹⁸ So the Tenth Amendment doesn’t tell the reader anything until he reads the rest of the Constitution.

To understand the rest of the Constitution, one must start with Article I, section 1, which specifies: “All legislative powers herein granted shall be vested in a Congress of the United States.” “Herein granted.” In other words, if the rest of the Constitution doesn’t enumerate a power for Congress to exercise, Congress lacks authority to exercise it.

If one reads the Constitution charitably but not hyperliterally, the Constitution does not authorize section 101 of TARP.¹⁹ The Interstate Commerce Clause gives Congress power to regulate “commerce ... among the several states,” but the buying of mortgages or mortgage-backed securities isn’t a general rule structuring and promoting interstate trade. The Bankruptcy Clause lets Congress establish “uniform Laws on the subject of Bankruptcies throughout the United States,” but the holders of troubled mortgages aren’t necessarily bankrupt – and in any case TARP certainly doesn’t establish a “uniform law” for dealing with troubled mortgages.

To be careful, a partisan of the Tea Party would need to consider the possibility that TARP is valid under the Necessary and Proper Clause. But that clause does not give members of Congress power to pass laws that are “needful,” or “as they think proper” for Congress’s enumerated powers. Rather, under the

Necessary and Proper Clause, a law must be “necessary,” “proper,” and both specifically to “carry into execution” Congress’s enumerated powers. A law properly carries into execution Congress’s interstate commerce power if it gives FBI officers jurisdiction to investigate crimes against interstate trade. By contrast, a scheme letting the Treasury Department buy mortgage-backed securities strays so far from any of Congress’s powers that it does not meaningfully carry into execution any of those powers, and it improperly subverts the Constitution’s assignment of federal and state functions.²⁰

According to partisans of the Governance Party, however, what I have just said is discredited constitutional law and worse policy. Discredited constitutional law, because since the New Deal the Commerce Clause and Necessary and Proper Clause have been construed to give the federal government virtually unlimited authority over activities that are arguably economic. In this case law, “commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.” Construed practically, “interstate commerce” consists not only of interstate trade but also economic activity that, when repeated across the country, arguably “affects” interstate trade. So if members of Congress could assert with a modicum of plausibility that troubled mortgage-backed securities jeopardize the stability of national credit markets, Congress may authorize federal officials to buy them back.²¹

That's the bad law, but why worse policy? According to Laurence Tribe, professor of constitutional law at Harvard, "the Great Depression had conclusively established for many Americans the interdependence of economic factors and the mutability of even quite traditional economic relationships." It would be suicidal to tether the country's economy to a brittle and (a popular term in Commerce Clause case law) "formalistic" conception of interstate commerce. No man is an island and, thanks to 401(k)'s and pensions, no one's financial security is immune from the accidents of others.²²

Separately, although The Federalist respects states' rights, it hedges its respect. For example, No. 17 recognizes that the Union will be subject to strong "centrifugal" tendencies "unless the force of [the centrifugal] principle should be destroyed by a much better administration of the latter."²³ To put it bluntly: If there were a financial meltdown, with whom would you prefer to stake your bets: Hank Paulsen and Timothy Geithner and their staffs, or appointees of the first three state governors you think of?

Yet The Federalist also provides insights suggesting why the Tea Party's more literal (or, yes, formal) reading of the Constitution might advance sound substance. Throughout The Federalist runs an argument about subsidiarity: when focused on local affairs, local government secures liberty more effectively and more satisfyingly than national government. Federalist No. 10 insists that "The

federal constitution forms a happy combination ... the great and aggregate interests, being referred to the national, the local and particular to the state legislatures.”²⁴

This argument has at least three ingredients. One relates to local knowledge. As Federalist No. 46 warns, “it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered.” Why? As Federalist No. 53 explains, in “[t]he great theatre of the United States,” it is impossible to know local regulatory conditions intimately.”²⁵ TARP was instituted expecting that Secretaries Paulsen and Geithner and their staffs could sort out false negatives (where the U.S. needed to buy troubled assets to prevent credit gridlock) from false positives (where the U.S. didn’t need to buy the assets, and doing so would subsidize Santelli’s “losers”). However well-intentioned, Geithners and Paulsens and their staffs simply may not have been up to the tasks. Maybe local regulators might not be able to sort winners from losers. But information overload provides a realistic reason to suspect they couldn’t do worse -- or, that no regulator could sort the false positives and negatives well enough for the game to be worth the candle.

Another ingredient focuses on parochialism. Factions in a state often want to commandeer state government functions to exclude competition from out of state. If the national government assumes too much power over local matters,

however, they will lobby Congress to make decisions steering federal benefits away from other states to their own. In Federalist No. 46, Publius found it likely that “the members of the federal legislature will be likely to attach themselves too much to local objects,” so that “[m]easures will be often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual states.”²⁶ So taxpayers in most of the country may justly have worried whether what TARP’s supporters touted as an emergency intervention was really a wealth transfer to speculative mortgagees in Arizona, Nevada, and Florida.

The last concern relates to demoralization. Citizens are more likely to be better informed and follow legislation closely, if it hits them where they live and can be involved in influencing it. Federalist No. 45 insists that “The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state.” No. 46 suggests that people have a stronger “natural attachment” to such affairs, and that they are “more familiarly and minutely conversant” with such affairs.²⁷ If our constitutional order steers problems to levels of government in which the citizenry may be involved, they will be interested and satisfied; if our system steers most problems to the top, citizens will be resigned that they cannot control their political processes and

cynical about far-off political decisions. In October 2010, Gallup released the results of a poll in which it asked respondents what word or phrase they would use “if someone asked you to describe the federal government in one word or phrase.” The three most common answers were “too big,” “corrupt,” and “confused.” The more bills Congress passes like TARP, the more it reinforces the perceptions of those respondents. Which goes a long way toward explaining why there is a Tea Party movement at all.²⁸

Separation of Powers

We can see similar tensions if we consider TARP from two different constitutional perspectives on separation of powers. For brevity’s sake, I will focus here primarily on whether section 101 accords with the nondelegation principle, starting again with the Tea Party critique.

Because (again) the Constitution confers only written, enumerated powers, Congress may not pass a statute unless some passage of the Constitution specifically authorizes the statute. When Article I, section 1 vests in Congress “all legislative powers herein granted,” the term “legislative powers” is simultaneously a grant of power and a limitation. When Congress passes a “law” (as opposed to a legislative act like a tax or an appropriation), it must be a “law” in the sense in which John Locke spoke of “settled, standing rules, indifferent, and the same to all parties” or (Federalist No. 62) “a fixed rule of action.” The Necessary and Proper

Clause reinforces the same result. Although Congress may pass laws necessary and proper “for carrying into Execution” laws under other primary fonts of congressional jurisdiction, it isn’t “proper” for carrying *Congress’s* lawmaking responsibility into execution for Congress to hand that responsibility over to executive officers.²⁹

When the Article I Vesting Clause and the Necessary and Proper Clause are read like ordinary contract language, TARP violates them both. The Treasury Secretary has discretion to buy troubled assets “on such terms and conditions as are determined by” – not Congress – but “the Secretary.” The Secretary’s discretion is limited in some respects, but not meaningfully. For example, he has statutory policies to consider, but those policies are general, and some of them are inconsistent with each other or his legal authority to purchase troubled assets. TARP directs him to consider the interests of taxpayers, financial stability, family home owners, financial institutions, cities, counties, and long-term retirement account funds. That’s a long way of saying the Secretary must the trade-offs a naive citizen expects members of Congress to make.³⁰

From the perspective of a partisan of the Governance Party, however, this constitutional argument also seems bad law and worse policy. Case law insists that “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.”³¹

Previous cases have upheld statutory delegations for officers to do what is “fair and equitable and [would] effectuate the purposes of this Act,” or what would promote the “public interest, convenience, or necessity.”³² TARP is nowhere near beyond the pale staked out in the case law.

And partisans of the Governance Party have policy arguments why the case law’s construction of the nondelegation doctrine makes sound policy sense. Those doctrines must be “driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” As one critic of “TARP-ing carping” argues, “TARP put few constraints on Treasury, even fewer than the original 3-page Treasury proposal. Why didn’t Congress compel Treasury by statute to spend the money in a way that it would like? Because it just wasn’t possible to agree to legislation that would both give Treasury the necessary discretion to save the financial system and set out the winners and losers in advance (except via side payments to wooden arrow makers and the like).”³³

In addition, partisans of the Governance Party could cite arguments or precedents from the Founding in support of their claim. The Federalist provides authority for reading the nondelegation doctrine less than literally. No. 37 acknowledges that “no skill in the science of government has yet been able to

discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary.” It also insists that “[e]nergy in government is essential to that security against external and internal danger . . . which enter into the very definition of good government.”³⁴ In short, citizens who want liberty to invest in or borrow out of a vibrant market economy have to be adult enough not to complain that economic specialists are making difficult decisions on the spot to keep confidence in markets.

Yet Locke and The Federalist provide Tea Party partisans with their own responses on the policy merits. Locke insisted on settled, standing laws because government must be an “umpire.” Even if Federalist No. 37 acknowledged that it can be hard to distinguish legislation from execution, No. 48 assumed such a distinction existed “in nature,” and No. 37 warned that “[a]n irregular and mutable legislation is no more an evil in itself, than it is odious to the people.”³⁵

Publius elaborates why in Federalist No. 62:

... Another effect of public instability, is the unreasonable advantage it gives to the sagacious, the enterprising, and the monied few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its

consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said, with some truth, that laws are made for the few, not for the many.³⁶

Here, Publius is explaining what happened when populist state legislatures passed too many inconsistent laws during the Revolutionary Era – not what happens when an executive officer makes many regulations or ad hoc decisions under broad legislative discretion. Yet there are good reasons for thinking this distinction doesn't make a difference in relation to the problem Publius identified. A prolix legal code is calamitous because, when too many laws conflict, the judge who must cut through the conflict essentially has discretion to make the law. Recall how TARP's statutory policies are very general and mutually inconsistent. Those inconsistencies give executive officers (the Treasury Secretary and his senior aides) similar discretion.

The ad hoc nature of the Secretary's decisions creates more grounds for criticism. First, the information-overload problems I discussed in relation to federalism apply to the decisions of the Treasury Secretary as much as they do to Congress. If there are too many risky mortgages or securities for Congress to pass standing laws settling them all, regulators are going to have just as much trouble dealing with them on a case by case basis. I am not saying that regulators will be

incapable of making decisions in all of these cases – rather that the decisions are unlikely as a group to approximate the merits or to be consistent enough to seem law-like.

That leads to further criticisms, about the loss of formal equality. When political decisionmaking is ad hoc in conditions of uncertainty, government ceases to be the “umpire” Locke expected. Some entities received assistance (Citigroup, Bank of America, Wells Fargo, JP Morgan, and Goldman Sachs in relation to AIG); some didn’t (Lehman Brothers and Bear Stearns). Some car companies were supported (again, notwithstanding the fact that the TARP statute didn’t authorize support for them) even though they sell less-competitive cars (GM, Chrysler), others are now competing against government-subsidized competition (Ford, Toyota, Chrysler).³⁷ And in their capacities as taxpayers, citizens have subsidized not only citizens in states with the biggest housing bubbles but the investment houses with the most sophisticated lawyers and the best-connected lobbyists.

These disparities are not consistent with meaningful liberty. Rather, they illustrate a form of anarchy peculiar to degraded political orders: “In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature, where the weaker individual is not secured against the violence of the stronger.”³⁸

Last, taken together, the ad hoc and unequal effects of TARP's administration chill the free exercise of economic liberty. As Federalist 62 continues:

The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow.

In other words, meaningful economic liberty requires a stable, general, and easy-to-follow set of rules. In other circumstances, uncertainty chills legitimate economic risk-taking. In TARP's case, the uncertainty influences affairs in a more complex fashion. Lenders and investors who do not have access to congressional committees or the Treasury Secretary and his staff may despair of competing on a tilted playing field. By contrast, lenders and investors who think they do have access are encouraged to speculate. They may gamble expecting that, if another credit crunch happens, federal regulators will deem them "too big to fail" as those regulators did in 2008 and 2009.

Conclusion

Let me close with a few lessons. First, if I have convinced you that the Founders said things insightful about and relevant to the debate about the mortgage-foreclosure crisis, I have accomplished much of what I hoped. Students in the classroom, and citizens in politics, are more likely to respect our Founding legacy if that legacy speaks to contemporary issues. All are even more likely to take an interest in the Founding if the Founders' observations give partisans on any side of any issue stakes in the Founding.

Second, when Tea Partiers cite the Declaration, the Constitution, or our political practice, they aren't necessarily trying to brand their opponents as un-American. To the contrary, they are practicing a quintessentially American phenomenon. Tea Partiers assume that the Declaration, the Constitution, and the traditions that have built on them all constitute a combination of authority and reason. They also assume that all Americans agree to be bound by the authority as construed by a political majority during an election, after voters have been presented with two reasonable interpretations of that authority. Jefferson and Madison made such an appeal 210 years ago; there is nothing un-American or exclusionary for Tea Partiers or the authors of the Pledge to make such an appeal now. I hope to have suggested by example how partisans might make such appeals giving equal due to the Constitution's legal authority and its political reason.

Of course, there are limitations to these appeals. For this “constitutional” style of political appeal to work, all Americans must agree in good faith that the Declaration of Independence, the Constitution, and the better parts of our political traditions are worth following, and all must think enough of their political adversaries to acquiesce if those adversaries win elections. For example, there is no point in reasoning in good faith within our political tradition with any modern political theorists who, like Goodnow, complains that Americans have a “superstitious reverence” for that tradition.

That raises important questions about members of the Governance Party. Since the New Deal, members of the Governance Party have claimed that their understanding of the Constitution is consistent with our foundational political tradition. They’ve claimed authority to govern on the ground that the American people embraces their construction of that political tradition. Assume, however, that a congressional majority should repeal TARP at some point in the future. Assume in addition that this majority claims to do so on the basis of a mandate from the American people to limit national administrative governance on the ground that it produces bad constitutional policy. In effect, in response to a challenge like Speaker Pelosi’s (“Are you serious? Are you serious?”), such a majority would say on behalf of the Tea Party, “Quite serious -- because the Constitution’s structures encourage a more involved citizenry and a leaner, less

corrupt, and less confused federal government than what we've seen for a generation and more."

If a contemporary political coalition starts repealing laws like TARP with arguments like these, Pelosi, Cohen, Chernow, and other members of the Governance Party will need to decide whether they will acquiesce. Will they accept the people's judgment to take America's constitutional tradition in a different direction? Or will they continue to insist that the people have fallen under the spell of witchcraft – and, like Goodnow a century ago, complain about the people's superstitious reverence for such witchcraft?

ENDNOTES.

¹ Republican Conference of the U.S. House of Representatives, A Pledge to America: A New Governing Agenda Built on the Priorities of Our Nation, the Principles We Stand For, & America's Founding Values, <http://www.gop.gov/resources/library/documents/solutions/a-pledge-to-america.pdf>, at 2, 33.

² U.S. Declaration of Independence ¶ 2 (1776).

³ Richard Cohen, "Republicans Under a Spell," *Washington Post*, Sept. 21, 2010; Ron Chernow, "The Founding Fathers Versus the Tea Party," *New York Times*, Sep. 23, 2010. http://www.nytimes.com/2010/09/24/opinion/24chernow.html?pagewanted=1&_r=2.

⁴ *Petition of Right* (England, 1628); *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (England, 1689); Thomas Jefferson, *A Summary View of the Rights of British America* (1774); Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War 1-72* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 2000). See 1 William Blackstone, *Commentaries on the Laws of England* *123-25, *156-57 (1766).

⁵ No. 10, at 44 (Gideon edition).

⁶ Alexander Hamilton et al., *The Federalist*, George W. Carey & James McClellan eds., (Indianapolis: Liberty Fund, 2001), No. 2, at 6; *Federalist* No. 10, at 44, 46.

⁷ *Federalist* No. 51, at 270. John Harrison argues that the Constitution protects economic liberty very little directly but quite extensively indirectly. See John Harrison, "The Constitution of Economic Liberty," *San Diego Law Review* 45 (2008): 709. I may disagree with him about the former claim, see *ibid.* at 718-23, but we agree on the latter, see *ibid.* at 711-18.

⁸ Matt Cover, "When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: Are You Serious?," *CNSNews.com*, Oct. 22, 2009, (<http://www.cnsnews.com/news/article/55971>; Frank J. Goodnow, *Social Reform and the Constitution* 9-10 (New York: The MacMillan Co., 1911), 9-10. For studies of the roots of the modern American regulatory state, see Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman & Littlefield Pubs., 2005); John Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (Washington, DC: Crane Russak, 1992); Ronald J. Pestritto, *The Progressive Origins of the*

Administrative State: Wilson, Goodnow, and Landis, *Social Philosophy & Policy* 24 (2007): 16; Eric R. Claeys, "The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Law," in *Modern America and the Legacy of the Founding*, Ronald J. Pestritto & Thomas G. West eds. (Lanham, MD: Rowman & Littlefield Pubs., 2007), 35; Tiffany Jones Miller, "Transforming Formal Freedom into Effective Freedom: Dewey, the New Deal, and the Great Society," in *Modern America and the Legacy of the Founding*, 169; Charles R. Kesler, "Woodrow Wilson and the Statesmanship of Progress," in *Natural Right and Political Right: Essays in Honor of Harry V. Jaffa*, Thomas B. Silver & Peter W. Schramm eds. (Durham: Carolina Academic Press, 1984), 103.

⁹ Cohen, "Republicans Under a Spell." Angelo M. Codevilla refers to the group whom I call the Governance Party the "ruling class. See "America's Ruling Class—and the Perils of Revolution," *The American Spectator* (July-August 2010).

¹⁰ See TARP sec. 3(5), codified at 12 U.S.C. § 5202(5); Jim Puzzanghera & Martin Zimmerman, "Bush extends aid to carmakers," *Los Angeles Times*, Dec. 20, 2008, at A1.

¹¹ Abdon M. Pallasch, "Rick Santelli: His '09 Rant Against Mortgage Bailouts for 'Losers' Ignited the Tea Party Movement," *Chicago Sun Times*, Sept. 19, 2010, <http://www.suntimes.com/news/politics/2723474,CST-NWS-TeaParty19.article>; see Codevilla, "America's Ruling Class"; *Pledge to America*, 21.

¹² See TARP sec. 503, codified at 26 U.S.C. § 4161 (2010); TARP sec. 110, codified at 26 U.S.C. § 5220 (2010); TARP sec. 111, codified at 12 U.S.C. § 5221 (2010); TARP secs 2 & 101, codified at 12 U.S.C. § 5201 & 5211 (2010); Daniel J. *USA Today*, July 14, 2010.

¹³ TARP sec. 101(a)(1), codified at 12 U.S.C. § 5202(a)(1) (2010).

¹⁴ *Federalist* No. 51, at 270-71; U.S. Const. art. I, sec. 8, cls. 3, 5.

¹⁵ See Brent Horton & Jack Vrablik, "The Troubled Asset Relief Program (TARP): Uses and Abuses," *Banking & Financial Services Report* 29, no. 8 (2010): 24; J.W. Verret, "Separation of Bank and State: The Bailout Meets Federal Budget Law," *BYU Law Review* (forthcoming 2011), manuscript at 5-9; Phillip Swagel, "The Financial Crisis: An Inside View," www.brookings.edu/economics/bpea/bpea.aspx.

¹⁶ *Federalist* No. 10, at 43.

¹⁷ Mitchell, "A Moral Abomination"; Dean Baker, "The Costs of TARP: One More Time," October 4, 2010, <http://seekingalpha.com/article/228230-the-cost-of-tarp-one-more-time>.

¹⁸ U.S. Const. amend. X.

¹⁹ See Gary Lawson, "Burying the Constitution Under a TARP," *Harvard Journal of Law & Public Policy* 33 (2009): 55, 58-61.

²⁰ See U.S. Const. art. I, sec. 8, cls. 3, 4, 18; id. art. II sec. 2; id. art. IV, sec. 3, cl. 2; Gary Lawson & Patricia Granger, "The 'Proper' Scope of the Sweeping Power: A Jurisdictional Interpretation of the Sweeping Clause," *Duke Law Journal* 43 (1993): 267.

²¹ *Wickard v. Filburn*, 317 U.S. 111, 122 (1942) (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)); see *United States v. Comstock*, 130 S. Ct. 1949 (2010); *Gonzales v. Raich*, 545 U.S. 1 (2005).

²² Lawrence Tribe, *American Constitutional Law* 3rd ed. (New York: Foundation Press, 2000), 811; *United States v. Lopez*, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring).

²³ *Federalist* No. 17, at 87; see id. No. 46, at 244.

²⁴ *Federalist* No. 10, at 47; see Eric R. Claeys, "Justice Sutherland and Commerce-Clause Federalism Before the New Deal," *Publius: The Journal of Federalism*, 34, No. 4 (2004): 9.

²⁵ Fed. No. 46, at 244; Fed. 53. P. 279.

²⁶ No. 46, at 245. See also No. 17, at 81-82.

²⁷ Nos. 45, 46, at 241-43.

²⁸ Jeffrey M. Jones, "Americans' Image of 'Federal Government' Mostly Negative: More Than 7 in 10 Describe Government in Negative Terms" (October 11, 2010), http://www.gallup.com/poll/143492/Americans-Image-Federal-Government-Mostly-Negative.aspx?utm_source=tagrss&utm_medium=rss&utm_campaign=syndication&utm_term=USA.

²⁹ John Locke, *Second Treatise of Government*, sec. 87, Peter Laslett ed. at 324 (1989); *Federalist* No. 62, at 324.

³⁰ Section 101(a)(1). 101(b). 101(e), 103 codified at 12 U.S.C. 5202, 5213; see Lawson, "Burying the Constitution Under a TARP," at 61-65; John Samples, "Lawless Policy: TARP As Congressional Failure," *Policy Analysis* (No. 660, February 4, 2010), http://www.cato.org/pub_display.php?pub_id=11183.

³¹ *Yakus v. United States*, 321 U.S. 414, 425 (1944) (internal quotations and citations omitted).

³² *Yakus*, 321 U.S. at 427; *National Broadcasting Co. v. United States*, 319 U.S. 190, 315-16 (1943).

³³ *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); Eric Posner, “Carping about TARP - ing” (Jan. 15, 2009), <http://volokh.com/posts/1231997535.shtml>.

³⁴ *Federalist* No. 37, at 181-82; *id.* No. 47, at 251.

³⁵ Locke, *Second Treatise*, sec. 87, at 324; *Federalist* 37, at 181; *id.* No. 48, at 256.

³⁶ No. 62, at 323-24.

³⁷ See John Dunbar & David Donald, “Who’s Behind the Financial Meltdown? The Top 25 Subprime Lenders and Their Wall Street Backers” (May 6, 2009), http://www.publicintegrity.org/investigations/economic_meltdown/articles/entry/1286/; Lawson, “Burying the Constitution Under a TARP,” at 70-72.

³⁸ No. 51, at 270-71.