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THE TEA PARTY MOVEMENT AND THE PERILS OF POPULAR ORIGINALISM

Jared A. Goldstein*

The Tea Party movement presents something of a curiosity for constitutional theory because it combines originalist ideology and popular constitutionalist methods. Like minotaurs, werewolves, and other half-man, half-animal hybrids of myth and legend, the Tea Party's hybrid of originalism and popular constitutionalism serves to expose the limitations of both sources upon which it draws. Although originalists assert that interpreting the Constitution according to its original meaning would take politics out of constitutional law, the Tea Party movement shows that originalism also provides a powerful political rhetoric. Moreover, while popular constitutionalists assert that democracy would be advanced by empowering the people to effectuate their constitutional understandings through ordinary politics, the Tea Party movement shows that when a popular movement advances a narrow, nationalist understanding of the Constitution, popular constitutionalism can also serve to restrict popular democracy.

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INTRODUCTION

What happens when two supposedly pure forms are combined? Myth and legend offer one answer, as some of the most fearsome monsters are half-man, half-animal hybrids like minotaurs and werewolves. These creatures provoke disgust and horror by their unnatural combination of supposedly fixed forms.¹ In the realm of constitutional theory, the ideology of the Tea Party movement is something of a hybrid, combining elements of originalism and popular constitutionalism, two approaches to constitutional law that are often described as essentially incompatible; but it remains to be seen whether the Tea Party's combination of the two theories is monstrous. More than any political movement in recent memory, the Tea Party movement is focused on the meaning of the

1. A sizable body of academic literature examines prevalent anxieties about "unnatural mixing" of supposedly fixed racial, national, cultural, and sexual categories. *See generally* HOMI K. BHABHA, *THE LOCATION OF CULTURE* (1994); PETER BURKE, *CULTURAL HYBRIDITY* (2009); ROBERT J.C. YOUNG, *COLONIAL DESIRE: HYBRIDITY, IN THEORY, CULTURE, AND RACE* (1995). A very different reaction to hybrids is offered by the 1970s ad campaign for the Reese's Peanut Butter Cup, which celebrated the combination of chocolate and peanut butter as "Two great tastes that taste great together!" One of the original ads is available on YouTube. *Reeses Commercial Robby Benson Donny Most*, YOUTUBE (Sept. 28, 2007), <http://www.youtube.com/watch?v=QfGQmotCIN0>.

Constitution.² On the one hand, the Tea Party movement purports to be an originalist movement, whose central commitment is to restore what the movement's supporters understand to be the nation's foundational principles.³ Tea Party supporters believe that the nation is facing disaster because it has abandoned the principles established by its Founding Fathers, and they seek to "take back the country" to restore the government to its foundational principles.⁴ On the other hand, as Ilya Somin has discussed, the Tea Party movement is easily recognizable as a nascent popular constitutionalist movement because it seeks to implement its understanding of the Constitution through ordinary politics.⁵

Theories of originalism and popular constitutionalism are not necessarily incompatible, in that they address different subjects. Originalism is a set of theories of textual interpretation, which most centrally assert that the meaning of

2. See 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) ("And fundamentally, [the Tea Party movement] is about the Constitution and the Declaration of Independence.").

3. See *Tea Party Patriots Mission Statement and Core Values*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/Mission.aspx> (last visited July 19, 2011) ("We, the members of The Tea Party Patriots, are inspired by our founding documents and regard the Constitution of the United States to be the supreme law of the land. We believe that it is possible to know the original intent of the government our founders set forth, and stand in support of that intent.").

4. 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." *We're Doing It Again in 2010!*, TRUSSVILLE TEA PARTY (Mar. 19, 2010), <http://www.trussvilleteaparty.com/>; see also, e.g., *What is Tea Party Nation?*, *Frequently Asked Questions*, TEA PARTY NATION, <http://www.teapartynation.com/page/frequently-asked-questions> (last visited Aug. 27, 2011) ("Tea Party Nation is a user-driven group of like-minded people who desire our God-given individual freedoms written out by the Founding Fathers.").

5. See generally Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/12/LRColl2011n12Somin.pdf>. To be sure, the Tea Party movement differs from the popular constitutionalism asserted by Larry Kramer and others in that it has not devoted much attention to challenging judicial supremacy, see generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), but has instead directed the bulk of its energy to challenging assertions of broad powers by Congress and the President. To the extent that the Tea Party movement has focused on judicial power, it has depicted the courts as accomplices to the unconstitutional acts of the other branches. See, e.g., *Declaration of Tea Party Independence*, DAILYCALLER.COM (Feb. 24, 2010) [hereinafter *Declaration of Tea Party Independence*], <http://dailycaller.firenetworks.com/001646/dailycaller.com/wp-content/blogs.dir/1/files/Tea-Party-Dec-of-Independence-22410.pdf> ("For much of its history the United States has been a land of prosperity and liberty, sound policies such as fiscal responsibility, constitutionally limited government and a belief in the free market have safeguarded this condition. In recent years however, Congress, the President, the Federal Reserve Board and the Courts have replaced those practices with profligate government spending and expansion of the government power beyond what is constitutionally permissible.").

the constitutional text was fixed at the time the Constitution was adopted, the only true meaning of the text is the original meaning, and only the original meaning has democratic legitimacy.⁶ Popular constitutionalism, in contrast, is a set of theories that address the institutional mechanisms for determining the meaning of the Constitution, which asserts that the authority to determine the meaning of the Constitution does not (or should not) rest exclusively in the hands of the judiciary and that the people at large can (or should) effectuate their understandings of the Constitution through democratic politics.⁷ In short, popular constitutionalism addresses *who* should have interpretive authority (the people at large), while originalism addresses *how* the text should be interpreted (according to its original meaning).

Notwithstanding the differing subjects addressed by the theories, there are good reasons that popular constitutionalism and originalism are often described as competing theories.⁸ Originalists assert that adherence to the Constitution's original meaning will protect the fundamental values embodied in the Constitution from political pressure.⁹ Originalism thus seeks to protect the one, true meaning of the Constitution against meddling by the people. On this view, popular constitutionalism is incompatible with originalism because it empowers the people to determine the meaning of the Constitution through politics.¹⁰ To originalists, only the original meaning of the Constitution has democratic legitimacy because only that meaning was adopted by the people through authoritative procedures. In contrast, popular constitutionalists consider originalism to be undemocratic because it allows elites—both at the time of the adoption of the Constitution and

6. See Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 887 (2008) (stating that originalism requires constitutional interpretations "faithfully to adhere to their meaning as understood by the people who chose to entrench them in the Constitution"). See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

7. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 182 (1999) ("[P]opulist 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.").

8. See, e.g., Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1103 (2009) ("Popular constitutionalism was, and remains, closer in spirit to modern ideas of a living constitution, and is therefore ultimately incompatible with all forms of originalism.").

9. For instance, Attorney General Edwin Meese declared that originalism seeks "to prevent passing fads and passions in the body politic from overriding fundamental values and principles." Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 9 (1988).

10. See Kramer, *supra* note 7, at 1344 ("[O]rdinary citizens are our most authoritative interpreters of the Constitution."); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can The People Be Trusted?*, 86 WASH. U. L. REV. 313, 345 (2008) ("[T]he American people today are worthy of the faith that popular constitutionalists urge us to place in them.").

today—to control the meaning of the Constitution.¹¹ Popular constitutionalism and originalism thus differ over both whose understanding of the Constitution should count and how that understanding can be discerned.

This Article examines the Tea Party movement's combination of originalism and popular constitutionalism, which, like the hybrid monsters of myth and legend, serves to expose the limitations of both sources upon which it draws. Part I explores the Tea Party's constitutional vision, which is built around a mythological narrative of the nation's founding. This narrative eschews conventional historical accounts and instead asserts that the nation's fundamental principles were established fully formed and eternal by the Founders and embodied in the Constitution. The Tea Party movement employs popular constitutionalist methods and seeks to mobilize the electorate to restore the purity of the Founding era and return to what the movement understands to be the nation's true identity—which is embodied in the Constitution's eternal principles. Part II explores the ways that the Tea Party movement's combination of originalism and popular constitutionalism undermines the primary claims asserted by proponents of both originalism and popular constitutionalism. While originalists assert that interpreting the Constitution according to its original meaning takes politics out of constitutional interpretation, the Tea Party movement shows that originalism can also function as purely political rhetoric. Moreover, while popular constitutionalists assert that democracy is advanced by empowering the people to effectuate their constitutional understandings through ordinary politics, the example of the Tea Party movement illustrates that popular constitutionalism can also be employed to restrict popular democracy.

I. THE TEA PARTY MOVEMENT'S POPULAR MOBILIZATION FOR ORIGINALISM

The Tea Party is a nationalist movement that uses originalist rhetoric to advance a narrow conception of what America is, what ideas are American, and who is truly American. To Tea Party supporters, the Constitution embodies the fundamental values upon which America is founded—most centrally, libertarian principles of individualism, limited government, and free markets. The Tea Party movement's constitutional rhetoric is built around a narrative of a golden age of the nation's founding, in which the nation's fundamental principles were established fully formed and eternal by the Founders and embodied in the Constitution. The adoption of the Constitution and the recognition of the eternal constitutional principles ushered in an era of unprecedented prosperity and freedom. Sadly, the nation strayed. It followed false gods pandered by progressives, socialists, and other foreign infiltrators. It lost its true self. The Tea Party movement seeks to convince the nation to return to what the movement understands to be the eternal principles embodied in the Constitution. Those principles protect the people from their worst impulses by requiring a very limited

11. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 (2010) (describing popular constitutionalism as “[r]enouncing the elitism and the court centrism of traditional constitutional theory”).

national government with few powers. The Tea Party movement thus seeks to mobilize the people to protect them from themselves.

A. The Rise of the Tea Party Movement

The Tea Party movement arose in 2009 out of a widespread anxiety that the nation stands on the precipice of transforming into something unrecognizably foreign.¹² The primary concerns revolved around the perceived size and intrusiveness of the federal government, which some understood to signify socialism and tyranny. Although these concerns were present before 2008, the election of Barack Obama led many to fear that a fundamental transformation of American life was underway.¹³ Addressing these fears of change, the Tea Party movement vows to defend and restore the fundamental principles that the movement identifies as forming the core of national identity.¹⁴ It is a response that is very similar to the promise offered by religious fundamentalist movements to those who are alienated by modernity. To Tea Party supporters, changes in the size and function of the federal government are not merely unwanted but conflict with fundamental 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 argues that only a revival of these principles can

12. See, e.g., JOHN M. O'HARA, A NEW AMERICAN TEA PARTY: THE COUNTERREVOLUTION AGAINST BAILOUTS, HANDOUTS, RECKLESS SPENDING, AND MORE TAXES 4 (2010) (asserting that the Obama Administration's proposals "would erode everything we believed was good about the United States"); KATE ZERNIKE, BOILING MAD: INSIDE TEA PARTY AMERICA 44 (2010) (referring to Dick Armey's commentary that the Tea Party "is really riding now a crest of national fear" that the Obama Administration is "going to ruin our country"); *Declaration of Tea Party Independence*, *supra* note 5 ("The Tea Party Movement rejects the imposition of 'transformational change' performed on our Nation by smug elites who call themselves the 'educated class.'").

13. In April 2010, around 18% of Americans identified themselves as Tea Party supporters. *National Survey of Tea Party Supporters*, N.Y. TIMES & CBS NEWS, 33 (Apr. 5–12, 2010) [hereinafter *Tea Party Survey*], <http://s3.amazonaws.com/nytdocs/docs/312/312.pdf>. Over half of Tea Party supporters described themselves as "angry" at the federal government, compared to 19% 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 2, at 85. "They look around and they no longer recognize their country and what it is rapidly becoming." *Id.*

14. See, e.g., O'HARA, *supra* note 12, 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."); *Statement of Principles*, CAMPAIGN FOR LIBERTY, <http://www.campaignforliberty.com/about.php#mission> (last visited July 19, 2011) ("Our country is ailing. 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."). 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 threaten their core identities. See *Introduction to FUNDAMENTALISMS OBSERVED*, at ix (Martin E. Marty & R. Scott Appleby eds., 1994) (defining and defending the term "fundamentalism").

save the nation from ruin.¹⁵ As politician 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.”¹⁶

By Tea Party supporters’ accounts, the movement began on February 19, 2009 during the CNBC show *Squawk Box* when financial analyst Rick Santelli denounced an Obama administration proposal to provide assistance to the home mortgage sector.¹⁷ Santelli screamed, “The government is promoting bad behavior!” To Santelli, the proposal to support homeowners facing foreclosure ran counter to fundamental American principles because it was tantamount to “subsidizing the losers”:

This is America! How many people want to pay for your neighbor’s mortgage that have an extra bathroom and can’t pay their bills? Raise your 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. It’s time for another Tea Party. What we are doing in this country will make Thomas Jefferson and Benjamin Franklin roll over in their graves. We’re thinking of having a Chicago Tea Party in July, all you capitalists. I’m organizing.¹⁸

Santelli’s call to form a new “Tea Party” has been described by Tea Partiers as the “rant heard round the world.”¹⁹

Santelli’s rant expresses the key elements of the Tea Party movement’s ideology. It expresses opposition to the Obama Administration in nationalist terms by declaring that “This is America!” It presumes a core set of true American principles, including beliefs in limited government and individual liberty. The Administration’s proposal conflicted with these values because it supported “the collective” rather than “the individual.” To Santelli, the proposal to support homeowners facing foreclosure was un-American, and smacked of Cuban-style socialism, because it took money from successful, hard-working Americans and gave it to economic “losers.” Santelli identified this core set of American

15. See, e.g., FARAH, *supra* note 2, 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”).

16. *The O’Reilly Factor: Sarah Palin on National Day of Prayer Controversy* (FOX television broadcast May 7, 2010) (transcript available at <http://www.foxnews.com/on-air/oreilly/2010/05/07/sarah-palin-national-day-prayer-controversy>).

17. See ARMEY & KIBBE, *supra* note 2, at 19–20; O’HARA, *supra* note 12, at 1; ZERNIKE, *supra* note 12, at 13. A video of the rant is available online. *Squawk Box: Santelli’s Tea Party* (CNBC television broadcast Feb. 19, 2009), available at <http://www.cnn.com/id/29283701> (accessed by opening embedded video). Of course, the Tea Party movement draws ideas and rhetoric from a variety of movements, including the John Birch Society, Ron Paul’s presidential campaign, among others.

18. ARMEY & KIBBE, *supra* note 2, at 26.

19. *Id.* at 19.

principles as coming from the Founding Fathers, to whom the Administration's proposal was so abhorrent that they must now be rolling over in their graves. Santelli declared that the right response to Obama's infidelity to basic American values is to return to the fundamental values and to the tactics of the Founders, to form, as they did, a new "Tea Party."²⁰

The rant was watched millions of times on the internet, and within days several local groups calling themselves a "Tea Party" formed to protest the \$787 billion stimulus package, excessive taxes, and the growing national debt.²¹ The next week, dozens of Tea Party protests occurred across the country.²² Within weeks, hundreds of local Tea Party groups were formed to protest excessive government. They oppose the Obama Administration's health care reform law, the financial bailout, proposed cap-and-trade legislation to address greenhouse gas emissions, excessive taxes, and the growing national debt.²³

In most ways, the demographics and issues that drive Tea Party supporters are indistinguishable from those of conservative Republicans.²⁴ Public opinion surveys in 2010 showed that around 18% of Americans identify themselves as Tea Party supporters.²⁵ A large majority of Tea Party supporters—88%—are white, and on average they are better educated and make a higher income than most Americans.²⁶ Most are at least 45 years old.²⁷ Like most Republicans, Tea Party supporters believe that the government is doing too much to help the poor, too much to help African Americans, and too much that should be left to individuals and the states.²⁸ Additionally, Tea Party supporters see the size of the federal government, the national debt, and illegal immigration as extremely pressing concerns.²⁹ Indeed, Tea Party supporters overwhelmingly vote Republican and can justifiably be seen as a subset of Republicans.³⁰

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

21. ZERNIKE, *supra* note 12, at 21–25.

22. *Id.* at 22.

23. See, e.g., Michelle Malkin, *Foreword*, to O'HARA, *supra* note 12, at xxi ("Millions of Americans joined the Tea Party movement in 2009 to protest reckless government spending in the pork-laden stimulus package, the earmark-clogged budget bill, the massive mortgage entitlement program, taxpayer-funded corporate rescues, the environmentally fraudulent cap-and-trade monstrosity, and the debt-exploding government health care takeover.").

24. Jeffrey M. Jones, *Debt, Gov't. Power Among Tea Party Supporters' Top Concerns*, GALLUP (July 5, 2010), <http://www.gallup.com/poll/141119/debt-gov-power-among-tea-party-supporters-top-concerns.aspx> ("[T]hose who describe themselves as Tea Party supporters are in many ways indistinguishable from, and largely a subset of, Republican identifiers more generally.").

25. *Tea Party Survey*, *supra* note 13, at 33.

26. *Id.* at 41.

27. *Id.*

28. *Id.* at 14–15, 26, 30–31.

29. *Id.* at 14–16, 27.

30. *Id.* at 40–41. Exit polls from the 2010 midterm elections revealed that 86% of Tea Party supporters voted for Republican candidates. Gary Langer, *2010 Elections Exit*

As the next section discusses, what distinguishes Tea Party supporters from other conservatives and libertarians is their combative, nationalist rhetoric that invokes a mythological Constitution at the core of our national identity. As Joseph Farah—who publishes the World Net Daily website and who gave the keynote address at the first national Tea Party convention—explained, “[w]hile elements of the conservative movement have emphasized the Constitution, the rule of law and the will of the people, conservatives have traditionally lacked the fiery commitment to that document that I see among tea partiers.”³¹

B. The Tea Party’s Nationalist Constitutional Rhetoric

Summarizing the Tea Party’s constitutional vision is somewhat tricky because the movement is composed of a diverse number of local and national organizations and, as such, is broad, decentralized, and lacks agreed upon doctrines or leaders.³² Nonetheless, an examination of prominent Tea Party books, websites, and speeches³³ shows that the Tea Party’s constitutional rhetoric follows the general pattern that scholars of nationalism have identified as forming the central rhetorical elements of most nationalist movements:

1. **The glorious past.** The original nation once existed as a pure, unified and harmonious community.

Poll Analysis: The Political Price of Economic Pain, ABC NEWS (Nov. 3, 2010), <http://abcnews.go.com/Politics/2010-midterms-political-price-economic-pain/story?id=12041739>.

31. FARAH, *supra* note 2, at 115.

32. See *Declaration of Tea Party Independence*, *supra* note 5 (“We reject the idea that the Tea Party Movement is ‘led’ by anyone other than the millions of average citizens who make it up. The Tea Party Movement understands that as a Free People, we need to SAVE OURSELVES, BY OURSELVES, FOR OURSELVES. The Tea Party Movement is not ‘led.’ The Tea Party Movement LEADS.”).

33. The Tea Party literature I rely upon includes the mission statements of the six national Tea Party umbrella organizations—Freedom Works Tea Party, 1776 Tea Party, Tea Party Nation, Tea Party Patriots, ResistNet, and Tea Party Express. I also rely upon books written by recognized Tea Party leaders and insiders—including ARMEY & KIBBE, *supra* note 2; FARAH, *supra* note 2; CHARLY GULLETT, *OFFICIAL TEA PARTY HANDBOOK: A TACTICAL PLAYBOOK FOR TEA PARTY PATRIOTS* (2009); and O’HARA, *supra* note 12—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* (Am. Documents Publ’g 2009) [hereinafter SKOUSEN, *FIVE THOUSAND*]; and W. CLEON SKOUSEN, *THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION* (1985) [hereinafter SKOUSEN, *MAKING OF AMERICA*], 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 Jeffery Rosen, *Radical Constitutionalism*, N.Y. TIMES, Nov. 28, 2010, § MM (Magazine), at 34 (characterizing Skousen as “the constitutional guru of the Tea Party movement”). In addition, I have also found useful several books and other materials describing the movement from the outside, including 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* (2011); and ZERNIKE, *supra* note 12.

2. **The degraded present.** The shattering of this corporate unity through some agency or traumatic series of events undermined the integrity of the national community. A key dimension of this rhetoric is the identification of the sources of the nation's decay.
3. **The utopian future.** Through collective action, the nation will reverse the conditions that have caused its present degradation and recover its original harmonious essence.³⁴

Nationalist rhetoric bears a close resemblance to religious fundamentalism in its emphasis on restoring the core features of the community, which are asserted to be under attack.³⁵ As the following sections explain, the Tea Party movement claims that the Founding Fathers established a core set of values—commitment to American exceptionalism, limited government, individual liberty, and free markets—that are embodied in the Constitution and form the core of the American character. Adoption of the Constitution ushered in a golden age, an unprecedented era of prosperity and freedom. Yet the nation turned its back on the Founders and betrayed its true national self by following foreign gods and adopting un-American policies. Although the nation stands on the brink of disaster, the Tea Party warns that it is not too late to turn back to the original values embodied in the Constitution and return to our true selves.

1. The Glorious Past

The Tea Party movement is far from the first Constitution-centered movement to oppose changes (or perceived changes) in the role of government. During the 1930s, the American Liberty League and associated groups declared the New Deal un-American and contrary to the Founding Fathers' vision.³⁶ Writing in 1937, Max Lerner explained that such groups depicted the Constitution and the founders in mythological terms:

Here was the document into which the Founding Fathers had poured their wisdom as into a vessel; the Fathers themselves grew ever larger in stature as they receded from view; the era in which they lived and fought became a golden age; in that age there had been a fresh dawn for the world, and its men were giants against the sky; what they had fought for was abstracted from its living context and

34. Matthew Levinger and Paula Franklin Lytle, *Myth and Mobilization: The Triadic Structure of Nationalist Rhetoric*, 7 *NATIONS AND NATIONALISM* 175, 178 (2001).

35. See *FUNDAMENTALISMS OBSERVED*, *supra* note 14, at ix ("The [Fundamentalist] movements got their name from the choice: they reached back to real or presumed pasts, to actual or imagined ideal original conditions and concepts, and selected what they regarded as fundamental."); see also Martin E. Marty & R. Scott Appleby, *Conclusion: An Interim Report on a Hypothetical Family*, in *FUNDAMENTALISMS OBSERVED*, *supra* note 14, at 822–23 (stating that when "[f]undamentalisms arise or come to prominence in times of crisis, actual or perceived," fundamentalist adherents will construe these circumstances as a "crisis of identity").

36. GEORGE WOLFSKILL, *THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE 1934–1940*, at 54, 70 (1962) (describing the establishment of the League to "defend the faith of the fathers" from the New Deal, which was an "alien philosophy").

became a set of “principles,” eternally true and universally applicable. . . . Americans began seeing the revolutionary heroes in the hazy light of semi-divinity and began getting them associated or confused with the framers of the Constitution The Golden Age had become a political instrument.³⁷

The Tea Party follows much the same script.³⁸

a. The Tea Party’s Mythological History

Professor Jack Balkin asserts that constitutional rhetoric in American politics comes in two popular flavors, redemption and restoration.³⁹ The Tea Party movement falls sharply on the side of restoration. A typical Tea Party group characterizes its mission as seeking “to promote the principles of our founding fathers—individual liberty and responsibility, limited government and moral leadership.”⁴⁰ Tea Party supporters believe that Americans have turned their backs on the “the Founders,”—an amalgamation of the leaders of the American independence movement of 1776 and the Framers of the Constitution of 1789—and the movement is devoted to restoring their vision of the Constitution.⁴¹

The Tea Party movement invokes Founders that are more mythological than historical. The establishment of the United States and the creation of the Constitution were nothing less than “miracles.”⁴² Its eternal words command our devotion. Of course, the hagiographic depiction of the Founders is far from

37. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1299 (1937).

38. See Kevin Drum, *Tea Party: Old Whine in New Bottles*, MOTHER JONES, Sept.–Oct. 2010, at 50 (“They are . . . angry about the recession; angry about health care reform; angry about President Obama; and angry about educated elites forever telling them what to do.”).

39. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 506 (2007) (“Social movements naturally look for these aspirational elements in the constitutional text to support their claims for change. When they look to the Constitution in this way, they naturally adopt the rhetorical tropes of restoration and redemption that are characteristic of our history.”).

40. *About*, FIRST COAST TEA PARTY, http://firstcoastteaparty.org/?page_id=550 (last visited Aug. 28, 2011). As Joseph Farah explains, “If you want a vision of what has motivated and energized millions of Americans to get off their rear ends and into the streets, you need to consider the vision our founders gave us.” FARAH, *supra* note 2, at 31; see also *About*, SILICON VALLEY TEA PARTY PATRIOTS, <http://siliconvalleyteaparty.com/about> (last visited July 19, 2011) (“Silicon Valley Tea Party Patriots is a non-partisan movement aimed at bringing limited government, fiscal responsibility, and the free-market principles that our country was founded on back to government.”); *Core Values*, VIDALIA TEA PARTY PATRIOTS, <http://www.vidaliatpp.com/Values.html> (last visited July 19, 2011) (“The core values of the TEA Party are the same values upon which the United States of America was founded and are rooted in our belief in Natural Law. They derive from a belief in free will, the primacy of individual and personal responsibility.”).

41. See, e.g., SKOUSEN, FIVE THOUSAND, *supra* note 33, at 28 (asserting that “the Founders” shared a “remarkable unanimity in fundamental beliefs”).

42. See Samuel G. Freedman, *Tea Party Rooted in Religious Fervor for Constitution*, N.Y. TIMES, Nov. 6, 2010, at A17.

novel,⁴³ but Tea Party supporters take it to an extreme because they reject conventional accounts of history. Just as they reject the mainstream media's depiction of current events because of supposed liberal bias, they believe that mainstream historians have distorted American history to paint the Founders and America in a negative light and to undermine what they view as American values. As Larry Schweikart and Michael Allen declare in *A Patriot's History of the United States*, for decades "those writing history have allowed their biases to distort the way American history is taught, . . . utterly downplaying the greatness of America's patriots and the achievements of 'dead white men.'"⁴⁴ In July 2010, Glenn Beck, one of the most trusted figures among Tea Party supporters, hosted an hour-long program of his Fox News show entitled "Restoring History," in which he told his viewers that American history books are full of lies produced with "malicious progressive intent."⁴⁵ For the last hundred years, Beck explained, leftists (as he characterizes them) have been rewriting history because they knew that they had "to separate us from our history to be able to separate us from our Constitution and our God."⁴⁶ Beck warned that all conventional views of American history are suspect: "You've been taught one lie, I think, your whole life."⁴⁷ The Tea Party's mission thus involves not merely restoring the Founders' Constitution, but also restoring the true history of the Founders.

The Tea Party invokes the Founders in distinctly religious terms. Tea Party supporters frequently declare their "faith" in the Founders.⁴⁸ The Wetumpka Tea Party declares, "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."⁴⁹ The Vidalia Tea Party likewise affirms its adherence to the "values upon which the United States of America was founded," which they identify as beliefs in "Natural

43. See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–53 (1988) (discussing the role of the Constitution in civil religion).

44. LARRY SCHWEIKART & MICHAEL ALLEN, A PATRIOT'S HISTORY OF THE UNITED STATES, inside cover (2007); see also LEPORE, *supra* note 33, at 16 (asserting that Tea Party supporters believe that "the academic study of history (whose standards of evidence and methods of analysis are based on skepticism) is a conspiracy and, furthermore, blasphemy"); SKOUSEN, FIVE THOUSAND, *supra* note 33, at 114–18 (asserting that in the first decades of the twentieth century, socialists attacked the Constitution, attempted to debunk the Founding Fathers, and fomented revolution by arguing that the Constitution is out of step with an industrialized society); *Declaration of Tea Party Independence*, *supra* note 5 ("We reject the fiction that an unbiased media still exists; there is friendly media and there is unfriendly ENE-media.").

45. *Glenn Beck: Restoring History* (FOX television broadcast July 9, 2010), available at <http://video.foxnews.com/v/4278075/beck-restoring-history/>; see also Sean Wilentz, *Confounding Fathers: The Tea Party's Cold War Roots*, NEW YORKER, Oct. 18, 2010, at 32.

46. *Glenn Beck: Restoring History*, *supra* note 45.

47. *Id.*

48. Cf. Jill Lepore, *The Commandments: The Constitution and Its Worshipers*, NEW YORKER, Jan. 17, 2011, at 70.

49. About Us, WETUMPKA TEA PARTY, <http://www.wetumpkateaparty.com/AboutUs.aspx> (last visited July 19, 2011).

Law, . . . free will, [and] the primacy of individual and personal responsibility.”⁵⁰ All Tea Party groups claim to speak for the Founders and to stand for their values, but they often differ about what those values are.⁵¹ Tea Party groups declare these distillations of the Founders’ principles without any reference to history but as affirmations of faith.⁵²

b. The Commie-Fighting Constitution of W. Cleon Skousen

To the extent that the Tea Party supporters point to written sources for their understanding of the Founders and the Constitution, they rely on narratives that reject conventional history and which, in turn, have been spurned by mainstream historians.⁵³ As Harvard historian Jill Lepore has declared, Tea Party claims about the Founders are “to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution.”⁵⁴ The most popular sources about the Founders and the Constitution among Tea Party supporters are the books of the late W. Cleon Skousen, an ardent supporter of the far-right John Birch Society. His Cold War-era books about the Constitution share a singular goal: to save America from international Communism.⁵⁵ Legal historian Jack Rakove once described Skousen’s work as “a joke that no self-respecting scholar would think is worth a warm pitcher of spit.”⁵⁶ Nonetheless, hundreds of Tea Party groups use Skousen’s books as the basis for seminars devoted to educating their members and the public on the principles of the Constitution and to show that the answers to America’s problems can be found in the wisdom of the Founding Fathers.⁵⁷

50. VIDALIA TEA PARTY PATRIOTS, *supra* note 40.

51. For instance, the Silicon Valley Tea Party identifies the Founders’ principles as “limited government, fiscal responsibility, and the free-market.” SILICON VALLEY TEA PARTY PATRIOTS, *supra* note 40. Tea Party Nation, in turn, defines the Founders’ values as, “Limited Government, Free Speech, the Second Amendment, our Military, Secure Borders and our Country!” TEA PARTY NATION, *supra* note 4.

52. Cf. Barnett, *supra* note 6, at 2 (“Tea Party organizations couch their beliefs in extremely general terms.”).

53. See generally ANDREW M. ALLISON, THE REAL BENJAMIN FRANKLIN (1982); ANDREW M. ALLISON, THE REAL THOMAS JEFFERSON (1983); JAY A. PARRY, THE REAL GEORGE WASHINGTON (1991).

54. Jill Lepore, *Tea and Sympathy: Who Owns the American Revolution?*, NEW YORKER, May 3, 2010, at 26.

55. SKOUSEN, FIVE THOUSAND, *supra* note 33; SKOUSEN, MAKING OF AMERICA, *supra* note 33; see also Rosen, *supra* note 33 (characterizing Skousen as “the constitutional guru of the Tea Party movement”).

56. Sean Wilentz, *Confounding Fathers*, NEW YORKER, Oct. 18, 2010, at 32.

57. Stephanie Mencimer, *One Nation Under Beck: In Which Our Reporter Learns About the Divine Origins of the Constitution at a Tea Party Seminar*, MOTHER JONES, May 1, 2010, at 21; Krissah Thompson, *In Course on Constitution, Students Find That Fathers Know Best*, WASH. POST, June 5, 2010, at A4. As of September 2010, NCCS is presenting several seminars per weekend based on Skousen’s work to Tea Party groups around the country. See *Upcoming NCCS Seminars*, NAT’L CENTER FOR CONST. STUD., <http://www.nccs.net/seminars/calendar.html> (last visited July 19, 2011).

Like Beck and many Tea Party supporters, Skousen believed that leftists have sought to manipulate what Americans believe about history, undermining belief in the Founders and the Constitution in order to make it possible to trick the nation into accepting Communism, which right-thinking Americans would otherwise recognize as a foreign doctrine.⁵⁸ According to Skousen, the false history foisted upon Americans succeeded in creating a “[g]eneration of lost Americans” and a nation of “un-Americans,” who had lost touch with their national identity.⁵⁹

Skousen sought to reintroduce America to the true Founders, presenting them as a unified group of chosen disciples to whom God revealed a divine formula for government.⁶⁰ He scoffed at conventional versions of American history that depict the Founders as relatively nonreligious 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 singular blessing.”⁶¹ Skousen likewise rejected the conventional understanding that the framers of the Constitution were principally influenced by European philosophers of the Enlightenment era, including Hobbes, Locke, and Rousseau.⁶² Far from following what Skousen refers to as the “fads of European philosophy,” the Founders took their inspiration from the Bible and the ancient Anglo-Saxons.⁶³ In fact, the Founders rejected all “European” theories and “made European theories unconstitutional.”⁶⁴

The central thrust of Skousen’s books is that the Constitution establishes eternal national principles that can protect the nation against the spread of world Communism. The first and most important of these “ancient principles” is the establishment of “natural law” as the only reliable basis for government.⁶⁵ For Skousen, natural law means “God’s laws” and encompasses the necessity for “limited government,” the right to bear arms, protections for the family and the institution of marriage, the sanctity of private property, and the avoidance of debt.⁶⁶ Such natural law principles, Skousen claimed, are instituted eternally and

58. SKOUSEN, FIVE THOUSAND, *supra* note 33, at 118 (“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 (1958) [hereinafter SKOUSEN, NAKED COMMUNIST] (asserting that Communists sought to lay the groundwork for collective government by discrediting the Constitution and the Founding Fathers, by prohibiting prayer in public schools, by encouraging public acceptance of homosexuality and masturbation, and by destroying the traditional family structure).

59. SKOUSEN, FIVE THOUSAND, *supra* note 33, at iii, 135; SKOUSEN, MAKING OF AMERICA, *supra* note 33, at 217.

60. SKOUSEN, FIVE THOUSAND, *supra* note 33, at 17, 15, 225.

61. *Id.* at 76; *see also* FARAH, *supra* note 2, 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”).

62. SKOUSEN, FIVE THOUSAND, *supra* note 33, at 63, 80.

63. *Id.* at 11–18.

64. *Id.* at 63, 86, 88–89, 118.

65. *Id.* at 33–40; SKOUSEN, MAKING OF AMERICA, *supra* note 33, at 195.

66. SKOUSEN, FIVE THOUSAND, *supra* note 33, at 40, 208.

are not subject to change by mortal legislators.⁶⁷ Legislation contrary to God's laws is a "scourge to humanity" and is therefore unconstitutional.⁶⁸

In words that sound much like Santelli, Skousen declared that natural law prohibits government efforts to provide welfare benefits or redistribute wealth.⁶⁹ Skousen cites a debunked story (also frequently told by Representative Ron Paul) that when Davy Crockett served in Congress he voted against a bill to provide financial support to a Navy widow because Crockett believed that the government has no authority to take money from some taxpayers and give it to others—no matter how worthy the cause or how needy the recipients.⁷⁰ As Skousen tells it, Congress cannot provide support for military widows or any others citizens who might need it because natural law establishes the inviolability of property rights.⁷¹ To tax some to give to others is tantamount to stealing.⁷² Indeed, by protecting property, the Founders sought to refute "European philosophers" who believed "that the role of government was to take from the 'haves' and give to the 'have nots.'"⁷³ As Skousen explains, the Founders disagreed and did "everything possible to make these collectivist policies 'unconstitutional.'"⁷⁴

As products of the radical right wing of the Cold War era, Skousen's books are decidedly strange sources to inspire a contemporary political movement. With the end of the Cold War, one might have expected Skousen's books to lose whatever appeal they once had, but the emergence of the Tea Party movement has made the books best sellers.⁷⁵ Several leading Tea Party-supported politicians are emphatic followers of Skousen, including recently elected Senators Mike Lee and Rand Paul, and Russell Pearce, the chief sponsor of Arizona's anti-immigration law.⁷⁶ With the growing prominence and growing power of the Tea Party

67. *Id.* at 40, 103–04.

68. *Id.* at 38.

69. *Id.* at 87–91.

70. SKOUSEN, *MAKING OF AMERICA*, *supra* note 33, at 218–19, 391–92. The story is widely quoted among conservatives but has no basis in fact. *See, e.g.*, 149 CONG. REC. H465-08, H495 (Feb. 13, 2003) (statement of Rep. Ron Paul) ("In the words of former Congressman Davy Crockett, this money is 'Not Yours to Give.'"); Jim Boylston, *Crockett and Bunce: A Fable Examined*, in *THE CROCKETT CHRONICLE*, Nov. 2004.

71. SKOUSEN, *FIVE THOUSAND*, *supra* note 33, at 124, 126.

72. *Id.*, at 126–29.

73. *Id.* at 87.

74. *Id.* at 341.

75. In 2009, Glenn Beck began touting *The Five Thousand Year Leap* as offering "answers to [the] questions plaguing America." Glenn Beck, dust jacket, in SKOUSEN, *FIVE THOUSAND*, *supra* note 33, at 359. After its 2009 re-issuance with a new introduction by Beck, the book became the nation's best-selling book on law and, for a few months, the best-selling book on Amazon.com. Sharon Haddock, *Beck's Backing Bumps Skousen Book To Top*, *DESERET MORNING NEWS* (Salt Lake City), Mar. 21, 2009, at E6; David Weigel, *Glenn Beck's Book Club: What the Far Right Is Reading*, *WASH. MONTHLY*, Nov.–Dec. 2009, at 9–10.

76. *See* Gary Nelson, *Iron Will Drives Pearce, Agenda*, *ARIZ. REPUBLIC*, June 6, 2010, at A1; Rosen, *supra* note 33, at 34 ("Many of the positions Lee outlined on the campaign trail appear to be inspired by the constitutional guru of the Tea Party movement, W. Cleon Skousen.").

movement, Skousen's influence has spread beyond Tea Party activists. Several prominent Republican leaders—Texas Governor Rick Perry, former Massachusetts Governor Mitt Romney, and Senator Orrin Hatch, among others—have openly endorsed Skousen's views.⁷⁷

Although not all Tea Party supporters have read Skousen or attended an educational seminar based on his brand of constitutional revivalism, his perspective on the Founders and their views is widely shared among the Tea Party movement. Like Skousen, many Tea Party supporters believe that the Constitution is divinely inspired and implements biblical precepts.⁷⁸ Like Skousen, many Tea Party supporters perceive America to be under attack from foreign forces, variously denominated as “socialists,” “progressives,” “communists,” and “collectivists,” threatening the nation's very existence.⁷⁹ And like Skousen, the Tea Party movement sees adherence to the Constitution as the solution, the bulwark against the transformation of the United States from a land of individualism to a socialist collectivist state.⁸⁰

c. The Founders' Constitutional Principles

Notwithstanding differences in what Tea Party groups identify as the Founders' principles, the movement agrees that certain core principles can be attributed to the Founders and are embodied in the Constitution. In February 2010, a group representing different Tea Party factions issued a “Tea Party Declaration of Independence,” which attempted to identify the movement's central

77. Marc Hansen, *Best Part of Romney Interview Was Off Air*, DES MOINES REG., Aug. 9, 2007, at B1; Wayne Slater, *Perry Uses Glenn Beck Favorite as Election Ally*, DALL. MORNING NEWS, Oct. 1, 2009, at 3A; Mark Hemingway, *Romney's Radical Roots*, NAT'L REV. ONLINE (Aug. 6, 2007, 6:30 AM), <http://article.nationalreview.com/323634/romneys-radical-roots/mark-hemingway>. U.S. Senator Orrin Hatch spoke at Skousen's funeral and read a poem he had written in honor of Skousen. *Funeral Program for Willard Cleon Skousen*, SKOUSEN2000.COM, <http://www.skousen2000.com/funeral.htm> (last visited July 19, 2001).

78. See, e.g., FARAH, *supra* note 2 at 74–75 (“Where did our founders get the concept? They got their inspiration from another radical document—the Bible.”); *The O'Reilly Factor: Sarah Palin on National Day of Prayer Controversy*, *supra* note 16. As a result of such views, the Texas School Board voted recently to replace the study of Locke, Hobbes, and Montesquie, in favor of biblical law as the antecedent to the Constitution. LEPORE, *supra* note 33, at 13.

79. See, e.g., FARAH, *supra* note 2, at 84–85 (“The very will of the American people is under attack . . . from globalists who seek to destroy America's national sovereignty.”); GULLETT, *supra* note 33, at 14; Glenn Beck, *Introduction to SKOUSEN*, FIVE THOUSAND, *supra* note 33, at 7 (stating “our Republic is at stake”).

80. See, e.g., FARAH, *supra* note 2, at 91 (asserting that enemies of the Constitution are attempting to “chang[e] the hearts and minds of the people to accept un-American values of collectivism and moral relativism”); *FAQ (Facts and Questions)*, PATRIOT ACTION NETWORK, <http://www.patriotactionnetwork.com/about-us/faq/> (last visited July 19, 2011) (“PANetwork is a place where citizens can resist—in a peaceful, patriotic way—the efforts to move our nation away from our heritage of individual liberties toward a ‘brave new world’ of collectivism.”).

commitments.⁸¹ The Tea Party Declaration crystallizes many of the disparate positions of the members of the Tea Party movement and identifies what most Tea Party groups cite as the eternal and unchanging principles at the core of the American nation: beliefs in American exceptionalism, individual liberty, limited government, and free markets.⁸²

Perhaps the most cherished of these principles is a belief in the greatness of America itself. As the Tea Party Declaration proclaimed: "We are the Tea Party Movement of America and we believe in American Exceptionalism."⁸³ Although beliefs about the exceptional nature of the United States are widespread, the Tea Party movement espouses an especially emphatic version of American exceptionalism.⁸⁴ As the founder of Tea Party Nation declared:

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.⁸⁵

To Tea Party supporters, faith in America's greatness is what separates true patriots from liberals and progressives like President Obama, who assuredly do not truly love their country. Tea Party favorite Sarah Palin complains that, "We have a president, perhaps for the first time since the founding of our republic, who

81. See 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/>.

82. See, e.g., TEA PARTY NATION, *supra* note 4 ("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, *supra* note 3 ("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.").

83. *Declaration of Tea Party Independence*, *supra* note 5.

84. For academic discussion of American exceptionalism, see the following examples: GODFREY HODGSON, *THE MYTH OF AMERICAN EXCEPTIONALISM* (2010); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1997); DEBORAH L. MADSEN, *AMERICAN EXCEPTIONALISM* (1998); Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006).

85. 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>; see also *Declaration of Tea Party Independence*, *supra* note 5 ("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."); *Excerpt from Sarah Palin's Address*, LAS VEGAS SUN (Mar. 28, 2010), <http://www.lasvegassun.com/news/2010/mar/28/excerpt-sarah-palins-address/> ("We believe, as Lincoln did, that this nation is the last, best hope of Earth. 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.").

expresses his belief that America is not the greatest earthly force for good the world has ever known.”⁸⁶

Tea Party supporters believe that what makes the United States exceptional is a “unique set of beliefs and national qualities” established by the Founders, which have made it “a model to the world.”⁸⁷ The core of these beliefs is a commitment to individual liberty, which the Tea Party movement equates with an unregulated economy.⁸⁸ As Tea Party Patriots, one of the national Tea Party umbrella groups, declared:

A free market is the economic consequence of personal liberty. The founders believed that personal and economic freedom were indivisible, as do we. Our current government’s interference distorts the free market and inhibits the pursuit of individual and economic liberty. Therefore, we support a return to the free market principles on which this nation was founded and oppose government intervention into the operations of private business.⁸⁹

The principle of “limited government,” in turn, prevents the government from interfering with individual liberties and free markets.⁹⁰ The Tea Party Declaration of Independence proclaims that the Constitution guarantees each person the ability “to direct our own affairs free of the dictates of an ever expanding federal government which is as voracious in its desire for power as it is incompetent and dangerous in its exercise.”⁹¹ Opposition to excessive taxation necessarily follows from these principles because taxes must be kept low to maintain limited government and thereby avoid interference with individual liberty and free markets.⁹²

86. SARAH PALIN, *AMERICAN BY HEART: REFLECTIONS ON FAMILY, FAITH, AND FLAG* 262 (2010). Rush Limbaugh has likewise called President Obama the first “anti-American President.” See *The Rush Limbaugh Show: “Imam Hussein Obama” Is Probably the “Best Anti-American President the Country’s Ever Had”* (Premiere Radio Networks Aug. 18, 2010), available at <http://mediamatters.org/mmtv/201008180035>.

87. PALIN, *supra* note 86, at 63; see also *Excerpt from Sarah Palin’s Address*, *supra* note 85 (“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.”).

88. See *Declaration of Tea Party Independence*, *supra* note 5 (“We believe that American Exceptionalism is found in its devotion to the cause of Liberty.”).

89. TEA PARTY PATRIOTS, *supra* note 3.

90. See, e.g., *The Meaning of Limited Government*, CHI. TEA PARTY, <http://teapartychicago.netboots.net/node/175> (last visited July 19, 2011) (“During the course of the 20th century and continuing to the present day, the federal government has expanded its power far beyond that intended by the Founders, thereby threatening our ‘unalienable rights to life, liberty and the pursuit of happiness.’”).

91. *Declaration of Tea Party Independence*, *supra* note 5 (altered to remove all caps in original); see also, *Why Limited Government?*, RICHMOND TEA PARTY <http://www.richmondteaparty.com/2010/09/why-limited-government/> (last visited July 19, 2011) (“A small, limited government, therefore, is the only possible government for a free people. All else, to one degree or another, is slavery.”).

92. See, e.g., ZERNIKE, *supra* note 12, at 42 (quoting Tea Party activist who describes the national debt as “the real threat to freedom”).

The Tea Party movement articulates all of its positions in terms of this set of interlocking principles—individual liberty, limited government, and free markets—which they identify as core constitutional principles. Any government action the movement opposes—whether it is health care reform, bailouts, taxes, debt, or cap-and-trade legislation—involves “excessive government” and therefore unconstitutionally infringes on individual liberty and interferes with the free market.⁹³

In invoking the Constitution as the basis for their guiding principles, Tea Party supporters devote little attention to what lawyers would recognize as constitutional law. They reject court-made precedent, just as they reject conventional accounts of history, because the Supreme Court has departed from the true meaning of the Constitution and succumbed to the lure of socialism.⁹⁴ Textual analysis too is unnecessary because the meaning of the Constitution is crystal clear. In *The Tea Party Manifesto*, Joseph Farah mocks President Obama as a “constitutional scholar,” declaring that “You don’t have to be a scholar to understand the Constitution. It was written to be understood easily by ordinary people.”⁹⁵ If one only reads the Constitution, “[t]here can be little mistake about what [the Founders] meant, what they had in mind, what they were thinking and why.”⁹⁶ As Farah and other Tea Party supporters insist, debate over the Constitution’s meaning only generates obfuscation of its true meaning: “The time for mere debate is over.”⁹⁷

The conviction that the Constitution is clear and should be easily accessible to everyone lies at the heart of the Tea Party’s efforts to distribute millions of pocket constitutions.⁹⁸ Indeed, Tea Party leaders exhort their supporters to read the Constitution daily, to memorize its passages, and to carry the Constitution with them at all times.⁹⁹

93. See, e.g., Malkin, *supra* note 23, at xxi; *Declaration of Tea Party Independence*, *supra* note 5, at 2.

94. FARAH, *supra* note 2, at 91 (“[T]he courts . . . are actively pushing another agenda and slowly, inevitably changing the hearts and minds of the people to accept un-American values of collectivism and moral relativism.”).

95. *Id.* at 102; see also ZERNIKE, *supra* note 12, at 67 (“If you don’t understand the Constitution, I’ll buy you a dictionary.” (quoting Dick Armey)); *The O’Reilly Factor: Sarah Palin on National Day of Prayer Controversy*, *supra* note 16 (“[The founding documents] are quite clear that we would create law based on the God of the Bible and the Ten Commandments. It’s pretty simple.”).

96. FARAH, *supra* note 2, at 103.

97. *Id.* at 98; see also ARMEY & KIBBE, *supra* note 2, at 65–67 (noting that the Constitution is only four pages long because, like the Tea Party, it expresses a simple idea: the need to leave citizens alone).

98. See Molly K. Hooper, *Constitution Is This Year’s Big Best-Seller*, THE HILL (May 21, 2010, 6:00 AM), <http://thehill.com/homenews/administration/99099-constitution-is-this-years-big-best-seller> (noting the increased sales of pocket Constitutions).

99. See Lepore, *supra* note 54.

2. *The Degraded Present*

In the Tea Party's constitutional narrative, the adoption of the Constitution and the recognition of the eternal constitutional principles of individual liberty, limited government, and free markets ushered in a golden age of prosperity and freedom that was nothing short of miraculous. It allowed humanity to make more progress in a short time than had been made in all of human history—hence the title of Skousen's book, *The Five Thousand Year Leap*.¹⁰⁰ The adoption of the Founders' principles made the United States the most prosperous and freest nation the world has ever known.¹⁰¹

Sadly, however, the nation has strayed from its foundational principles.¹⁰² Beginning in the early twentieth century, socialists sought to convince the public that the Founders and their principles were out-of-date.¹⁰³ As Skousen reports, "By the 1920s, the debunking of the Founding Fathers was in full swing."¹⁰⁴ Once the people abandoned faith in the Founders, the United States began to adopt one policy after another that conflicted with its foundational principles.¹⁰⁵ The primary transgression was the establishment of federal welfare programs like Social Security and Medicare, which violate the fundamental prohibition against "collectivist" measures that redistribute wealth.¹⁰⁶ Labor, environmental, and consumer protection laws followed, which likewise transgress the principles of individual liberty, limited government, and free markets.¹⁰⁷

According to Skousen and many Tea Party supporters, almost everything the federal government does today is unconstitutional.¹⁰⁸ Tea Party supporters have declared that the purpose of these unconstitutional programs is clear: to oppress the people, take away their freedoms, and establish rule by elites. As the Tea Party Declaration of Independence explains:

100. SKOUSEN, *FIVE THOUSAND*, *supra* note 33, at 5.

101. According to Skousen, the Constitution paved the way for what he refers to as the industrial revolution, the machine revolution, the transportation revolution, the communications revolution, the energy resource revolution, and the computer revolution. SKOUSEN, *MAKING OF AMERICA*, *supra* note 33, at 2–3; *see also Declaration of Tea Party Independence*, *supra* note 5 ("For much of its history the United States has been a land of prosperity and liberty, sound policies such as fiscal responsibility, constitutionally limited government and a belief in the free market have safeguarded this condition.").

102. *See, e.g.*, FARAH, *supra* note 2, at 82 ("Today, counter-revolutionaries are running the show in America. They have subverted much of what the founders bestowed upon us."); O'HARA, *supra* note 12, at 21 ("Ours is a nation unmoored from history [because of the] founding principles of this country and their steady abandonment.").

103. *Cf.* LEPORE, *supra* note 33, at 12 (discussing the Tea Party view that "liberals had contaminated the teaching of American history").

104. SKOUSEN, *FIVE THOUSAND*, *supra* note 33, at 134.

105. SKOUSEN, *MAKING OF AMERICA*, *supra* note 33, at 407 (referring to the theme, "Unconstitutional Doctrines Dominate Today").

106. *Id.* at 255, 387–92.

107. SKOUSEN, *FIVE THOUSAND*, *supra* note 33, at 350.

108. *See, e.g., id.* at 351–53; *see also, e.g.*, FARAH, *supra* note 2, at 70; *Declaration of Tea Party Independence*, *supra* note 5.

We reject the endless creation of myriad federal government agencies that drown free enterprise and local control in the swarms of education, energy, ecology, and commerce bureaucrats who style themselves “czars” sent to harass us. . . . 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.”¹⁰⁹

Tea Party supporters thus believe that the purpose of these federal programs is to “harass” the people, to create dependency, and to undermine the foundational American value of individual self-reliance.

It may be perplexing that so many programs at odds with American values have been enacted, but the Tea Party movement declares that the source of the attack on the Constitution is clear: advocates of foreign, anti-American ideas have taken over the federal government.¹¹⁰ The attack on American values that began with the progressives in the early decades of the twentieth century has now reached a culmination with the election of President Barack Obama. Tea Party supporters argue that liberals and the Obama administration are “attacking” America, that Obama is “anti-American,” and that he is seeking to undermine basic American values.¹¹¹ The rhetoric of foreign invasion and foreign infiltration dominates Tea Party speeches and literature.¹¹² Tea Party supporters perceive that foreign forces are succeeding in taking over the United States, transforming the country they love into an unrecognizably alien realm.¹¹³

Tea Party supporters routinely demonize as “un-American” anyone who supports policies that conflict with what they perceive to be fundamental American

109. *Declaration of Tea Party Independence*, *supra* note 5.

110. For instance, Tea Party Nation founder Judson Phillips declared: “McCarthy had one simple idea. If you are going to work in a sensitive position for the government, you should be loyal to America. It is a pity that rule is not in effect today. If it were, Obama and his entire regime would be gone.” Judson Phillips, *If They Call It “McCarthyism” He Must Be on to Something*, TEA PARTY NATION (Feb. 8, 2011, 7:05 AM), <http://www.teapartynation.com/forum/topics/if-they-call-it-mccarthyism-he>.

111. See, e.g., GULLETT, *supra* note 33, at 12 (“In response to . . . all the Socialist intellectual and financial atrocities that have been implemented by the Federal Government since Obama took office, clear-thinking Americans (what remains of us) have taken to the streets . . .”).

112. Sometimes this rhetoric of invasion is literal. See, e.g., FARAH, *supra* note 2, at 69 (asserting that the “political and cultural elite” have sought to prevent American sovereignty by “conspiring to bring into America millions and millions more sheep—illegally”).

113. *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 33, 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 “[g]eneration of lost Americans,” and a nation of “un-Americans”); SKOUSEN, MAKING OF AMERICA, *supra* note 33, at 217 (same).

values.¹¹⁴ President Obama, in particular, is often described as foreign.¹¹⁵ He is sometimes described as foreign *by birth*, by so-called “birthers,” who assert that he was not born in the United States and therefore is constitutionally ineligible to be President.¹¹⁶ He is sometimes described as *religiously* foreign by those who believe he is secretly a Muslim living in a Christian nation.¹¹⁷ 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.¹¹⁸ But perhaps most often, he is described as *ideologically* foreign because he does not adhere to the Tea Party’s notions of American exceptionalism, limited government, individual liberty, and free markets.¹¹⁹ All 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 America’s greatness.¹²⁰

114. See, e.g., FARAH, *supra* note 2, at 91 (“[T]he courts and America’s key cultural institutions are actively pushing . . . and slowly, inevitably changing the hearts and minds of the people to accept un-American values of collectivism and moral relativism.”); ZERNIKE, *supra* note 12, at 70–71.

115. See, e.g., Drum, *supra* note 38, at 50 (“‘Obama isn’t a U.S. socialist,’ thundered Fox News commentator Steven Milloy at a tea party convention earlier this year, ‘he’s an international socialist!’”).

116. See, e.g., Joseph Farah, co-founder of W. Journalism Center, Keynote Address to National Tea Party Convention (Feb. 5, 2010) (video available at <http://www.c-spanvideo.org/program/291955-1>); Judson Phillips, *The Eligibility Issue*, TEA PARTY NATION (Feb. 20, 2011, 7:52 AM), <http://www.teapartynation.com/forum/topics/the-eligibility-issue>. On April 27, 2011, President Obama released a copy of his long-form birth certificate, see Dan Pfeiffer, *President Obama’s Long Form Birth Certificate*, WHITE HOUSE BLOG (Apr. 27, 2011, 8:57 AM), <http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate>, but many Tea Partiers reject this evidence as a forgery, see, e.g., Alan Caruba, *Pageantry, History and Change*, TEA PARTY NATION (May 1, 2011, 7:33 AM), <http://www.teapartynation.com/profiles/blogs/pageantry-history-and-change> (referring to the obviously fraudulent “birth certificate”); *Is Obama’s Birth Certificate a Fake?*, PATRIOT UPDATE (Apr. 27, 2011), <http://patriotupdate.com/6137/is-obama%E2%80%99s-birth-certificate-a-fake>.

117. See, e.g., 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 to describe President Obama as “Indonesian Muslim turned welfare thug and a racist in chief”).

118. See BURGHART & ZESKIND, *supra* note 33, at 57–67.

119. In various permutations, the meme that Obama is foreign is widespread among conservatives. See, e.g., DINESH D’SOUZA, *THE ROOTS OF OBAMA’S RAGE* 1–15 (2010) (claiming that the Obama administration is attempting to carry out the socialist, anti-colonial dreams of his Kenyan father); Steven G. Calabresi, *The Teleprompter Presidency? Justice DeLayed or Denied?*, POLITICO (Aug. 17, 2010), http://www.politico.com/arena/perm/Steven_G_Calabresi_A5D4F886-1279-48D4-96B9-D176A986A416.html (asserting that “at some level [Obama] does not really know America very well nor does he thoroughly identify with it”).

120. See, e.g., BURGHART & ZESKIND, *supra* note 33, at 68–69.

3. *The Utopian Future*

Tea Party supporters believe that the nation is on the brink of collapse or tyranny because it has abandoned the Founders' principles.¹²¹ Make no mistake, Glenn Beck warns, "our Republic is at stake."¹²² Because the Tea Party movement identifies the rejection of the Constitution as the cause of the nation's problems, the solution is obvious: we must embrace the Constitution again. The Tea Party identifies various crises facing the nation—a massive national debt, an excessive and intrusive federal government, and the loss of individual freedom—that could all be resolved if the nation would listen to the wisdom of the Founders. As Beck writes, the Founders anticipated today's problems: "The questions that we face were foreseen by the greatest group of Americans to ever live: the Founding Fathers. They knew that we would be grappling with issues like the ones we face today at some point, so they designed a ship that could withstand even the mightiest storm."¹²³

For some, it is almost too late. The Virginia Tea Party Patriots opened their 2010 convention by holding a funeral for the Constitution.¹²⁴ In this act of political theater, a man dressed as Thomas Jefferson led a solemn procession, slowly ringing a bell through downtown Richmond, followed by supporters carrying a black cardboard coffin labeled "The Constitution."¹²⁵ "We the people have gathered here today," the Jefferson impersonator pronounced, "to mourn the destruction of our Constitution."¹²⁶ As the organizers of the funeral explained, the Constitution died from "decades of overreaching legislation, activist judges, and finally the current Congress and the Obama Administration."¹²⁷ Notwithstanding

121. See, e.g., BRUCE BEXLEY, *THE TEA PARTY MOVEMENT: WHY IT STARTED, WHAT IT'S ABOUT, AND HOW YOU CAN GET INVOLVED* 5 (2009) (explaining that the Tea Party movement arose because government spending threatened to "destroy the country" and deprive the people of their freedoms); FARAH, *supra* note 2, at 21 (discussing the fundamental crises threatening America's very existence as a sovereign, free, vibrant, cohesive, self-governing nation-state"); O'HARA, *supra* note 12, at 21 (asserting that the present crisis arose because of the "steady abandonment" of the "founding principles of this country"); *Mission Statement*, BOONE TEA PARTY, <http://booneteaparty.org/mission.htm> (last visited July 19, 2011) ("Our government has strayed drastically from our nation's foundation . . . We are now in grave danger of losing our fundamental rights and liberties as American citizens.").

122. Beck, *supra* note 79, at 7. Dick Armeey agrees that out of control spending is "threatening the American way of life." ARMEY & KIBBE, *supra* note 2, at 8.

123. Beck, *supra* note 79, at 6.

124. Video of the funeral is available online. GOPTrust, *Funeral for the Constitution at Virginia Tea Party Convention*, YOUTUBE (Oct. 12, 2010), <http://www.youtube.com/watch?v=1Opwl3RZ-SQ>.

125. *Id.*

126. *Id.*

127. *Funeral for the Constitution at Virginia Tea Party Convention*, THE NAT'L REPUBLICAN TR. POL. ACTION COMMITTEE, http://www.goptrust.com/Tea_Party_Convention_Funeral.html (last visited July 19, 2011).

the asserted death of the Constitution, the Tea Party movement is borne of the conviction that the Constitution can rise again, if only we believe in it.¹²⁸

II. THE TEA PARTY MOVEMENT'S POPULAR ORIGINALISM AS A MONSTROUS HYBRID

The core of originalism is that the Constitution should be interpreted according to its original meaning, while the core of popular constitutionalism is that the people can effectuate their constitutional understandings through ordinary politics.¹²⁹ While there may be countless ways to combine these two theories, the Tea Party movement offers a combination that undermines the primary claims asserted by proponents of each. As Section A discusses, originalists assert that interpreting the Constitution according to its original meaning would take politics out of constitutional law. The Tea Party movement shows, however, that originalism also provides a powerful political rhetoric of restoration. As Section B discusses, popular constitutionalists assert that empowering the people to effectuate their constitutional understandings through ordinary politics would enlarge popular democracy. Yet the Tea Party movement shows that when a popular movement advances a narrow, nationalist understanding of the Constitution, popular constitutionalism can also be employed to restrict popular democracy.

A. *Originalism As Political Rhetoric*

Originalism is touted as avoiding the problem of interpretive subjectivity by embracing a fixed meaning of the Constitution's text, discoverable by careful examination of the historical record.¹³⁰ Originalism is something quite different, however, when it is employed not as an interpretive approach but as the basis of a political program aimed at reshaping current politics. Of course, political movements often employ originalist rhetoric to express their objectives, and it is unremarkable for politicians to claim that they are trying to carry out the principles

128. Indeed, the theme of the Virginia Tea Party Patriots convention was that "The Constitution Still Matters," and keynote speaker Lou Dobbs bemoaned that it was a sad day in America when the people have to remind the politicians that the Constitution matters, but it is "oh so necessary." Catfishhilton, *Lou Dobbs at VA Tea Party Convention in Richmond, Virginia*, YOUTUBE (Oct. 9, 2010), <http://www.youtube.com/watch?v=RTD-IJKRoZ0>.

129. Compare TUSHNET, *supra* note 7, at 182 ("Populist constitutional law . . . treats constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves."), with Calabresi, *supra* note 6, at 887 (stating originalism requires that constitutional interpretations "faithfully to adhere to their meaning as understood by the people who chose to entrench them in the Constitution").

130. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 352 (1990) ("Once adherence to the original understanding is weakened or abandoned, a judge, perhaps instructed by a revisionist theorist, can reach any result, because the human mind and will, freed of the constraints of history and 'the sediment of history which is law,' can reach any result."); Scalia, *supra* note 6, at 864 (asserting that originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

of the nation's founders.¹³¹ As several commentators have noted, originalism often provides a rhetoric of constitutional restoration employed by political groups to mobilize their supporters.¹³² What makes the Tea Party movement different from other movements that occasionally employ originalist rhetoric is that restoring an originalist vision is central to its political agenda.

Jack Balkin—himself an advocate of an interpretive method that combines originalism and popular constitutionalism¹³³—claims that it is the nature of American popular constitutionalism that participants speak, as the Tea Party does, in both the voice of the past and the present: “If the Constitution is to be ‘our’ Constitution, we must be able to see ourselves as part of a project that unites past and present generations and projects outward into the future.”¹³⁴ Other scholars appear to be more skeptical of the use of originalist rhetoric in popular politics. Reva Siegel and Robert Post suggest that the invocation of originalist rhetoric allows for a subterfuge that gives political movements a “conviction of authenticity,” enabling them to portray their current agendas as arguments about being true to an idealized past rather than as programs that serve contemporary interests, which could be debated on their own terms. For instance, the gun rights movement argues for an individual right to own handguns, not chiefly because of the instrumental benefits of gun ownership, but because that is what the movement claims the Founding Fathers intended.¹³⁵

Historians have found much to criticize in originalism, especially in popularized forms. For example, historian Jill Lepore has characterized popularized originalism as “originalism scrawled with Magic Markers, on poster board.”¹³⁶ Yet the difference between the Tea Party's originalism and academic originalism is not merely that its historical research fails to measure up to academic standards. Tea Party supporters eschew conventional accounts of history altogether, which they believe have been distorted to undermine traditional

131. For instance, the gun rights movement helped reshape the understood meaning of the Constitution by employing originalist rhetoric. See Reva Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

132. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009); cf. LEPORE, *supra* note 33, at 14 (“Americans have drawn Revolutionary analogies before. They have drawn them for a very long time. When in doubt, in American politics, left, right, or center, deploy the Founding Fathers.”).

133. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion*]; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 549 (2009) [hereinafter Balkin, *Framework Originalism*] (“Original meaning originalism and living constitutionalism are compatible positions.”); Balkin, *supra* note 39.

134. Balkin, *supra* note 39, at 520. Asserting a related point, Todd Pettys argues that the prevalence of originalist rhetoric in popular politics serves as an important check on popular constitutionalism because “[w]e are . . . exceedingly reluctant to do anything that would open us to the charge that we are breaking faith with either the Founders or the Constitution.” Pettys, *supra* note 10, at 346.

135. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitutionalism*, 75 FORDHAM L. REV. 545, 561 (2006).

136. Lepore, *supra* note 54.

values.¹³⁷ Lepore accurately characterizes the Tea Party as espousing a form of “historical fundamentalism,” which she describes as including a belief that “the founding” is “ageless and sacred and to be worshipped,” that certain texts—“the founding documents”—are “to be read in the same spirit with which religious fundamentalists read, for instance, the Ten Commandments,” and that the academic study of history, based on skepticism and rigorous standards of evidence is “a conspiracy and furthermore, blasphemy,” while arguments based on the Founders are treated as “incontrovertible.”¹³⁸ Tea Party supporters generally make little attempt to ground their assertions about the Founders in historical evidence.¹³⁹ Instead, they largely rely on unconventional sources like W. Cleon Skousen, who articulated a constitutional mythology in which the Founders were just like many contemporary conservatives—devout Christians who wanted low taxes and rejected all “European” theories.¹⁴⁰

Notwithstanding the absence of historical support for its version of history, the mythological history invoked by the Tea Party movement is fairly typical of many nationalist movements. As political scientists have long noted, nationalist movements often rely on fantastic versions of national history to advance their cause.¹⁴¹ Nationalists uniformly share the conviction that their nation had a glorious past, and they employ narratives of a golden age to explain and authenticate their present day political agendas. Matthew Levinger and Paula Franklin Lytle have argued that dismissing nationalist historical narratives as a historical misses their point: “[I]magined history so expressed cannot be understood merely as a true or false account, but rather as a narrative articulating the elements of a social movement’s agenda.”¹⁴² Seen this way, the Tea Party’s mythological history is more valuable for what it reveals about the movement’s contemporary agenda than what it says about the past.¹⁴³

137. See *supra* notes 49–52 and accompanying text.

138. LEPORE, *supra* note 33, at 16. Lepore has explained her hope that, by critiquing the Tea Party’s use of history, political discourse might be based on historical evidence, instead of faith and fantasy. See Linford D. Fisher, *Of Tea Parties, Historical Fundamentalism, and Antihistory*, RELIGION IN AM. HIST.: A GROUP BLOG ON AM. RELIGIOUS HIST. & CULTURE (Oct. 27, 2010), <http://usreligion.blogspot.com/2010/10/of-tea-parties-historical.html>. The blog contains an interview with Jill Lepore and quotes her saying, “I’d like people to have a different vision for what political discourse could be like in this country, one that is based on historical evidence and respectful dialog.” *Id.*

139. See *supra* notes 60–61 and accompanying text.

140. See *supra* notes 67–71 and accompanying text.

141. See Levinger & Lytle, *supra* note 34, at 178 (“Numerous scholars have remarked on a curious dimension of nationalist rhetoric: namely, that all nations possess glorious pasts.”); see also HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETATIVE ESSAY 29 (1957) (“Nationalist historiography desires not only to describe a people’s life but to help form it and to make its history appear as the fulfillment of a supposed national destiny.”); ANTHONY D. SMITH, NATION IN HISTORY: HISTORIOGRAPHICAL DEBATES ABOUT ETHNICITY AND NATIONALISM 67–68 (2000) (“Similarly, memories of political, religious, economic, and artistic ‘golden ages’ may continue to inspire later generations of that *ethnie* and become the canon of authenticity and creativity for latter day nationalists.”).

142. Levinger & Lytle, *supra* note 34, at 188.

143. See KOHN, *supra* note 141.

The Tea Party movement's mythological history nonetheless illustrates the vast gulf between the methodology for discerning the meaning of the Constitution professed by originalists and the mechanisms by which political movements that employ originalist rhetoric establish their understanding of constitutional meaning. Originalists argue that the historical record provides the only objective evidence for discerning original meaning, and therefore the only true meaning, of the Constitution.¹⁴⁴ Careful sifting through dusty sources and detailed analysis is required.¹⁴⁵ Critics of originalism argue that interpretation of historical materials is subject to manipulation to serve current agendas and in any event is beyond the capacity of lawyers and judges,¹⁴⁶ but political movements like the Tea Party make little pretense that their convictions about the true meaning of the Constitution derive from careful scrutiny of the historical record. As Robert Post and Reva Siegel have argued, the political use of originalist rhetoric is at war with the assertedly neutral methodology originalists espouse. As they argue, the use of originalist rhetoric by political groups illustrates that originalists' "conservative commitments . . . are not determined by objective and disinterested historical research into the circumstances of the Constitution's ratification."¹⁴⁷

In support of the claim that originalism should be understood primarily as a form of political rhetoric by which conservative movements seek to advance contemporary goals, Siegel points to the history of the gun rights movement.¹⁴⁸ Gun rights advocates construed the Second Amendment to protect an individual right to own guns long before any evidence about the amendment's original meaning had been gathered.¹⁴⁹ Gun rights groups launched a public campaign to convince the American people that the Second Amendment protected such a right, and only after that campaign was well under way did academics undertake historical research to support the positions of the gun rights movement.¹⁵⁰ The

144. See, e.g., Scalia, *supra* note 7, at 864 (asserting that originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

145. *Id.* at 856–57 ("Properly done, the task [of originalist interpretation] requires the consideration of an enormous mass of material. . . . It is, in short, a task sometimes better suited to the historian than the lawyer.").

146. See, e.g., Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 236 (2010) (defending originalism against the criticism that "the search for the original public meaning of the Constitution does not constrain judges; it merely provides a new set of materials from which they may pick and choose, as they used to scavenge through legislative history, in order to reach a personally preferred conclusion."); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103 (2000).

147. Post & Siegel, *supra* note 135, at 554, 557.

148. Siegel, *supra* note 131, at 201–36.

149. *Id.* at 191 ("We should find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms." (quoting Robert A. Sprecher, *The Lost Amendment* (pt. 2), 51 A.B.A. J. 665, 669 (1965))).

150. *Id.* at 212–14, 223 (explaining how "the New Right coalition imbued libertarian claims on the Second Amendment with originalist authority, endowing the argument with evidence, rhetorical form, and public authority").

salient point is that the political position came first, and the legal and historical support followed. After a long political campaign waged by a dedicated interest group that succeeded in gaining significant electoral and popular support, and backed by some legal academics and legal historians (albeit not a consensus),¹⁵¹ it had become plausible for the Supreme Court to announce that the Second Amendment protected an individual right to own guns.¹⁵² Indeed, the Court said, it always had.¹⁵³

The same pattern has already begun with the Tea Party movement. Some of the Tea Party's academic supporters have noted that the Tea Party's claims about the Founders and the Constitution lack support, but they do not see this as a significant flaw.¹⁵⁴ Professor Randy Barnett, for instance, recently explained that we should not expect the Tea Party movement to generate or elaborate constitutional theories or produce well-developed constitutional arguments. Barnett said that the Tea Party movement should be understood instead as a sort of "emerging market" for certain kinds of libertarian and conservative theories, to which elites can peddle their ideas and services:

Under these circumstances, political and intellectual entrepreneurs are needed to devise, develop and disseminate ideas that meet the demands of the Tea Party market. Many will try to speak to the demands of Tea Partiers. Some will get them; others will not. Many ideas will be floated. Some will stick; most will be discarded.

....

When it comes to the Constitution, I no more expect Tea Partiers to produce detailed critiques of current constitutional practice, or develop a reform agenda, than I expect those in this room to design the iPods and iPhones you love, or the cars you drive or the clothes you wear. But just as you are the ultimate judges of whether you like or are indifferent to any particular device, so too will Tea Partiers be the judges of which reform ideas appeal to them and which leave them cold and unsatisfied.¹⁵⁵

This is a rather remarkable statement from a leading originalist about the relationship between constitutional law and politics.¹⁵⁶ Like popular

151. See Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

152. See *Heller*, 554 U.S. 570.

153. *Id.* at 576–605.

154. Somin, *supra* note 5, at 301 (“[P]ublic opinion on constitutional and policy issues is often influenced by widespread political ignorance and irrationality. There also tends to be a conflation of constitutional and policy preferences. The Tea Party is no exception to these trends.”).

155. Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281, 282–83 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/10/LRColl2011n10Barnett.pdf>.

156. To be fair, Barnett was speaking primarily about the market for constitutional reform proposals, rather than about the market for constitutional theories as such. Yet he seems to have the latter in mind as well, considering that he declared that he

constitutionalists, Barnett embraces the idea that the people today, not elites, must be “the judges” of what constitutional ideas appeal to them. Intellectual elites play a supporting role by selling ideas to the Tea Party market and providing the technical details to articulate and support an existing vision.

Barnett’s understanding of the relationship between political movements and elites in advocating for constitutional change comports with Jack Balkin’s explanation of how constitutional movements operate. As Balkin explained, popular movements invoke the Constitution to make broad claims based on certain ideological commitments, but those claims are not necessarily grounded in historical research:

When people talk about constitutional principles, . . . they tend to talk loosely about “what the framers intended” [or] “what our founding fathers fought for.” They offer fairly general claims about liberty, equality and democratic government. Members of social and political movements are not professional historians, and they tend to use—or reimagine—history to suit their own often parochial ends.¹⁵⁷

Balkin wrote that it falls to lawyers and judges to offer supporting evidence and to translate the demands of political movements into the language of the law.¹⁵⁸

While Balkin and Barnett may well be correct in describing how political movements operate as a market for legal and intellectual ideas, this recognition conflicts with the professed methodology and ideology of originalism. If originalists were true to their professed methodology, the first task in constitutional interpretation would be to identify the original meaning, without regard to contemporary political debates. Yet Barnett and Balkin acknowledge that politically based conclusions come first, with advocates like the Tea Party movement deciding what the Constitution *must have originally meant*, and only later employing advocates like Barnett who can provide plausible support for that meaning. This acknowledgment presents no problem for Balkin, who recognizes that the people have a significant role in deciding how the original constitutional principles should be interpreted to apply to contemporary life.¹⁵⁹ But it should be a problem for an original public meaning originalist like Barnett, who may be committing originalist apostasy by confirming the political nature of originalist methodology.

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did not expect Tea Party supporters to “produce detailed critiques of current constitutional practice,” and that “intellectual entrepreneurs” will seek to sell their ideas to the Tea Party market, which will be “the judges” of which ideas to adopt. *Id.* at 282.

157. Balkin, *supra* note 39, at 509.

158. *Id.* (“Lawyers will have to translate and reconstruct social movement arguments in ways that judges and other legal decisionmakers can recognize as legal arguments. Put another way, lawyers and judges translate claims of constitutional politics into claims about constitutional law.”).

159. See Balkin, *Abortion*, *supra* note 133 at 292–311; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 4 (2010); Balkin, *Framework Originalism*, *supra* note 133, at, 549–59; Balkin, *supra* note 39, at 432–36.

The recognition that originalist scholarship may serve existing political arguments confirms the claims made by Post and Siegel that originalism should be understood as simply the rhetoric that conservative political movements have chosen to effectuate their brand of popular constitutionalism.¹⁶⁰ If the Tea Party succeeds as a political movement, it will likely follow a similar trajectory as the gun rights movement. First, it must persuade a significant segment of the American people that their vision of the Founders' Constitution represents the true Constitution. Next, it must gain further political power. Finally, academics will provide historical and theoretical support for the movement's positions. It will then be obvious to most everyone, including Justices of the Supreme Court, that the Constitution means, and indeed has always meant, just what the Tea Party says it means.

B. Popular Constitutionalism as an Anti-Democratic Strategy

Popular constitutionalists like scholars Larry Kramer and Mark Tushnet have claimed that democratic values are advanced by recognizing the people's power to control the meaning of the Constitution, rather than ceding that power to elites.¹⁶¹ Popular constitutionalist literature frequently emphasizes that the people can and should be trusted to resolve fundamental questions of governance.¹⁶² As Kramer has argued, a distrust of ordinary people forms a significant part of the justification for empowering courts rather than the electorate to determine the meaning of the Constitution:

The modern Anti-Populist sensibility presumes that ordinary people are emotional, ignorant, fuzzy-headed and simple-minded, in contrast to a thoughtful, informed, and clear-headed elite. Ordinary people tend to be foolish and irresponsible when it comes to politics: self-interested rather than public-spirited, arbitrary rather than principled, impulsive and close-minded rather than deliberate or logical. Ordinary people are like children, really. And being like children, ordinary people are insecure and easily manipulated. The result is that ordinary politics, or perhaps we should say the politics

160. See, e.g., Post & Siegel, *supra* note 135; Siegel, *supra* note 131.

161. Mark Tushnet has argued that "populist constitutionalism"—which may differ somewhat from Larry Kramer's "popular constitutionalism"—would by definition 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 7, at 52; see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1042–43 (2004) ("The danger of judicial supremacy is not that the people will be deprived of the authority to decide a particular case, but rather that they will cease to maintain a vibrant and energetic engagement with the process of constitutional self-governance.").

162. See, e.g., KRAMER, *supra* note 5, at 247 ("The question Americans must ask themselves is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens.").

that ordinary people make, “is not just low in quality but dangerous as well.”¹⁶³

Popular constitutionalism is thus borne of the conviction that the people should be empowered to decide fundamental questions themselves. In this way, popular constitutionalists disagree with originalists because they consider constitutional lawmaking effectuated by the people through political mechanisms to have democratic legitimacy, unlike decisions by judicial elites.¹⁶⁴

The claim that popular constitutionalism empowers the people is turned upside down, however, when it is combined with the Tea Party’s originalist conception of the Constitution. The Tea Party movement seeks to use popular politics to *limit* popular democracy in a large number of ways. Indeed, the movement asserts that the nation is facing a crisis precisely because of democratic excesses. In many ways, the Tea Party movement shares the same anti-populist concerns that Kramer attributes to supporters of judicial supremacy, asserting that the people cannot be trusted with too much democracy because they will choose—and indeed have chosen—dangerous and misguided policies. We need to return to the Founders’ Constitution, the Tea Party shouts, because the people have run amok. To the Tea Party, the nation is facing a crisis precisely because of an excess of popular democracy, in which the people have been duped by liberal elites into accepting foreign ideas. At a minimum, the Tea Party movement calls into question the assertion that popular constitutionalism generally advances democratic values. Popular constitutionalism may promote democratic control over constitutional interpretation while severely restricting popular control over other areas.

In seeking to limit the people’s power, the Tea Party movement may be more extreme than other popular constitutional movements, but it is not novel. Indeed, a primary focus of many political movements that have succeeded in changing the understood meaning of the Constitution—including the civil rights movement, the feminist movement, and the gun rights movement—was the conviction that values like liberty and equality should trump democratic power. Like the Tea Party movement, these movements responded to what they saw as excesses of majority power. The Tea Party movement may be more extreme in its anti-democratic agenda than other movements, but in seeking to limit democracy to promote other identified values, the Tea Party is no different in kind.

1. The Puzzle of Originalist Popular Constitutionalism

The central descriptive insight developed by scholars of popular constitutionalism is that political movements have frequently succeeded in changing constitutional law without amending the Constitution, transforming constitutional interpretations that appeared implausible yesterday into the settled

163. *Id.* at 242 (quoting RICHARD PARKER, *HERE THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* 58 (1994)).

164. *See, e.g.,* Pozen, *supra* note 11, at 2048 (“To sustain the democratic legitimacy of our legal order, scholars associated with popular constitutionalism urge that the people reassert their authority over the construction and enforcement of constitutional norms.”).

doctrines of today.¹⁶⁵ To mention a couple of noted examples, in 1873, it was obvious to all members of the Supreme Court that the Constitution does not guarantee equal treatment of men and women, but one hundred years later the success of the modern feminist movement made it just as obvious that the Constitution requires equal treatment.¹⁶⁶ In 1930, a unanimous Supreme Court thought that it was obvious that the Second Amendment protects only a right to own guns in relation to service in a state militia, but in 2008 the success of the guns rights movement had made it equally obvious to a majority of Justices that the Constitution protects an individual right to own guns for self-defense.¹⁶⁷

The mechanisms by which political movements transform outlandish theories into settled doctrines are quite varied in form. Acting within the judicial system, political movements can adopt litigation strategies that place their issues before the courts in persuasive contexts.¹⁶⁸ They can put pressure on judges by demonstrations of public support for their positions.¹⁶⁹ They can act through the political system by electing Presidents and Senators who appoint Supreme Court Justices who agree with the movement's views.¹⁷⁰ More broadly, they can persuade the American people on the merits of their constitutional views, bringing about changes in perceptions that may be formally implemented through political and judicial pathways.¹⁷¹

165. See, e.g., STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 45 (1998) (arguing that “the meaning of most of the Constitution is determined through ordinary politics”); William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 969–70 (2006) (“From the New Deal right down to the present, party politics and social movements . . . have been lively sites of popular involvement in—and popular influence over—the nation’s constitutional development.”).

166. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006). Compare *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (finding no constitutional violation in excluding women from the practice of law), with *United States v. Virginia*, 518 U.S. 515, 557–58 (1996) (holding unconstitutional the exclusion of women from a state-operated military academy).

167. Compare *United States v. Miller*, 307 U.S. 174, 178 (1939) (“With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.”), with *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment encompasses a right to own guns unrelated to service in militia).

168. 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).

169. See, e.g., KRAMER, *supra* note 5, at 249.

170. See, e.g., David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism? Some Cautionary Remarks*, 81 CHI.-KENT L. REV. 1069 (2006); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001).

171. As Charles Wyzanski, lawyer for the Roosevelt Administration, said after winning the cases that upheld New Deal legislation, “I . . . tell my friends that it was not

As Ilya Somin has discussed, the Tea Party movement is easily recognizable as a nascent popular constitutionalist movement both in its goals and its methods.¹⁷² The Tea Party movement seeks to bring about changes in constitutional law—restoring what it understands to be the true meaning of the Constitution—principally without employing the cumbersome process for amending the Constitution under Article V.¹⁷³ The Tea Party movement employs many of the methods that successful popular constitutional movements have used to effectuate changes in constitutional meaning. For example, drawing hundreds of thousands of people to the streets, the Tea Party movement demanded that their vision of the Constitution be implemented.¹⁷⁴ They protested, marched, disrupted town hall meetings, and, perhaps more than any other group, shaped the 2010 elections.¹⁷⁵ The Tea Party movement has also developed a substantial educational program that seeks to teach the public about what it understands to be the true meaning of the Constitution. The program has included hundreds of public seminars on the Constitution, most of which are based on the views of W. Cleon Skousen, which teach that the Constitution embodies a set of principles derived from the Bible that protects the nation from Communism.¹⁷⁶

Having helped elect a Republican majority in the House of Representatives, the Tea Party is widely considered the dominant faction in

really Mr. Wyzanski who won the Wagner cases, but Mr. Zeitgeist.” Letter from Charles E. Wyzanski to Learned Hand, Learned Hand Papers, Harvard Law School Library (Apr. 14, 1937), *quoted in* Paul A. Freund, *Charles Evans Hughes As Chief Justice*, 81 HARV. L. REV. 4, 35 n.112 (1967).

172. Somin, *supra* note 5, at 302–04.

173. In addition to seeking to effectuate constitutional change through ordinary politics and educational campaigns, the Tea Party has advocated several changes to the Constitution through Article V. These include repeal or revision of the birthright citizenship clause of the Fourteenth Amendment, repeal of the Sixteenth and Seventeenth Amendments, and enactment of the Repeal Amendment, developed by Professor Randy Barnett, which would empower a supermajority of states to repeal federal law. *See* Somin, *supra* note 5, at 306–08 (summarizing Tea Party constitutional proposals); Barnett, *supra* note 166 (discussing proposed Repeal Amendment). Some critics have argued that it is inconsistent for the Tea Party to advocate both to restore the Founders’ Constitution and to change the Constitution. *See* Dahlia Lithwick & Jeff Shesol, *Repealing Common Sense: The Conservative Mission to Destroy the Constitution In Order to Save It*, SLATE (Dec. 3, 2010, 6:21 PM), <http://www.slate.com/id/2276463/>. Tea Party supporters have argued that these amendments will actually help restore the Founders’ original vision, which has been undermined by subsequent amendments, including the enactment of the Sixteenth and Seventeenth Amendments, which the Tea Party understands to undermine federalism by enlarging federal power at the expense of the states. *See* Barnett, *supra* note 155.

174. For a journalist’s history of the Tea Party movement, *see* ZERNIKE, *supra* note 12. For an insider’s account, *see* O’HARA, *supra* note 12.

175. Exit polls show that 41% of voters in the 2010 election identified themselves as Tea Party supporters, and 87% of them voted Republican. *See* Tom Curry, *What Exit Polls Say About Tea Party Movement*, MSNBC.COM (Nov. 3, 2010, 10:00 AM), http://www.msnbc.msn.com/id/39979427/ns/politics-decision_2010/.

176. *See* Garrett Epps, *Stealing the Constitution*, THE NATION (Feb. 7, 2011) (describing a Tea Party seminar), <http://www.thenation.com/article/157904/stealing-constitution>; Mencimer, *supra* note 57; Rosen, *supra* note 33; Thompson, *supra* note 57.

Republican politics and is developing a strategy to effectuate constitutional change from inside the government, which includes the formation of Tea Party caucuses in the House and Senate.¹⁷⁷ Members of the House Tea Party Caucus have organized seminars for House members on their understanding of the meaning of the Constitution, which included a lecture given by Justice Scalia.¹⁷⁸ Newly elected Senator Mike Lee of Utah, one of the founders of the Senate Tea Party Caucus and also a Skousen follower, has expressed a clear plan for how the movement can succeed in carrying out its vision.¹⁷⁹ Lee argues that Congress should first limit itself to enacting laws that fit the Tea Party's ideas of congressional power, should repeal laws that exceed that power, and should only confirm judges and justices that agree with the movement's views of the Constitution.¹⁸⁰

Notwithstanding the clear goals and strategy that the Tea Party movement has developed to effectuate its constitutional vision, it is somewhat problematic to describe the Tea Party movement as a popular constitutionalist movement because the movement ideologically rejects key tenets of popular constitutionalism. Supporters of the Tea Party movement would almost certainly bristle at the suggestion that they are a movement like the feminist movement, or worse, the progressive movement, which succeeded in remaking the Constitution without following the procedures for formally amending the Constitution. Tea Party supporters claim that they are seeking to *restore* the original meaning of the Constitution, not to *change* its meaning. Tea Party supporters express strong disdain for the notion that the meaning of the Constitution changes, popularly referred to as living constitutionalism, which they see as one of the principal causes of the nation's abandonment of its true constitutional self.¹⁸¹ Although the courts have not been a primary focus of the Tea Party movement, the movement rejects the notion that political groups should influence constitutional interpretation and that the meaning of the Constitution changes with the times.¹⁸²

177. See Jeff Zeleny, *For Republicans, Too, a Broad Power Shift After the Elections*, N.Y. TIMES, Feb. 10, 2011, at A18; see also Janie Lorber, *Republicans Form Caucus for Tea Party in the House*, N.Y. TIMES, July 21, 2010, at A18.

178. See Ashley Southall, *Justice Scalia to Speak to Tea Party Caucus on Separation of Powers*, N.Y. TIMES BLOG (Jan. 23, 2011, 11:41 PM), <http://thecaucus.blogs.nytimes.com/2011/01/23/justice-scalia-to-speak-to-tea-party-caucus-on-separation-of-powers/>.

179. See Senator Michael S. Lee, Address at the 2010 Nat'l Lawyers Convention (Nov. 19, 2010) (video available at http://www.fed-soc.org/publications/pubid.2020/pub_detail.asp).

180. *Id.*

181. See, e.g., ARMEY & KIBBE, *supra* note 2, at 131; WILLIAM DAVIS EATON, LIBERAL BETRAYAL OF AMERICA AND THE TEA PARTY FIRESTORM 57–59 (2010); FARAH, *supra* note 2, at 101–08.

182. See, e.g., Publius Huldah, *Judicial Abuse of the Fourteenth Amendment: Abortion, Sexual Orientation & Gay Marriage*, PUBLIUS-HULDAH'S BLOG: UNDERSTANDING THE CONSTITUTION (Jan. 10, 2011), <http://publiushuldah.wordpress.com/2011/01/10/judicial-abuse-of-the-fourteenth-amendment-abortion-sexual-orientation-gay-marriage/> (“When federal judges redefine terms in the Constitution, they ‘amend’ the Constitution in violation of Art. V. Article V. sets forth the two lawful methods of amending the Constitution, neither of which is ‘redefinition by judges.’ . . . Are there remedies for this judicial lawlessness? YES! Congress should use its Impeachment Power to remove the usurping judges.”).

Can the Tea Party really be considered a popular constitutionalist movement when it ideologically rejects popular constitutionalism?

Notwithstanding whatever conceptual problems there might be in reconciling popular constitutionalism and originalism, the Tea Party plainly embodies both approaches in that it claims to speak both for the people today and for the Founders. Tea Party Nation asserts that it is fighting against “an ever-expanding government who has ignored the will of ‘We the People’ for far too long.”¹⁸³ At the same time that it advocates for “the people” against a tyrannical government, the movement asserts that it speaks on behalf of “the Founders.”¹⁸⁴ The 1776 Tea Party, another one of the national Tea Party groups, sees no distinction between these two time periods, declaring: “From our founding, the Tea Party is the voice of the true owners of the United States, WE THE PEOPLE.”¹⁸⁵ The movement thus finds no trouble reconciling the differing temporal sources for its asserted authority—today and yesterday—by claiming that the people today want what the Founders wanted.¹⁸⁶ Tea Party supporters thus claim to be working today to restore principles established long ago.

2. *The Tea Party Movement’s Anti-Democratic Agenda*

The Tea Party movement’s constitutional agenda seeks to limit democratic power in several senses. The movement’s agenda centers on what supporters perceive to be excesses of democracy. Tea Party supporters believe that the people, acting through their electoral representatives, have created a variety of regulatory programs—including minimum wage laws, Social Security, Medicare, environmental laws, and the recent Affordable Care Act—that exceed their power, restrict individual liberty, and interfere with free markets.¹⁸⁷ According to the Tea Party, the people must be protected from what they want, and that is precisely the function of the Constitution.¹⁸⁸ With its central focus on “limited government,” the Tea Party movement emphasizes that the people lack power to adopt such programs, regardless of their support by electoral majorities.

The Tea Party movement has not hidden its disdain for democracy. Indeed, Tea Party supporters routinely disparage the term *democracy*. Citing Skousen, Tea Party supporters claim that it was international socialists who first

183. TEA PARTY NATION, *supra* note 5.

184. *Id.* (“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!”).

185. *What is the Tea Party?*, TEAPARTY.ORG, <http://www.teaparty.org/about.php> (last visited July 19, 2011).

186. As the mission statement of Tea Party Nation explains, “We believe that it is possible to know the original intent of the government our founders set forth, and stand in support of that intent.” TEA PARTY PATRIOTS, *supra* note 4.

187. *See, e.g., Declaration of Tea Party Independence*, *supra* note 6 (“We reject the endless creation of myriad federal government agencies that drown free enterprise and local control in the swarms of education, energy, ecology, and commerce bureaucrats who style themselves ‘czars’ sent to harass us.”).

188. *See, e.g., FARAH*, *supra* note 2, at 113.

began to describe the United States as a *democracy* in an attempt to discredit the Founders and lay the groundwork for the acceptance of socialism.¹⁸⁹ To Tea Party supporters, describing the United States as a democracy is another lie perpetrated by progressives.¹⁹⁰ Tea Party supporters often repeat the slogan that America is a republic, not a democracy, to emphasize the ways that the Constitution limits democratic power and prevents democratic excesses.¹⁹¹

The Tea Party movement's rhetoric expresses profound distrust of the ability of ordinary citizens to decide important questions. Joseph Farah, for instance, has explained that President Obama was elected due to "mankind's innate desire to collectivize and rebel against God's order."¹⁹² The Tea Party's agenda of restoring the "Founders' Constitution" seeks principally to protect the nation against the damage the people would do—and have done—when left to decide important questions themselves. The Tea Party's nationalist rhetoric serves the same goal of foreclosing democratic deliberation.¹⁹³ By characterizing a great number of ideas and people as un-American, anti-American, or foreign, the Tea Party movement seeks to marginalize many proposals in political debate. As Tea Party supporters declare, there can be no compromise or dialogue with those who would destroy America.¹⁹⁴

The Tea Party's understanding of the Constitution is thus the antithesis of Justice Holmes's notion that the Constitution is "made for people of fundamentally

189. SKOUSEN, FIVE THOUSAND, *supra* note 33, at 114–18.

190. *Id.*

191. Newly elected Senator Rand Paul repeatedly emphasized this trope in his campaign. *See, e.g.,* RemnantMan, *Rand Paul – We Are a Republic – Not a Democracy*, WORLD NEWS (Nov. 20, 2009), http://wn.com/Rand_Paul_We_are_a_Republic_not_a_Democracy. The slogan traces back to the John Birch Society, which used it to challenge "collectivism," "statism," and communism. *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 809 n.7 (2002). In 1989, the Arizona Republican Party, led by former Governor Evan Mecham, adopted a declaration that "the U.S. Constitution created 'a republic based upon the absolute laws of the Bible, not a democracy.'" T.R. Reid, *Republicans Rue Mecham's Return: Arizona's Maneuvers Embarrassing National Party Leaders*, WASH. POST, Mar. 14, 1989, at A12; *see also* Patrick J. Buchanan, *A Republic, Not a Democracy*, ANTIWAR.COM (Mar. 2, 2005), <http://antiwar.com/pat/?articleid=5015> ("Let us restore that republic and, as Jefferson said, 'Hear no more of trust in men, but rather bind them down from mischief with the chains of the Constitution.'").

192. *See, e.g.,* FARAH, *supra* note 2, at 113.

193. To be sure, as Ilya Somin has pointed out, the Tea Party movement is far from the first political movement to accuse its opponents of being un-American for supporting opposing policies that the movement considers to embody fundamental American values. Somin, *supra* note 5, at 303–04. Unlike the groups cited by Somin, however, which occasionally employed nationalist rhetoric, nationalist rhetoric dividing "true Americans" from others based on their allegiance to the Founders' Constitution is a central feature of the Tea Party movement. *See supra* Part I.B.

194. *See supra* note 128 and accompanying text; *see also* ZERNIKE, *supra* note 12, at 127 ("Those who tried to engage the Tea Partiers in debate about the details of the [health care reform] legislation . . . seemed to be missing the point.").

differing views.”¹⁹⁵ Holmes understood the Constitution to establish a framework for working out differences between people with strongly conflicting philosophies of government, including disputes between those who favor and oppose economic regulations. The Tea Party movement, in contrast, believes that the Constitution itself resolves those differences, establishing once and for all time the fundamental values that bind us, leaving little room for interpretation or debate.¹⁹⁶ Under the Tea Party’s understanding, the Constitution does not merely provide a framework for resolving fundamental differences through ordinary politics; the Constitution itself resolves those differences.¹⁹⁷

3. *Popular Constitutional Movements Against Popular Democracy*

In considering the relationship between popular constitutionalism and democracy, it is important to distinguish between democratic control on two levels: constitutional interpretation and governmental power; or, in other words, between constitutional and ordinary politics.¹⁹⁸ With this distinction in mind, there is no contradiction between the claim that popular constitutionalism promotes democracy and a movement like the Tea Party movement that advances an agenda that would significantly curtail democratic power. Popular constitutionalism addresses the question of *who* has ultimate authority to interpret the Constitution, not *what* interpretations are offered. Democratic power over constitutional law is advanced when the people assert power to determine the meaning of the Constitution, regardless of whether they construe the Constitution to expand or limit democratic power at the level of ordinary politics. Thus, even though the Tea Party movement may seek to severely limit the people’s power to enact economic regulations, the movement nonetheless can be said to promote democratic power to control the meaning of the Constitution.

Advocates of popular constitutionalism usually assume, however, that popular constitutionalism leads to the enlargement of popular democracy generally, not only on the level of constitutional politics. They often point to President Franklin Roosevelt’s Constitution Day speech of 1937 to typify popular constitutionalism.¹⁹⁹ Roosevelt declared that “the Constitution of the United States was a layman’s document, not a lawyer’s contract. *That* cannot be stressed too

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

196. *Id.* at 103; cf. SKOUSEN, *MAKING OF AMERICA*, *supra* note 35, at 217 (equating Herbert Spencer’s Social Statics with the principles of the Founding Fathers).

197. See, e.g., FARAH, *supra* note 2, at 121 (“Wouldn’t it be nice if the two major political parties in America fought over minor issues rather than fundamental structural issues?”).

198. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991) (characterizing constitutional politics as involving disputes over the establishment and meaning of the Constitution, in contrast to ordinary politics, which involve resolving disputes within the structures established by the Constitution).

199. See, e.g., KRAMER, *supra* note 5, at 217–18; William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 181 (2001); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 36 (2003) (declaring that the Constitution “is not primarily a ‘lawyer’s contract,’ nor is it even chiefly a constraint on majoritarian enactments”).

often.”²⁰⁰ Roosevelt argued against the decisions of the *Lochner*-era Supreme Court, which stood in the way of the New Deal and limited the power of both the federal and state government to enact economic regulations.²⁰¹ As Roosevelt saw it, the Court had given an overly expansive reading of the liberty protected by the Due Process Clause, and an overly narrow reading of government powers, which severely restricted the people’s power to enact regulations.²⁰² Roosevelt declared that “we have those who really fear the majority rule of democracy, who want old forms of economic and social control to remain in a few hands.”²⁰³ For Roosevelt, the people’s control over the meaning of the Constitution was the solution to the crisis created when the Court prevented the people from governing themselves how they pleased.²⁰⁴

Contemporary proponents of popular constitutionalism have generally understood popular control over the meaning of the Constitution as the solution to the same sort of problem Roosevelt faced: restrictions on governmental power imposed by an overly aggressive judiciary. For instance, Mark Tushnet, author of *Taking the Constitution Away from the Courts*, has argued that overthrowing judicial supremacy would empower the people to carry out the project of ensuring universal human rights that began in the Declaration of Independence.²⁰⁵ In Tushnet’s conception, popular constitutionalism “leaves a wide range open for resolution through principled political discussions.”²⁰⁶ In this vein, Tushnet has argued that proposals to curtail human rights—such as revoking birthright citizenship—should not be considered exercises in popular constitutionalism because they would restrict the sphere of democratic power at the level of everyday politics.²⁰⁷ In Tushnet’s view, popular constitutionalism allows the people to stand up to institutions that hold back their ability to enact the policies that they want; it does not encompass movements that would take away the people’s authority to govern as they see fit.

200. Franklin D. Roosevelt, President of the United States, Address on Constitution Day, Washington D.C. (Sept. 17, 1937), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359 (Samuel I. Rosenman ed., 1941).

201. KRAMER, *supra* note 5, at 217–18.

202. *Id.* (“Yet nearly every attempt to meet [the people’s] demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to read into the Constitution language which the framers refused to write into the Constitution. . . . But the Constitution guarantees liberty, not license masquerading as liberty.”).

203. Roosevelt, *supra* note 200, at 361.

204. Kramer thus strongly approves of the resolution of the New Deal crisis, in which the Court adopted highly deferential review of congressional assertions of legislative power. KRAMER, *supra* note 5, at 219. Kramer’s concern about the power of the judiciary—and thus the need for popular constitutionalist action to wrest control from the Court on behalf of the people—lies in cases construing individual rights, where the Court has asserted a much more aggressive stance. *Id.*

205. TUSHNET, *supra* note 7, at 190.

206. *Id.* at 185.

207. *Id.* at 188–91 (arguing that a rejection of birthright citizenship “is anti-constitutional because it rejects the narrative of populist constitutional law”).

The Tea Party movement, however, arose to address a very different class of problems than those focused on by popular constitutionalists. The Tea Party movement does not complain about overly restrictive interpretations of the Constitution holding back the people's power to rule their affairs. On the contrary, they challenge excesses of governmental power imposed by an aggressive legislature, which they believe has been tolerated by an overly passive judiciary. Proponents of popular constitutionalism have not given much thought to the implications of popular movements that would take away the people's power to govern themselves.²⁰⁸

However, the Tea Party movement's anti-democratic agenda is not unique. In fact, many successful popular constitutional movements expressed the conviction that the Constitution imposes stricter limits on democracy than were contemporaneously observed. In demanding that the Fourteenth Amendment prohibits racial segregation, the Civil Rights movement sought to foreclose a set of Jim Crow policies that millions of Americans had obtained through democratic processes. In arguing that sex discrimination is prohibited by the Equal Protection Clause, the feminist movement likewise sought to foreclose a large set of policy choices effectuating traditional gender roles that had been obtained through democratic processes. By the same token, the gun rights movement seeks to prevent and overturn gun restrictions obtained through democratic processes.²⁰⁹ In each of these examples, political movements demanded that the people sacrifice political power in order to protect what the movement considered to be a higher value, such as liberty or equality.²¹⁰ The Tea Party movement fits neatly within these traditions of popular constitutionalism because it too demands that constitutional limits be enforced on the people's power to enact a set of policies—most prominently economic regulations—in order to protect what the movement understands to be more fundamental commitments, such as individual liberty.

The recognition that popular constitutionalist movements have often sought to restrain democracies just as they have sought to remove restraints may

208. Ilya Somin, however, has praised this feature of the Tea Party movement. Somin, *supra* note 5, at 309 (“Despite its many similarities to previous popular constitutionalist movements, the Tea Party is unusual in one important respect: it is the first such movement in many years to focus its efforts primarily on limiting the power of the federal government.”).

209. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (holding that the individual rights interpretation of the Second Amendment limits state power to control gun ownership).

210. Of course, this way of describing these movements is somewhat oversimplified. By seeking to restrict democratic power in one domain (e.g., by ending race and sex discrimination), each of these movements also sought to increase democratic power in another domain, including by obtaining democratic power on behalf of groups that had been excluded from government. The gun rights movement too has argued that sacrificing the people's power to enact gun control laws actually promotes democratic power because it prevents governmental tyranny. See Brief for the Nat'l Rifle Ass'n and the NRA Civil Rights Def. Fund as Amici Curiae in Support of Respondent at 17, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (arguing for strict scrutiny of gun control laws because of the “explicit connection between the right to keep and bear arms and the preservation of democratic self-government”).

provide at least a partial answer to critics of popular constitutionalism—who have argued that empowering the public to determine the meaning of the Constitution would be tantamount to abandoning constitutionalism itself and embracing something more like mob rule, in which decisions about the role and scope of government would be unconstrained by any sort of fundamental law.²¹¹ The examples of the Civil Rights movement, the feminist movement, the guns rights movement, and now the Tea Party movement show that this understanding of popular constitutionalism is not entirely correct, because in each case the movement has sought to enforce limits on democracy by invoking what the movement perceived to be fundamental law. These examples should show that neither the critics' fears nor the proponents' hopes are well founded: popular control over the meaning of the Constitution does not necessarily lead to mob rule or to increased democratic power.

CONCLUSION

In a recent presentation, Randy Barnett quipped that, whatever else comes of the Tea Party movement, "one thing is certain: in the future law professors are going to be talking a whole lot more critically about 'popular constitutionalism' than they did in the recent past."²¹² Although Barnett did not elaborate on the point, what he appears to mean is 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. Barnett may well be right. By combining originalism and popular constitutionalism, the Tea Party movement illustrates the ways that popular control over the Constitution can be put to anti-democratic ends, undermining one of the principal claims asserted by proponents of popular constitutionalism. The Tea Party movement's avowed originalism, which strives to restore a mythological "Founders' Constitution," likewise illustrates how originalist rhetoric can serve crassly political ends. Originalism can thus provide a powerful political rhetoric of restoration that can be employed in a public campaign to broadly limit democratic power. Although the Tea Party movement does not by itself undermine the case for either popular constitutionalism or originalism, the movement reveals that the two theories can be joined together to make a monstrous hybrid that undermines the basic claims of each theory.

211. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1640 (2005) (reviewing KRAMER, *supra* note 5) (citing Kramer's position that "constitutional interpretation by mob . . . is the logical stopping point of" popular constitutionalism); Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 883 (2006) (reviewing KRAMER, *supra* note 5) ("*The People Themselves* has sparked considerable controversy, and one of the persistent themes in criticism of Kramer's work is that popular constitutionalism invariably leads to mob rule."); Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, at A32 (reviewing KRAMER, *supra* note 5) ("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?").

212. Barnett, *supra* note 155, at 287.