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Roger Williams University School of Law

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# Newsroom

## Goldstein on Tea Party Congress

Professor Jared Goldstein spoke to 'CQ Weekly' about the challenges faced by Republican leaders in bringing the Tea Party's constitutional vision to Congress.

The current cover story from [CQ Weekly](#): "[Republicans Turn to Constitutionalism to Rein in Authority](#)" by Seth Stern, CQ Staff:



**Jan 10, 2011:** The exercise of reading the Constitution aloud on the House floor, all 4,543 words of it, was an easy and attention-grabbing way for Republican leaders to show last week that they take the Constitution seriously — and to reach out to an important new constituency responsible for their resurgence: the tea party.

If anything binds the decentralized and diffused tea party movement together, it is a shared sense that congressional Democrats and the White House ignored what tea partiers say is the Constitution's strictly limited understanding of the federal government's powers when lawmakers rushed to bail out big business and overhaul the nation's health care system. But the trend has been decades in the making, they say, building ever since the New Deal, when lawmakers decided that the relevant question to ask when legislating was not whether there was anything in the Constitution that authorized them to act, but whether there was anything in it to stop them.

Tea party members embraced the Constitution as their lodestar and most potent symbol. They handed out copies and read the Constitution aloud at their rallies while memorizing its provisions and studying them at home in small groups.

Republican candidates used references to the Constitution as shorthand to assure tea party voters that they shared the same values. Allen B. West, a former Army lieutenant colonel who ran successfully for the

House in Florida, made sure to mention that he believed in the importance of “governing with constitutional principles” in his first 30-second campaign ad.

In the weeks since the election, the new members of Congress elected with tea party help swore that they would be guided by the Founding Fathers’ vision of a government of limited power.

As Mike Lee, Utah’s new Republican senator, told a conservative lawyers’ convention in November, “If I can’t imagine myself explaining to James Madison with a straight face why what I was doing was consistent with the text and history of the Constitution as it’s been amended all 27 times, I’ll vote no.”

That same month, while waiting to board a flight to Washington, West sat quietly underlining passages of the well-worn pocket Constitution he frequently held up at campaign rallies.

Now, as these freshmen take office, they must decide how far to press a constitutional philosophy that would, if taken to its literal extreme, dictate dismantling much of the modern administrative state, from the Education Department to Social Security.

Ultimately, though, it is the GOP caucus leaders who will decide whether all the talk about the nation’s founding document amounts to anything more than symbolism and a convenient way to rebrand their agenda.

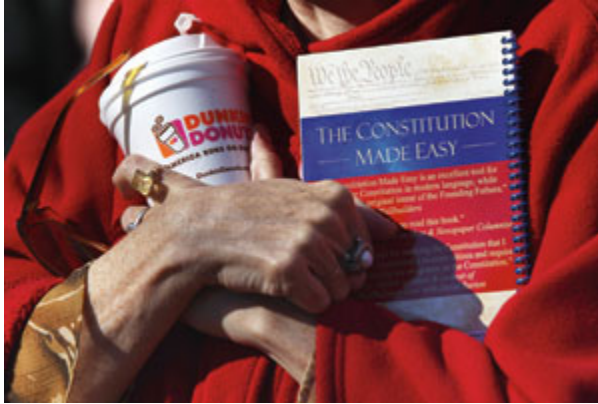
“We’ll find out if this is just a fad or pure rhetoric, or whether some of these guys are going to take a principled stand on this,” said Todd Zywicki, a law professor at George Mason University.

Lee, the new senator, is not entirely kidding when he jokes that the Constitution was something of a “second religion” in his house growing up.

This son of President Ronald Reagan’s solicitor general, the late Rex E. Lee, remembers sitting around the dinner table as a child discussing the document’s Presentment Clause, which lays out the process by which a bill becomes a law. He hadn’t even reached adolescence when he started watching his father argue before the U.S. Supreme Court.

Lee, 39, vividly recalls asking his father what in the Constitution gave the federal government the power to regulate abortion. He was 10 years old at the time.

## **Tea-Infused Vision**



In the three decades since, Lee only grew more certain in his conviction about the Constitution's strict limits on federal power as he studied law at Brigham Young University; clerked for Justice Samuel A. Alito Jr.; and worked as a federal prosecutor, corporate lawyer and counsel to Utah's governor.

"Within this charter for our national government there is no power to do all things that Congress deems expedient," Lee said during a November speech in Washington at the Federalist Society's annual convention. (Lee was president of his campus chapter of the conservative lawyers' group during law school.) "There is no power to make life fairer, more equitable, more enjoyable for Americans more generally. There are instead limited, enumerated powers."

What the federal government can do, Lee said, is all laid out plainly in Article I, Section 8 of the Constitution. Most of the enumerated powers are so specific as to generate no dispute, such as the power to establish post offices. Others are vestiges of the past with little modern relevance, such as the power to license private vessels to attack pirates.

But many powers are broad, such as the Commerce Clause, authorizing Congress to regulate interstate commerce. And these, Lee says, are the ones that have been stretched far beyond what the Founding Fathers envisioned and have gotten the country into trouble.

Things went awry, Lee said, during the New Deal, when the Supreme Court interpreted the Commerce Clause more expansively and for the first time began deferring to Congress' interpretation of its authority to enact legislation on everything from crop controls to health care.

Rather than blaming the Supreme Court for giving Congress free rein, Lee blames Congress for failing to rein itself in. "Members of Congress need to be accountable and hold themselves accountable to their oath regardless of what the courts are willing to enforce," Lee said.

It is perhaps not surprising that Lee should espouse a narrative of the Constitution that has circulated in the elite conservative and libertarian legal circles in which he has traveled since childhood.

But only recently have grass-roots conservative activists come to the same conclusions as they look to the nation's founding documents for answers about why and how the federal government has gotten so big and spent so much money it didn't have.

The belief that the nation's leaders have ignored the strict limits the Constitution places on federal government power motivated conservatives across the country to get involved in the tea party movement and bring candidates such as Lee to power.

The new activists are people such as Frank Anderson, a school operations manager in Lindon, Utah, who volunteered on the successful 2008 House campaign of another Utah Republican, Jason Chaffetz. Like Lee, Chaffetz won election after defeating a sitting incumbent in a Republican primary.

"We've left the bedrock of the Constitution, which was designed to limit the areas the federal government would get involved with," Anderson said. "When you leave those anchors, you tend to drift."

After Chaffetz's victory, Anderson and some fellow Chaffetz campaign volunteers created a grass-roots group, the Independence Caucus, as a vehicle for vetting and endorsing other conservative candidates around the country. (Lee is among 13 lawmakers in the 112th Congress endorsed by the Independence Caucus.)

Anderson doesn't consider himself a tea party member; he said his group got there first. Nevertheless, the Independence Caucus' candidate questionnaire is as close to a manifesto as one can find within the decentralized tea party movement.

The first of the 80 questions asked candidates whether they agreed that "the federal government is limited to the 30 enumerated powers that are specified in the Constitution." The second asked for an assurance that they would oppose any legislation "that purports to regulate or otherwise involve the federal government in any areas that are not specifically and expressly enumerated in the Constitution and therefore reserved as the exclusive province of the states."

Among those areas the Independence Caucus questionnaire said are beyond the province of the federal government: education, energy, farm subsidies, labor and non-interstate roads.

For tea party activists, this list of enumerated powers offers a straightforward guide to federal power that any layman can understand. “If it’s not on that list, you can’t do it,” said Larrey Anderson, a former state legislator in Idaho. “It’s not hard to read that, and there aren’t that many powers listed.”

It is a view shared by West, the new Florida lawmaker with no legal training. “He’s not going to make a decision or vote in any way that goes against what the Founding Fathers believed in and is spelled out in the Constitution,” said West’s spokeswoman Angela Sachitano. “That’s why he takes it everywhere he goes.”

### **Liberal Critique**

But liberal constitutional scholars say the open-ended language of the Constitution doesn’t actually provide as much certainty about complex policy questions as tea party activists — and the candidates they helped elect — suggest.

“The drafters of the document understood that they could not have known all the possible constitutional controversies that would arise in the future,” said Professor Jamal Greene of Columbia Law School. “The document is a political document designed to set a broad framework for future controversies.”

The Constitution’s open-ended language explains why so many social and political movements throughout American history, ranging from abolitionists and supporters of slavery through opponents of the New Deal and the civil rights movement, could all turn to it as a source of legitimacy.

“It’s easy to find some support for any position in the Constitution,” said Michael Klarman, a Harvard Law School legal historian.

As in these past movements, Klarman said, tea party activists are relying on the Constitution to advance their underlying policy preferences.

“When people talk about going back to the Constitution, it’s not really that they want to go back to the Constitution,” Klarman said. “They have a certain substantive agenda: restricting the power of the federal government.”

Not all exercise of federal power generates equal alarm among tea party members, Klarman says: They seem far angrier about the health care overhaul and bank bailouts than about the way the administrations of both George W. Bush and Barack Obama have waged war against terrorism.

Should lawmakers actually interpret the Constitution the way the tea party envisions it, liberal scholars say, the consequences would be dire. A narrowly circumscribed reading of the Commerce Clause would strip Congress' ability to regulate child labor, pollution, economic crimes such as securities fraud — or even kidnapping.

"If you take many of these things to their logical conclusion, the modern administrative state falls apart," said Christopher W. Schmidt, a professor at Chicago-Kent College of Law. "This is an incredibly radical critique."

### **How Far?**

The tea party-backed lawmakers will face a difficult choice as they apply their narrow reading of federal power, said **Jared A. Goldstein of Roger Williams University School of Law**.

"If a lawmaker really believes that the Department of Education is unconstitutional and the Environmental Protection Agency is unconstitutional and the Department of the Interior has no authority to manage national parks within his own state, is he really not going to vote for the appropriations bill for those agencies or is he going to compromise and recognize the reality that these agencies exist whether he likes them or not?"

“Unless they’re going to vote no on everything, they’re going to have to compromise on many of their beliefs,” **Goldstein said**. “But I bet elements of the tea party movement will challenge and abandon their newly elected representatives when they compromise, which is what Congress has to do to get anything passed.”

Ideological purity carries its own political risks. Any suggestion that popular entitlement programs such as Social Security aren’t constitutional is likely to generate a costly political backlash.

In the past, Rep. Ron Paul, R-Texas, isolated himself by regularly voting against legislation he thought was unconstitutional. Mike Lee said he’s confident he won’t similarly wind up a voice in the wilderness in the Senate. He said his potential allies include fellow Republican newcomers such as Paul’s son, Rand Paul of Kentucky, and Marco Rubio of Florida, as well as incumbent senators such as Jim DeMint of South Carolina and Tom Coburn of Oklahoma.

Federalist Society Executive Vice President Leonard Leo predicted that these new lawmakers will take a variety of approaches, from trying to make modest changes to regulatory agencies to raising much broader questions of constitutional power.

“I think you’ll see the gamut,” Leo said. “These newly elected leaders come from very different diverse backgrounds and experiences, and will have different sensibilities of how to put the constitutional issues into play.”

In thinking through how he will apply his analysis of enumerated powers, Lee said he will distinguish between “forward-thinking discussions of new programs” — which he will find easier to reject outright — and pre-existing ones.

“The tougher issue arises when you’re talking about existing programs that Americans have come to rely on,” Lee said.

Lee said he wouldn’t automatically vote against appropriations bills funding government entities he might not think are constitutional.

“In many instances, you have to move one step at a time and there will be times when I’ll be faced with legislation that moves us in the right direction,” Lee said. “It might not be all the way I want, but I would vote for it if it moves in the direction of constitutionally limited government.”

Establishment conservatives and grass-roots activists talk in equally pragmatic terms.



“If you’re serious about constitutional limits you need to be serious about these conversations, but also do it in a way that doesn’t so isolate yourself that it becomes less meaningful,” said Matthew Spalding of the Heritage Foundation. “The principled way to proceed is to proceed in light of your principles as best you can.”

Similarly, Frank Anderson of the Independence Caucus, which asked candidates to pledge to vote against all programs they deem unconstitutional, said, “We didn’t get here in a day; we’re not going to get out of it in a day.”

For example, Anderson said that while he believes the Education Department is not constitutionally authorized, states have become too dependent on federal education aid to “turn it off overnight.” Instead, Anderson said, he would favor gradually winding it down over time and would start by turning all federal education aid into no-strings-attached grants to states.

The danger is that the more such compromises lawmakers make, the harder it will be to argue that they are consistently applying a strict vision of the Constitution. “How many exceptions does one make to one’s theory of the Constitution” before it stops being principled? asked Nathaniel Persily of Columbia Law School.

### **Practical Steps**

In the weeks before they took power, House Republican leaders announced two steps to show that their respect for the Constitution was not just empty campaign rhetoric.

In addition to reading the Constitution aloud on the House floor, Republicans adopted a new rule requiring that every piece of legislation introduced be accompanied by a separate statement laying out what enumerated power authorizes it “as specifically as practicable.”

House Republicans had included the proposal in their Pledge to America during the 2010 election campaign, after it had been languishing within the GOP caucus for years. Rep. John Shadegg of Arizona first introduced what he called the Enumerated Powers Act in 1995, the last time Republicans took control of the House.

Supporters of the rule say they want to ensure that it’s not reduced to a box lawmakers check without much thought.

One proposal would have allowed for a separate debate on a measure’s constitutionality if requested by enough members. “That will force people who are really cavalier about constitutionality to take a serious

look at it," said Rob Bishop of Utah, who headed the GOP transition committee that helped develop the rule.

However, the Republican leadership opted against adopting such an automatic trigger for debating the constitutionality of pending legislation.

But a report on the new rule by the non-partisan Congressional Research Service highlighted the difficulties involved in getting members involved in constitutional interpretation.

As the CRS report noted, it's entirely up to individual members to ascertain the basis of constitutional authority, and there is no enforcement mechanism.

Members aren't required to cite constitutional authority for each provision and don't have to note whether the other parts of the Constitution might put limits on the ability to act. For instance, a member might cite the requisite authority to regulate the interstate sale of pornographic materials without any reference to constraints the First Amendment may impose.

Jerrold Nadler of New York, the top Democrat on the House Judiciary Subcommittee on the Constitution, called the new requirement "meaningless," since lawmakers already know they are "governed by the Constitution."

"If anything we do is unconstitutional, it would go to the courts," Nadler said.

Relying on courts as the only arbiter of legislation's constitutionality is exactly the sort of mind-set Republicans say they want to change.

For much of American history, all three branches of government took seriously their obligation to consider the constitutionality of pending legislation, said Zywicki of George Mason University. "That has atrophied since the New Deal," he said. "Since the New Deal, we've seen this bifurcation where politicians vote for something because they think it's a good idea, and they leave it up to the courts to decide whether it's constitutional or not."

Tea party adherents say a particularly galling example of how little Congress thinks about the constitutionality of legislation came during the health care debate in 2009. When a reporter asked Democratic Speaker Nancy Pelosi of California what in the Constitution authorized an individual mandate, she replied, "Are you serious? Are you serious?" (Pelosi's spokesperson later followed up with a lengthy written response.)

But such concerns long predate the tea party movement. “At best, Congress does an uneven job of considering the constitutionality of the statutes it adopts,” wrote Abner Mikva, a former representative from Illinois, in a 1983 law review article. Mikva, who was then a judge on the U.S. Court of Appeals for the D.C. Circuit, lamented that members of Congress “are not ideologically committed or institutionally suited to search for the meaning of constitutional values.”

Whether Congress is any better equipped to do so now will be put to the test as the Republican majority implements its rule requiring references to constitutional authority.

Rules Committee staff have already distributed a memo laying out sample constitutional authority statements and a list of potential sources. It conveyed some sense of the difficulty of finding any consensus about what the Constitution requires.

In addition to the Federalist Papers and the Congressional Research Service’s Annotated Guide to the Constitution, the memo listed as sources the websites of outside groups such as the conservative Heritage Foundation and liberal American Constitution Society, which have very different visions of the document.

The Rules Committee also invited staff from both parties to attend hourlong sessions where they explained the new rule. But attendees say that may not be enough guidance for members and staff who aren’t necessarily well-versed in the Constitution.

As a supplement, Rep. Scott Garrett, R-N.J., who founded the House Constitution Caucus in 2005, has introduced a resolution that would require all staff to attend annual tutorials on the Constitution.

Garrett said he envisions outside legal experts developing the curriculum for sessions that would last as long as staffers’ ethics training: an hour for junior staff and two for more senior staff. “It’s an hour or two more than we have now,” Garrett said.

Rep. Michele Bachmann, a Minnesota Republican who heads the House Tea Party Caucus, is organizing a series of seminars at which members will have a chance to learn more about the Constitution. “People made their voices very clear that they want us to work within the bounds of the Constitution,” Bachmann said. “So it’s important that we know it and understand it.”

Justice Antonin Scalia has agreed to be the first speaker later this month, and Bachmann has also invited conservative radio host Mark Levin, who wrote the book “Men in Black: How the Supreme Court Is Destroying America.”

Garrett said a similarly high-profile list of guests, including Scalia and Justice Stephen G. Breyer, attracted few lawmakers to a Constitution Caucus speakers' series several years ago. Garrett said many of the new lawmakers might prove to be a more enthusiastic audience.

Lee said he's fully aware of how hard it might be to change the culture of Congress when it comes to constitutional interpretation and views it as a long-term project.

"It's a process I think will play out over the course of years and, in fact, decades," Lee said. "You can't simply flip a switch and change things that quickly. These things take time to sink in."

Schmidt said it shouldn't be too hard for lawmakers such as Lee to claim some measure of success.

"It could be clogging up the system, it could be the next time a major bill is debated on the floor of Congress, more people are using this rhetoric of the Constitution," Schmidt said. "If government in the next two years just does less, partly because some members' vision is partly colored by the idea of a Constitution of limited powers, that is a small-level victory of sorts."

*For full story, click [here](#).*