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CAN POPULAR CONSTITUTIONALISM SURVIVE THE TEA PARTY MOVEMENT?

Jared A. Goldstein*

The sudden emergence and prominence of the Tea Party movement raises important questions about the role of the Constitution in popular politics. More than any political movement in recent memory, the Tea Party movement is centrally focused on the meaning of the Constitution.¹ Tea Party supporters believe that the nation is facing a crisis because it has abandoned the Constitution, and they seek to restore the government to what they believe are its foundational principles.²

As Ilya Somin discusses, the Tea Party movement is easily recognizable as a nascent popular constitutionalist movement because it seeks to implement its constitutional vision using the tools of ordinary politics.³ Popular constitutionalists argue that the ultimate meaning of the Constitution should be determined by the people, acting through political processes, rather than by the courts.⁴ Like many political movements that have suc-

* Professor of Law, Roger Williams University School of Law; J.D., University of Michigan, 1994; B.A., Vassar College, 1990. This essay is a revised and expanded version of the presentation I made at the 2011 AALS Annual Meeting in San Francisco as part of the panel, "The Constitutional Politics of the Tea Party Movement," along with Professors Randy Barnett, Sanford Levinson, Nathaniel Persily, and Ilya Somin. The panel was organized and moderated by Professor Richard Albert, and I thank him for including me.

¹ See, e.g., DICK ARMEY & MATT KIBBE, *GIVE US LIBERTY: A TEA PARTY MANIFESTO* 66 (2010) ("First and foremost, the Tea Party movement is concerned with recovering constitutional principles in government."); JOSEPH FARAH, *THE TEA PARTY MANIFESTO: A VISION FOR AN AMERICAN REBIRTH* 27 (2010) ("[F]undamentally, [the Tea Party] is about the Constitution and the Declaration of Independence.").

² A typical mission statement of a Tea Party group declares, "Our demands are simple: Return the role of the Federal government to the original design laid out in the U.S. Constitution." TRUSSVILLE TEA PARTY, <http://www.trussvilleteaparty.com/> (last visited Mar. 9, 2011) (link).

³ See Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY (forthcoming April 2011).

⁴ I am speaking here of the normative claims of some proponents of popular constitutionalism, who advocate greater public control of constitutional interpretation. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 182 (1999) ("Populist constitutional law . . . treats constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves."); Larry D. Kramer, *Undercover Anti-Populism*, 73 *FORDHAM L. REV.* 1343, 1344 (2005) ("The basic principle of popular constitutionalism can be briefly stated. It is, in a nutshell, the idea that ordinary citizens are our most authoritative interpreters of the Constitution.") (link). Popular constitutionalism also includes more descriptive scholarship, which examines how political and social movements often influence constitutional developments without arguing that such influence is necessarily a good

ceeded in changing the understood meaning of the Constitution, including the civil rights movement, the feminist movement, and the gun rights movement, the Tea Party movement has sought to mobilize the public to demand the implementation of its constitutional vision.⁵ The Tea Party movement drew hundreds of thousands of people to the streets to demand a return to the “Founders’ Constitution.”⁶ They protested, marched, disrupted town hall meetings, and held seminars on the meaning of the Constitution.⁷ Perhaps more than any other group, they shaped the 2010 elections, greatly affecting the composition of Congress.⁸

This Essay takes the first steps toward an assessment of popular constitutionalism in light of the Tea Party movement and suggests that the Tea Party movement calls into question some of the central claims of popular constitutionalism. To understand why, it is necessary to first look at the Tea Party’s constitutional vision and rhetoric.⁹ Examination of prominent

thing. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006). For a nice summary of the popular constitutionalist literature, including the distinctions between normative and positive popular constitutionalists, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010) (link).

⁵ For an examination of the ways that some of these groups have succeeded in effectuating changes in constitutional law outside the Article V amendment process, see, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Siegel, *supra* note 4.

⁶ See JOHN M. O’HARA, A NEW AMERICAN TEA PARTY: THE COUNTERREVOLUTION AGAINST BAILOUTS, HANDOUTS, RECKLESS SPENDING, AND MORE TAXES 18–20, 237–38 (2010).

⁷ See *id.* at 1–18; KATE ZERNIKE, BOILING MAD: INSIDE TEA PARTY AMERICA 64–80, 83–84 (2010).

⁸ Exit polls show that forty-one percent of voters in the 2010 election identified themselves as Tea Party supporters, and eighty-seven percent of them voted for Republican candidates. Tom Curry, *What Exit Polls Say About Tea Party Movement*, MSNBC, Nov. 3, 2010, http://www.msnbc.msn.com/id/39979427/ns/politics-decision_2010/ (link).

⁹ Summarizing those constitutional views, however, is difficult because the Tea Party movement is broad and decentralized with no agreed-upon doctrines or leaders. The Tea Party literature I rely upon includes the mission statements of the six national Tea Party umbrella organizations—FreedomWorks Tea Party, 1776 Tea Party, Tea Party Nation, Tea Party Patriots, ResistNet, and Tea Party Express; Tea Party websites, such as www.TeaPartyNation.com, www.TeaPartyPatriots.org, and www.TeaParty.org; books written by recognized Tea Party leaders and insiders, including ARMEY & KIBBE, *supra* note 1; FARAH, *supra* note 1; CHARLY GULLETT, OFFICIAL TEA PARTY HANDBOOK: A TACTICAL PLAYBOOK FOR TEA PARTY PATRIOTS (2009); and JOHN M. O’HARA, *supra* note 6; as well as speeches given at Tea Party events. I also rely on two books on the Constitution that predate the Tea Party movement, W. CLEON SKOUSEN, THE FIVE THOUSAND YEAR LEAP: 28 GREAT IDEAS THAT CHANGED THE WORLD (7th ed. 2009) [hereinafter SKOUSEN, FIVE THOUSAND] and W. CLEON SKOUSEN, THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION (1985) [hereinafter SKOUSEN, MAKING], which are considered by many to be the most influential books on the Tea Party’s constitutional vision and which have been used by hundreds of Tea Party groups to educate their members and the public about the meaning of the Constitution. See Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG., Nov. 26, 2010, <http://www.nytimes.com/2010/11/28/magazine/28FOB-idealab-t.html> (characterizing Skousen as “the constitutional guru of the Tea Party movement”) (link). In addition, I have also found useful several books and other materials describing the movement from the outside, in-

Tea Party books, websites, and speeches shows that the Tea Party employs constitutional rhetoric to advance a militantly nationalist agenda, characterized by a broad conception of American exceptionalism and a narrow conception of what America stands for, what ideas and policies are American, and who the “real Americans” are. In the Tea Party’s constitutional mythology, a legendary and possibly divinely inspired group known as “The Founders” created a sacred text known as “the Constitution” that embodies the values that make America exceptional—the libertarian principles of individualism, limited government, and faith in free markets.¹⁰ As Harvard historian Jill Lepore has declared, the Tea Party’s depiction of American history “is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution.”¹¹ Tea Party supporters believe that commitment to this mythological “Founders’ Constitution” represents the dividing line between true patriotic Americans and others, including most prominently President Obama, who seek to foist un-American ideas on the American people and who must be defeated to save America.¹² In Tea Party rhetoric, the Constitution is a label for the fundamental principles that the movement embraces, while all other values and policies are regarded as dangerously un-American.¹³

After describing the nationalist core of the Tea Party’s constitutional vision, this Essay frames (but does not attempt to resolve) a set of questions

cluding DEVIN BURGHART & LEONARD ZESKIND, *TEA PARTY NATIONALISM: A CRITICAL EXAMINATION OF THE TEA PARTY MOVEMENT AND THE SIZE, SCOPE, AND FOCUS OF ITS NATIONAL FACTIONS* (2010); JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010); and ZERNIKE, *supra* note 7.

¹⁰ In February 2010, a group of leading Tea Party activists circulated a “Tea Party Declaration of Independence,” which seeks to articulate the movement’s principles. Carl Andrews, *Tea Party Nation Drafts Declaration of Independence*, AM. CONSERVATIVE DAILY, Feb. 25, 2010, <http://www.americanconservativedaily.com/2010/02/tea-party-nation-drafts-declaration-of-independence/> (link). The document declares: “For much of its history the United States has been a land of prosperity and liberty, [sic] sound policies such as fiscal responsibility, constitutionally limited government and a belief in the free market have safeguarded this condition.” *Declaration of Tea Party Independence*, DAILY CALLER, <http://dailycaller.firenetworks.com/001646/dailycaller.com/wp-content/blogs.dir/1/files/Tea-Party-Dec-of-Independence-22410.pdf> (last visited Mar. 16, 2011) (link).

¹¹ Jill Lepore, *Tea and Sympathy: Who Owns the American Revolution?*, NEW YORKER, May 3, 2010, http://www.newyorker.com/reporting/2010/05/03/100503fa_fact_lepore?currentPage=all (link).

¹² For examples of Tea Party criticism of Obama and his policies as un-American, see Brian Montopoli, *Sarah Palin: Obama’s Policies Are “Un-American”*, CBS NEWS, Apr. 14, 2010, http://www.cbsnews.com/8301-503544_162-20002464-503544.html (link); Kate Phillips, *After Explaining a Provocative Remark, Paul Makes Another*, N.Y. TIMES, May 21, 2010, <http://www.nytimes.com/2010/05/22/us/politics/22paul.html> (describing Rand Paul’s criticism of the Obama administration’s stance toward BP after the 2010 oil spill in the Gulf of Mexico) (link).

¹³ See, e.g., *About*, FIRST COAST TEA PARTY, http://firstcoastteaparty.org/?page_id=550 (last visited Mar. 16, 2011) (“The First Coast Tea Party’s mission is to promote the principles of our founding fathers—individual liberty and responsibility, limited government and moral leadership.”) (link); *What Is the Wetumpka Tea Party?*, WETUMPKA TEA PARTY, <http://www.wetumpkateaparty.com> (follow “About Us” hyperlink) (last visited Mar. 16, 2011) (“We believe in the principles that our country was founded upon: Faith, Honesty, Reverence, Hope, Thrift, Humility, Charity, Sincerity, Moderation, Hard Work, Courage, Personal Responsibility, Gratitude.”) (link).

that the movement's distinct constitutional vision and rhetoric pose for theories of popular constitutionalism.¹⁴ Most centrally, this Essay asks whether the Tea Party movement undermines the claim by some popular constitutionalists that popular engagement with the Constitution and control over constitutional interpretation promote democratic values and may be necessary for democratic legitimacy.¹⁵ As the Tea Party movement illustrates, political movements can mobilize the public around shared constitutional commitments for the purpose of foreclosing popular democracy. The Tea Party movement seeks to close off debate over policy choices understood by many to be available through ordinary politics and employs rhetoric that demonizes the movement's opponents as un-American and therefore outside the bounds of American politics. The Tea Party movement thus suggests that the relationship between popular constitutionalism and popular democracy is far from clear.

I. THE TEA PARTY'S CONSTITUTION

The Tea Party movement arose out of a widespread anxiety that the nation stands on the precipice of a significant and unwanted transformation.¹⁶ Millions of Americans are deeply alienated by what they believe to be fundamental changes in American life, especially in the perceived size and intrusiveness of the federal government.¹⁷ Addressing the fears aroused by change, the Tea Party movement offers the same solution that religious fundamentalist movements offer to those who are alienated by modernity—identification of the fundamental principles at the core of their identity that they believe are under attack and a vow to defend and restore those principles.¹⁸ To Tea Party supporters, changes in the size and function of the

¹⁴ For my initial and tentative answers to the questions posed here, see Jared A. Goldstein, *The Tea Party Movement and the Contradictions of Popular Originalism*, 53 ARIZ. L. REV. (forthcoming 2011).

¹⁵ See, e.g., Pozen, *supra* note 4, at 2057 (asserting that popular constitutionalists “believe that judicial supremacy threatens to sap the democratic legitimacy of American constitutional law and therefore the health of our legal-political order”).

¹⁶ See, e.g., O'HARA, *supra* note 6, at 4 (asserting that the Obama Administration's proposals “would erode everything we believed was good about the United States”); ZERNIKE, *supra* note 7, at 44 (the Tea Party “is really riding now a crest of national fear” that the Obama Administration is “going to ruin our country”) (quoting Dick Arney) (internal quotation marks omitted).

¹⁷ In April 2010, around eighteen percent of Americans identified themselves as Tea Party supporters. *National Survey of Tea Party Supporters*, N.Y. TIMES, at 33 (Apr. 5–12, 2010), <http://documents.nytimes.com/new-york-times-cbs-news-poll-national-survey-of-tea-party-supporters> (link). Over half of Tea Party supporters described themselves as “angry” at the federal government, compared to nineteen percent of Americans generally. *Id.* at 14. As Joseph Farah has explained, “[m]any Americans are indeed dispirited” as a result of the profound changes the country is undergoing. FARAH, *supra* note 1, at 85. “They look around and they no longer recognize their country and what it is rapidly becoming.” *Id.*

¹⁸ See, e.g., O'HARA, *supra* note 6, at 204 (“The only radicalism involved in this movement is the preservation of the once radical ideas defended by the Founders that people should have a right to life, liberty, and the pursuit of happiness.”); *About the Campaign for Liberty*, CAMPAIGN FOR LIBERTY, <http://www.campaignforliberty.com/about.php#mission> (last visited Mar. 16, 2011) (“Our country is ail-

federal government are not merely unwanted, but conflict with foundational American principles and what it means to be American. The Tea Party movement locates the fundamental principles that form the American character in the Constitution, and it argues that only a revival of these principles can save the nation from ruin.¹⁹ As Sarah Palin, a favorite among Tea Party supporters, declared, while some want a “fundamental transformation of America,” we should instead “go back to what our Founders and our founding documents meant.”²⁰

In their devotion to the Founders and the Constitution, Tea Party supporters reject conventional historical accounts of the Founders and accepted constitutional doctrines, believing that foreign forces have warped history and constitutional law in order to undermine American values.²¹ The most popular counter-narrative of American history and constitutional law among Tea Party supporters can be found in the books of W. Cleon Skousen, an ardent John Birch Society supporter whose Cold War era books claim that socialists sought to pave the way for a takeover of the United States by undermining belief in the Founders and the Constitution.²² Skousen, like many Tea Party supporters, presents the Founders as a group of God’s chosen disciples to whom God revealed a divine formula for government.²³ Skousen scoffs at conventional versions of American history that depict the Founders as relatively non-religious deists, declaring that the Founders “continually petitioned God in fervent prayers, both public and private, and looked upon his divine intervention in their daily lives as a sin-

ing. That is the bad news. The good news is that the remedy is so simple and attractive: a return to the principles our Founders taught us.”) (link). Although the term “fundamentalist” can be controversial because it is sometimes used pejoratively or dismissively, sociologists of religion have generally embraced the term to describe religious movements that arise in opposition to elements of modernity that believers perceive as threatening their core identities. See *Introduction to FUNDAMENTALISMS OBSERVED* ix (Martin E. Marty & R. Scott Appleby eds.) (pbk. ed. 1994) (defining and defending the term “fundamentalism”).

¹⁹ See, e.g., FARAH, *supra* note 1, at 84, 88 (asserting that because America is “under attack from globalists who seek to destroy America’s national sovereignty, . . . [i]t’s time to reclaim the promise our founders gave us uniquely in the Declaration of Independence and the Constitution”).

²⁰ Ellen, *Sarah Palin Lectures Fox News Viewers: Our Constitution Creates Law Based on the God of the Bible and the Ten Commandments*, NEWS HOUNDS, May 7, 2010, http://www.newshounds.us/2010/05/07/sarah_palin_lectures_fox_news_viewers_our_constitution_creates_law_based_on_the_god_of_the_bible_and_the_ten_commandments.php (link).

²¹ See, e.g., SKOUSEN, *FIVE THOUSAND*, *supra* note 9, at 118 (asserting that in the first decades of the twentieth century radicals sought to pave the way for socialism by attacking the Constitution and claiming it was out of step with an industrialized society).

²² *Id.* (“Therefore, to adopt socialism, respect and support for traditional constitutionalism had to be eroded and then emasculated.”); see also W. CLEON SKOUSEN, *THE NAKED COMMUNIST* 259–62 (10th ed. 1961) (asserting that Communists sought to lay the groundwork for collective government by discrediting the Constitution and the Founders, by prohibiting prayer in public schools, by encouraging public acceptance of homosexuality and masturbation, and by destroying the traditional family structure).

²³ See SKOUSEN, *FIVE THOUSAND*, *supra* note 9, at 15, 17, 225.

gular blessing.”²⁴ Skousen likewise rejects conventional historical accounts that the constitutional framers were principally influenced by European philosophers of the Enlightenment era.²⁵ On the contrary, Skousen claims that the Founders rejected all “European” theories and, indeed, that “the Founders [m]ade European [t]heories [u]nconstitutional.”²⁶ Perhaps above all else, the Founders established a system devoted to individualism and sought to forbid any resort to “collectivism.”²⁷

To the Tea Party movement, the Founders established a core set of principles to which the nation must return. Prominent among those principles is an emphatic version of American exceptionalism.²⁸ As Judson Phillips, the founder of Tea Party Nation, proclaimed, “America is the most exceptional country the world has ever known and the American people are the most exceptional people the world has ever seen. America and Americans have done more good during the existence of our country than any other country in the history of the world.”²⁹ Tea Party supporters believe that the “unique set of beliefs and national qualities” established by the Founders makes America exceptional and “a model to the world.”³⁰ Liberals like President Obama who have somehow managed to gain national power, however, do not share this love of country.³¹ On the contrary, to Tea Party supporters, they are un-American, anti-American, and foreign.³²

The distinctly nationalist core of the Tea Party movement was apparent from the moment of its creation. By Tea Party supporters’ accounts, the

²⁴ *Id.* at 76; see also FARAH, *supra* note 1, at 74 (asserting that the Founders “got their inspiration from another radical document—the Bible” and, in fact, “[m]any of the founders were biblical scholars”).

²⁵ See SKOUSEN, FIVE THOUSAND, *supra* note 9, at 63, 80.

²⁶ *Id.* at 63, 87–89.

²⁷ *Id.* at 118 (“As Samuel Adams pointed out, the Founders had tried to make socialism ‘unconstitutional.’”).

²⁸ See, e.g., *Declaration of Tea Party Independence*, *supra* note 10, at 4 (“We are the Tea Party Movement of America and we believe in American Exceptionalism. We believe that American Exceptionalism is found in its devotion to the cause of Liberty.”).

²⁹ Judson Phillips, *I Am Tired of Pat Buchanan*, TEA PARTY NATION, Dec. 14, 2010, <http://www.teapartynation.com/forum/topics/i-am-tired-of-pat-buchanan>. For a brief description of Phillips and the founding of Tea Party Nation, see BURGHART & ZESKIND, *supra* note 9, at 33.

³⁰ SARAH PALIN, AMERICA BY HEART: REFLECTIONS ON FAMILY, FAITH, AND FLAG 63 (2010); see also *Excerpt from Sarah Palin’s Address*, LAS VEGAS SUN, Mar. 28, 2010, <http://www.lasvegassun.com/news/2010/mar/28/excerpt-sarah-palins-address/> (“And we still believe that America is exceptional. And we know that what makes her exceptional is not her politicians, it’s her people and it is the founding principles that they hold dear.”) (link).

³¹ See PALIN, *supra* note 30, at 262 (“We have a president, perhaps for the first time since the founding of our republic, who expresses his belief that America is not the greatest earthly force for good the world has ever known.”).

³² Widely followed among conservatives generally, Rush Limbaugh proclaimed that Obama is the “first anti-American President.” *The Rush Limbaugh Show: “Imam Hussein Obama” Is Probably the “Best Anti-American President the Country’s Ever Had”* (Premiere Radio Network Aug. 18, 2010) (link).

movement began on February 19, 2009, when financial analyst Rick Santelli denounced an Obama Administration proposal to provide assistance to the home mortgage sector on the CNBC show *Squawk Box*.³³ Santelli screamed, “The government is promoting bad behavior!”³⁴ To Santelli, the proposal to support homeowners facing foreclosure amounted to “subsidizing the losers” and therefore ran counter to fundamental American principles:

This is America! How many of you people want to pay for your neighbor’s mortgage that has an extra bathroom and can’t pay their bills? Raise their hand! President Obama, are you listening? . . . You know Cuba used to have mansions and a relatively decent economy. They moved from the individual to the collective. Now they’re driving ‘54 Chevys, maybe the last great car to come out of Detroit. . . . We’re thinking of having a Chicago Tea Party in July. All you capitalists that want to show up to Lake Michigan, I’m going to start organizing. . . . If you read our Founding Fathers, people like Benjamin Franklin and Jefferson, what we’re doing in this country now is making them roll over in their graves.³⁵

Santelli’s invitation to form a new “Tea Party”—described by Tea Partiers as the “rant heard ‘round the world”³⁶—expressed opposition to the Obama Administration in unmistakably nationalist terms: “This is America!” Santelli seemed to believe that the home-mortgage assistance proposal was un-American because it took money from successful, hard-working Americans and gave it to economic “losers.” The proposal supposedly smacked of Cuban-style socialism, which Santelli understood to conflict with American values because it supported “the collective” rather than “the individual.” Indeed, the proposal was so antithetical to foundational American principles that it would make Franklin and Jefferson roll over in their graves. The solution to the alleged transformation of the United States—from a nation devoted to individualism and capitalism to a collectivist state like Cuba—was to return to the Founders’ vision and tactics, to launch a new “Tea Party,” just as they had done.³⁷

Tea Party supporters couple a deep belief in America’s greatness with a narrow understanding of what makes America great. As reflected in San-

³³ *Squawk Box: Santelli’s Tea Party* (NBC television broadcast Feb. 19, 2009) (link); see, e.g., ARMEY & KIBBE, *supra* note 1, at 19–20; O’HARA, *supra* note 6, at 1–2; ZERNIKE, *supra* note 7, at 13.

³⁴ *Squawk Box: Santelli’s Tea Party*, *supra* note 33.

³⁵ *Id.*

³⁶ ARMEY & KIBBE, *supra* note 1, at 19.

³⁷ See *id.* at 34 (“Santelli, perhaps unintentionally, reintroduced freedom-loving Americans to their roots and a fundamental tenet of our nation’s fabric.”).

telli's rant and countless other Tea Party declarations, the Tea Party's constitutional vision consists of a small set of familiar conservative and libertarian principles—individual liberty, free markets, low taxes, limited federal power, and states' rights—that Tea Party supporters identify as the fundamental constitutional principles laid down by the founding fathers.³⁸ The Tea Party movement articulates all of its policy positions in terms of these basic principles. The Tea Party opposes the recent health care reform law, financial sector bailout, and proposed cap-and-trade legislation because they curtail liberty. These initiatives interfere with the free market, violate the principle of limited government, increase federal taxes, and decrease the states' power.³⁹ To the Tea Party movement, these basic principles represent the fundamental values that underlie the American way of life.⁴⁰

The Tea Party movement perceives these foundational American principles to be under attack by foreign and un-American forces variously denominated "progressives," "globalists," "socialists," and "collectivists," who threaten America's very existence.⁴¹ Rhetoric of foreign invasion and foreign infiltration dominates Tea Party speeches and literature.⁴² Tea Party supporters perceive that foreign forces are succeeding in taking over the United States, transforming the country they love into an unrecognizable and alien land.⁴³ Employing militantly nationalist rhetoric, the Tea Party

³⁸ See, e.g., *Frequently Asked Questions*, TEA PARTY NATION, <http://www.teapartynation.com/page/frequently-asked-questions> (last visited Apr. 13, 2011) ("Tea Party Nation is a group of like-minded individuals who believe in our God given Individual Freedoms written out by the Founding Fathers. We believe in Limited Government, Free Speech, the Second Amendment, our Military, Secure Borders and our Country!"); *Tea Party Patriots Mission Statement and Core Values*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/mission.aspx> (last visited Mar. 21, 2011) ("Our mission is to attract, educate, organize, and mobilize our fellow citizens to secure public policy consistent with our three core values of Fiscal Responsibility, Constitutionally Limited Government and Free Markets.") (link).

³⁹ See, e.g., O'HARA, *supra* note 6, at 207, 214–15 (asserting that Tea Party supporters "believe that age-old philosophical principles of individual liberty, the pursuit of happiness, and basic property rights, as enshrined in law through the United States Constitution, are the fundamental building blocks of our civil society," while liberal support for programs like universal health care is "founded on the perversions of the philosophical principles that founded our nation").

⁴⁰ See, e.g., *Tea Party Patriots Mission Statement and Core Values*, *supra* note 38 ("The Tea Party Patriots stand with our founders, as heirs to the republic, to claim our rights and duties which preserve their legacy and our own.").

⁴¹ See, e.g., FARAH, *supra* note 1, at 83–84 ("The very will of the American people is under attack . . . from globalists who seek to destroy America's national sovereignty; Glenn Beck, *Foreword* to SKOUSEN, FIVE THOUSAND, *supra* note 9, at 7 ("[O]ur Republic is at stake.").

⁴² Sometimes this rhetoric of invasion is literal. See, e.g., FARAH, *supra* note 1, at 69 (asserting that the "political and cultural elite" have sought to prevent American sovereignty by "conspir[ing] to bring into American millions and millions more sheep—illegally").

⁴³ *Id.* at 85 ("Many Americans . . . look around and they no longer recognize their country and what it is rapidly becoming."); SKOUSEN, FIVE THOUSAND, *supra* note 9, at iii, 135 (explaining that socialists succeeded in duping the American people to abandon many of the foundational principles upon which the nation was founded, producing a "generation of lost Americans" and a nation of "un-Americans").

movement seeks to combat the supposed foreign takeover by re-establishing true American values.⁴⁴

Tea Party supporters routinely demonize as un-American anyone who supports policies that conflict with what they perceive to be fundamental American values.⁴⁵ They describe President Obama, in particular, as foreign.⁴⁶ He is sometimes described as *literally* foreign by so-called “birth-ers,” who assert that he was not born in the United States.⁴⁷ He is sometimes described as religiously foreign by those who believe he is secretly a Muslim living in a Christian nation.⁴⁸ He is sometimes described as racially foreign by those who consciously or unconsciously hold race-based ideas of what it means to be a true American.⁴⁹ But perhaps most often, he is described as ideologically foreign because he does not adhere to the Tea Party movement’s notions of small government, low taxes, and free markets.⁵⁰ All of these points of view share the core Tea Party message: President Obama and his liberal supporters are foreign usurpers, not real Americans, and all true patriots must rise up to defeat them before they destroy everything that is great about America.⁵¹

⁴⁴ See FARAH, *supra* note 1, at 88.

⁴⁵ See, e.g., *id.* at 91 (“[T]he courts and America’s key cultural institutions are . . . slowly, inevitably changing the hearts and minds of the people to accept un-American values of collectivism and moral relativism.”).

⁴⁶ See, e.g., Kevin Drum, *Tea Party: Old Whine in New Bottles*, MOTHER JONES, Sept. 2010, <http://motherjones.com/politics/2010/08/history-of-the-tea-party> (“‘Obama isn’t a US socialist,’ thundered Fox News commentator, Steven Milloy at a tea party convention earlier this year, ‘he’s an international socialist!’”) (link).

⁴⁷ See, e.g., Joseph Farah, Address at the National Tea Party Convention (Feb. 5, 2010), available at <http://www.c-spanvideo.org/program/291955-1> (link).

⁴⁸ See, Alex Altman, *Racism Rift Highlights Dilemma: Who Speaks for the Tea Party?*, TIME, July 22, 2010, <http://www.time.com/time/politics/article/0,8599,2005371,00.html> (quoting Tea Party Express founder Mark Williams describing President Obama as an “Indonesian Muslim turned welfare thug and a racist in chief”) (link).

⁴⁹ See, e.g., BURGHART & ZESKIND, *supra* note 9, at 57–67; see also Rich Swier, *Destroy the Family, You Destroy the Country!*, TEA PARTY NATION, Mar. 28, 2011, <http://www.teapartynation.com/profiles/blogs/destroy-the-family-you-destroy> (arguing that as a result of federal policies “[t]he White Anglo-Saxon Protestant (WASP) population in America is headed for extinction and with it our economy, well-being and survival as a uniquely America [sic] culture”).

⁵⁰ See, e.g., Alan Caruba, *Obama, As Red As It Gets*, TEA PARTY NATION, Mar. 20, 2011, <http://www.teapartynation.com/profiles/blogs/obama-as-red-as-it-gets>. In various permutations, the meme that Obama is not truly American is widespread among conservatives. See, e.g., DINESH D’SOUZA, *THE ROOTS OF OBAMA’S RAGE* (2010) (claiming that Obama is attempting to carry out the socialist, anti-colonial dreams of his Kenyan father); Arena Profile: Steven G. Calabresi, POLITICO, http://www.politico.com/arena/bio/steven_g_calabresi.html (last visited Mar. 21, 2011) (asserting that “at some level [Obama] does not really know America very well nor does he thoroughly identify with it”) (link).

⁵¹ See, e.g., BURGHART & ZESKIND, *supra* note 9, at 68–69.

II. QUESTIONS THE TEA PARTY MOVEMENT POSES FOR POPULAR CONSTITUTIONALISM

The emergence of the Tea Party raises several questions about popular constitutionalism and the role of constitutional rhetoric in political discourse that should be addressed in future scholarship.

First, and perhaps most prominently, does the example of the Tea Party support or undermine the claim that popular constitutionalism advances democratic values? Proponents of popular constitutionalism have argued that democracy is advanced when the people at large assert control over the meaning of the Constitution, rather than allowing elites to resolve fundamental questions about governmental powers and individual rights under the guise of interpreting the Constitution.⁵² Critics of popular constitutionalism have argued that empowering the public to determine the meaning of the Constitution would be tantamount to abandoning constitutionalism altogether and would amount to something more like mob rule, in which decisions about the role and scope of government would be unconstrained by any sort of fundamental law.⁵³ Proponents of popular constitutionalism, in turn, accuse their critics of being elitists who distrust the ability of ordinary citizens to resolve important questions.⁵⁴

Although critics of popular constitutionalism fear that popular control over the meaning of the Constitution would lead the people to construe the Constitution so broadly as to remove any effective constraints on democracy, the Tea Party movement suggests that popular constitutionalism can lead in the opposite direction, in which political movements advance highly restrictive interpretations of the Constitution that leave little room for popular democracy. The Tea Party movement's understanding of the Constitution would eliminate large swaths of federal power, taking away the people's hard-won authority to determine economic policies at a national level, which has been understood to be available for several generations.⁵⁵

⁵² Mark Tushnet has argued that "populist constitutionalism"—which perhaps differs somewhat from Larry Kramer's "popular constitutionalism"—would seek to carry out the project of democracy and human rights begun in the Declaration of Independence and the Preamble to the Constitution, which Tushnet understands to embrace a "commitment to the realization of universal human rights" and popular democracy. TUSHNET, *supra* note 4, at 52–53.

⁵³ Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1640 (2005) (book review) (arguing that "constitutional interpretation by mob . . . is the logical stopping point of" popular constitutionalism); Laurence H. Tribe, "The People Themselves": *Judicial Populism*, N.Y. TIMES, Oct. 24, 2004, <http://www.nytimes.com/2004/10/24/books/review/24TRIBEL.html> ("For if constitutional law were but a vessel into which the people could pour whatever they wanted it to contain at any given moment, wouldn't the whole point of framing a constitution have been lost?") (link).

⁵⁴ According to Larry Kramer, defenders of judicial supremacy dismiss "democratic politics as scary and threatening" and harbor "deep-seated misgivings about ordinary citizens." LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 242–44 (2004).

⁵⁵ See SKOUSEN, *FIVE THOUSAND*, *supra* note 9, at 342–55 (asserting the unconstitutionality of the New Deal, administrative agencies, Social Security and other federal welfare programs, all federal envi-

In some ways, the Tea Party movement's understanding of the Constitution is the antithesis of Justice Holmes's notion that the Constitution is "made for people of fundamentally differing views."⁵⁶ Although Holmes believed that the Constitution established a framework for resolving fundamental differences through political and legal processes, the Tea Party believes that the Constitution itself resolves those differences, establishing once and for all the fundamental values that bind us, leaving no room for interpretation or debate.⁵⁷ In addition to the ways that the Tea Party movement's substantive constitutional vision would limit popular democracy, the Tea Party employs nationalist constitutional rhetoric in an attempt to foreclose democracy in another way: by labeling their opponents and their ideas as dangerously un-American and therefore outside the appropriate bounds of American political discourse.

Second, does the example of the Tea Party movement call into question whether popular constitutionalism can live up to its proponents' goal of making constitutional interpretation more legitimate by making it more democratic? Both originalism and popular constitutionalism respond to the familiar counter-majoritarian challenge that legal doctrines lack legitimacy if they are based on judges' own value judgments. Originalists respond to this criticism by asserting that judges should seek to limit subjectivity by attempting to construe the Constitution to carry out the meaning understood by the people at the time of its adoption.⁵⁸ Popular constitutionalists offer a different solution, asserting that the people today, not elite judges, should determine the Constitution's meaning.⁵⁹ The Tea Party movement is a surprising hybrid of these two positions, a sort of popular originalism, a popular movement that purports to advance originalist interpretations. It is unclear, however, whether proponents of either theory can accept the democratic legitimacy of constitutional interpretations that purport to speak both for the people today and for the Founders.

Third, does the example of the Tea Party movement offer any insight into the challenge of bridging the gap between the Constitution inside the courts and the Constitution outside the courts? Scholars have long recog-

ronmental, labor, and consumer laws, the creation of national forests, wilderness areas, and national parks, and the abandonment of the gold standard); *Declaration of Tea Party Independence*, *supra* note 10, at 2 ("We reject a profligate Government that is spending TRILLIONS of dollars on worthless socialist schemes designed to bankrupt us and put the American people in a position of dependence on the State, as peasants begging for their very sustenance from self-styled 'educated classes' and so-called 'experts'").

⁵⁶ *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

⁵⁷ Cf. SKOUSEN, MAKING, *supra* note 9, at 217 (suggesting that Herbert Spencer's Social Statics expresses the Founders' principles after all).

⁵⁸ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (contending that original meaning "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

⁵⁹ See, e.g., KRAMER, *supra* note 54, at 247 (2004) ("The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves.").

nized that the Constitution plays an independent role in popular culture, far removed from its role as a source of legal doctrines. In popular culture, the Constitution is a quasi-religious object of reverence and a potent symbol of national ideals.⁶⁰ The Tea Party's constitutional rhetoric invokes one version of this mythological Constitution with little reference to the legal Constitution familiar to law professors. Does the emergence of the Tea Party movement suggest that it may be impossible to bridge the gap between the two constitutions?

CONCLUSION

In his contribution to this symposium, Randy Barnett quips that, whatever else comes of the Tea Party movement, "one thing is certain . . . future law professors are going to be talking a whole lot more critically about 'popular constitutionalism' than they did in the recent past."⁶¹ Although Barnett does not elaborate on the point, I suspect that he means that the spectacle of the Tea Party movement may make popular constitutionalism less appealing to the predominately liberal law professors who have been the principal proponents of the theory. On that point, Barnett may well be right. Yet, if the popularity of popular constitutionalism may suffer, I doubt that law professors will talk about it less. The Tea Party is likely to prove just as irresistible an object of academic study as it has as an object of media attention. As a hybrid of originalism and popular constitutionalism, the Tea Party movement is the Reese's Peanut Butter Cup of legal theory, and it provides the opportunity to ask whether these two great tastes go great together, to ask whether popular constitutionalism is any more palatable when the people purport to offer originalist solutions and whether originalism is any more palatable when a popular movement endorses it. The burgeoning discipline of Tea Party studies has much work to do to answer these questions.

⁶⁰ Writing in 1937, Max Lerner spoke of the dual nature of the Constitution, in which it functions as both a legal instrument and a symbol: "As a symbol it is part of the mass mind, capable of arousing intense popular hysteria," a fetish, widely believed to "possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe." Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294 (1937); see also SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–53 (1988) (discussing the role of the Constitution in civil religion).

⁶¹ Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281 (2011) (link).