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Vultures in Eagles' Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought

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VULTURES IN EAGLES' CLOTHING:
CONSPIRACY AND RACIAL FANTASY
IN POPULIST LEGAL THOUGHT

Angela P. Harris*

INTRODUCTION.....	270
I. LEGAL POPULISM DESCRIBED.....	273
A. <i>Taxes and Money</i>	277
1. Federal Reserve Notes Are Not Legal Tender.....	279
2. Wages Are Not Income.....	279
3. The Sixteenth Amendment Was Never Properly Ratified.....	280
4. The Tax System Is Unlawful Because It Violates Individual Constitutional Rights.....	281
5. Paying Income Taxes is Voluntary.....	281
B. <i>Of Guns and Militias</i>	285
C. <i>Brave New Legal World: The Common Law Movement</i>	287
D. <i>The Sovereign Citizenry</i>	292
II. INTERPRETING LEGAL POPULISM.....	297
A. <i>Legal Populism as Conspiracy Theory</i>	298
B. <i>Conspiracy Theory as Political Practice</i>	303
III. A PEDAGOGY OF THE MARGINALIZED.....	312
A. <i>The Attack on Government</i>	316
B. <i>The Return of Formalism</i>	318
C. <i>Marginalization and Melancholia</i>	320
CONCLUSION.....	325

* Professor of Law, University of California–Berkeley, School of Law (Boalt Hall); B.A. 1981, University of Michigan; M.A. 1983, University of Chicago; J.D. 1986, University of Chicago. This Article began as a talk I gave on a whim, shortly after tax day, 1996, during my Rockefeller Fellowship at the Stanford Humanities Center. Thanks to the other Fellows and the SHC staff for seeing the depths in legal populism. Thanks also to the people who, over many years, helped me find the voices in which to tell this complex story. These include folks at Yale Law School; Georgetown University Law Center; the Association for the Study of Law, Culture, and the Humanities meeting at Cardozo School of Law; the University of California–Irvine Humanities Research Center; and Ohio State University, Moritz College of Law. This Article is dedicated to my grandfather, Junious Harris, a dedicated conspiracy theorist and race man, who always knew what time it was.

George Washington and George Washington's slaves lived different realities. And if we extend that insight to all the dimensions of [W]hite American history we will realize that [B]lacks lived at a different time and a different reality in this country. And the terrifying implication of all this is that there is another time, another reality, another America.¹

INTRODUCTION

On the day after tax day, 1996, I read with fascination an article in the *San Francisco Chronicle* titled "State Panel Probes Legislator's Reluctance to Pay Federal Taxes."² The article reported that state senator Don Rogers, a Bakersfield Republican, was under investigation for his declaration four years ago that he did not have to pay federal taxes. The reason: Rogers claimed he held a "[W]hite man's citizenship" and was not a United States citizen. The article quoted from the affidavit Rogers had filed with the Sonoma County recorder's office in 1992—the same year, the article noted, that he had filed for protection under the federal bankruptcy law after the Internal Revenue Service sought nearly \$150,000 in back taxes, interest, and penalties:

I, Donald A. Rogers, being of sound mind and lawful age, do solemnly declare: I was born in Louisiana State of parents who were [W]hite, who were Citizen-Principals and whose parents time out of mind were and always had been [W]hite. . . .

[The "main purpose" of Clause One of the Fourteenth Amendment is establishing "the citizenship of the Negro."] And because such a [W]hite man's citizenship was not restricted by the 14th Amendment and because he receives no protection from it, he has no reciprocal obligation to a 14th Amendment allegiance or sovereignty and owes no obedience to anyone under the 14th Amendment.³

Surfing the World Wide Web after reading this article, I found five different websites in one afternoon concerning the illegality of the tax system,

1. LERONE BENNETT, *THE CHALLENGE OF BLACKNESS* 39 (1972).

2. Robert G. Gunnison, *State Panel Probes Legislator's Reluctance to Pay Federal Taxes*, S.F. CHRON., Apr. 16, 1996, at A17.

3. *Id.*

In response to reporters' discovery of this document, Senator Rogers "denied that he is a racist or that he believes he is not a full-fledged United States citizen. He said he has settled with the IRS and paid all his federal taxes." *Id.* "I got some bad advice, and since then I changed my mind," the CHRONICLE reported Rogers said. "It was back at a time when I was going through a problem with the IRS, and I looked at this and thought it was maybe something that had some merit. But since then, I have decided it does not." *Id.*

each linking to four or five other sites, and most containing links to an e-mail listserv for discussions. Nearly a decade later, although websites have moved in and out of existence and in and out of public accessibility, a similar search turned up similar results. Although many of these sites offer materials for sale, many more do not. Interspersed with the ads for books and videotapes promising immediate relief from taxes are many, many articles and essays written by non-lawyers on constitutional matters and posted for discussion. Multiple copies of the Declaration of Independence and the Constitution are linked to these web pages. Even the material on these sites that seems primarily aimed at taking advantage of people's greed and gullibility taps into a conversation that transcends narrow economic interests. The conversation concerns the nature of American government and its relationship to the people whom it purports to represent.

The people who create these sites are known by many names: Patriots, citizens' militias, tax and antigovernment protesters, White separatists, survivalists. They—especially immediately after the 1995 bombing of the federal building in Oklahoma City—are often portrayed as more numerous, better organized, and more powerful and menacing than they really are.⁴ They are also commonly described in the popular press in terms of their distance from America: their political alienation, their ideological extremism, their social disaffection.

A subset of this broad, diverse, and fluid group, however, is notable not only for its distance from America but also for its deep engagement with it. These people, whom I will call "legal populists," understand themselves not as opposed to the nation but as its disinherited scions. The troubles they look forward to include the collapse of the United States government. Yet

4. Popular accounts seem both to exaggerate the threat these groups pose and to caricature their members. Richard Mitchell, for example, emphasizes low turnouts and poor organization among the survivalists he visited and got to know in the course of researching his book, *DANCING AT ARMAGEDDON*, and he harshly criticizes journalists and fellow academics for "sav[ing] the aryan cause and its like from its own triviality" by creating a mediagenic but false story of well-oiled machineries of violent racist terror. See RICHARD MITCHELL, *DANCING AT ARMAGEDDON: SURVIVALISM AND CHAOS IN MODERN TIMES* 173–74 (2002) (describing the media and academic fascination with "aryanism" and concluding: "There is nothing grand about practiced aryanism including nothing grandly sinister."). Betty Dobratz and Stephanie Shanks-Meile, who studied White separatists, note the many factions these groups are split into and wonder whether they ought even to be considered a single "movement." BETTY A. DOBRATZ & STEPHANIE SHANKS-MEILE, *THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES: "WHITE POWER, WHITE PRIDE!"* 13 (1997). They also quote George Eric Hawthorne of the Resistance Record Company (a White power label) as musing, "I always find it—I'm trying to look for the right word—perhaps perplexing that a movement that is really so relatively small—so relatively insignificant in comparison to the power structure—can get so much media attention." *Id.* at 86. Kathleen Blee observes that news media typically depict racist activists as "semiarticulate, lower-class men (and sometimes women) who spew venomous sentiments about African Americans, Jews and immigrants" but notes that actual recruitment patterns do not fit these stereotypes. KATHLEEN M. BLEE, *INSIDE ORGANIZED RACISM: WOMEN IN THE HATE MOVEMENT* 25 (2002).

they take the United States' basic legal documents—the Declaration of Independence and the original Constitution—as sacred texts on par with the Christian Bible, which many also revere. The people in whom I am interested are in fact conducting a romance with the law: its forms, its tools, its expressive and material power. Legal populists are not likely to identify with traditionally subordinated identity groups, but they do view themselves as disenfranchised. And, as traditionally subordinated groups have often done in the United States, they look to the law both as a site of oppression and as a potential source of redemption.

This Article has three interrelated aims. First, I will briefly describe the online world of the legal populists. Other legal scholars have provided detailed and insightful, even brilliant, glimpses of the legal worlds these groups inhabit.⁵ However, like the popular press, they have tended to emphasize the distance of those worlds from “ours.” The adjectives applied to legal populists and their activities by these scholars do this work vividly: “terrifying,” “madness,” “frivolous,” “inane.”⁶ For me, however, the most interesting thing about the legal populists is not their distance from the legal and political mainstream but the intricate ways they—like the subordinated identity groups with whom I identify, who are both their antitheses and their cousins in struggle—at once reject and embrace it.

My second aim in this Article is to give an account of legal populism that connects it with the American tradition of conspiracy theory and with the political consciousness of survivalism. To the extent that the interpretive practices of legal populists approach the vertiginous interpretive practices of conspiracy theory, legal populism, as Mark Fenster writes of conspiracy theory, “represents the desire for, and the possibility of, a knowable political order; yet, in its disturbing revelations and uncertain resolution it also implicitly recognizes the difficulty of achieving transparent, equitable power relations in a capitalist democracy.”⁷ Moreover, law, I will suggest, is attractive to legal populists because learning to research and interpret Supreme Court opinions and file liens, like building your own bomb shelter or learning to live “off the grid,” offers the possibility of a mastery over the conditions of one’s life that is rarely possible in contemporary mass society.

My third and final aim in this Article is to examine, as David Williams has done in a wonderful series of articles,⁸ the relationship be-

5. See, e.g., Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. L. & LITERATURE 65 (1996); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) [hereinafter Williams, *Civic Republicanism*].

6. See, e.g., Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291 (1996–97); Koniak, *supra* note 5; Williams, *Civic Republicanism*, *supra* note 5.

7. MARK FENSTER, *CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE* 138 (1999).

8. See Williams, *Civic Republicanism*, *supra* note 5; David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74

tween the nation dreamed of by many legal populists and the one inhabited by state-sanctioned legal insiders. As Williams has convincingly shown, many legal populists seek the restoration of a White republican America that is utterly incompatible with the multinational, multicultural America of the twenty-first century.⁹ Legal populism's nostalgia resonates with the hopes of many elites, whose "conservative" political agenda similarly targets both the federal government and unassimilable minorities as enemies of the nation. Yet unlike these elites, the legal populists feel themselves to be disenfranchised and disempowered, and their narratives reject rather than embrace current distributions of political power. Legal populists occupy a peculiar position in the nation that I think of as "marginalized but not subordinated."¹⁰ They desire the destruction of most existing legal, political, and social regimes of power, but they do so in the name of a utopian vision that is utterly true to aspects of American history that most Americans would rather simply forget. A look at the legal populists' world, then, shows not only its distance from but also its nearness to "our" own.

I. LEGAL POPULISM DESCRIBED

Akhil Amar, a legal scholar and student of the United States Constitution, notes that "[t]he idea of popular education resurfaces over and over in the Bill of Rights."¹¹ We are familiar, he says, with the checks and balances that form the structure of the original Constitution. National power was to be checked and balanced by state power; judicial, executive, and legislative power were to be separated and put in competition with one another. But we tend to neglect the framers' assumption that the government itself was to be checked by the People.¹² Amar argues that each intermediate association the Bill of Rights safeguards—the church, the militia, and the jury:

TUL. L. REV. 387 (1999) [hereinafter Williams, *Constitutional Tales of Violence*]; David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996) [hereinafter Williams, *The Militia Movement*].

9. Williams, *Civic Republicanism*, *supra* note 5; Williams, *Constitutional Tales of Violence*, *supra* note 8; Williams, *The Militia Movement*, *supra* note 8.

10. I thank Marc Spindelman for this formulation.

11. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991) [hereinafter Amar, *Bill of Rights*].

12. For example, Amar notes that James Madison and Thomas Jefferson believed that professional judges had to be counterbalanced by citizen juries. *Id.* at 1207. In addition, "both Madison and Jefferson emphasized public education [about constitutional rights] as the remedy for, and deterrent to, unconstitutional conduct." *Id.* at 1208. Patrick Henry and John Marshall, in the Virginia ratifying convention, stressed the importance of "maxims" that ordinary people in a democracy would know and use to regulate their conduct. *Id.* at 1208–09. Amar quotes from the anti-federalist papers:

If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people and has their assent. . . . [E]ducation [consists of] a

was understood as a device for educating ordinary citizens about their rights and duties. The erosion of these institutions over the last 200 years has created a vacuum at the center of our Constitution. Thus, one of the main tasks for today's constitutional theorists should be to explore ways this vacuum might be filled.¹³

Amar's vacuum is being filled, but not by professional constitutional theorists communicating with readers from the general public. Rather, it is being filled by "legal populism": everyday people reading and interpreting the Constitution and federal cases and examining the basic elements of constitutional structure for themselves. For the purpose of this Article, legal populism encompasses the following features: (1) a patriotic interest in and affiliation with the primary legal texts of the United States, including the English common law, the Declaration of Independence, and/or the original Constitution and Bill of Rights; (2) a deep suspicion, bordering on hatred, of the current United States government, which is often allied with a fear of an internationalist New World Order; (3) an engagement, bordering on romance, with the techniques of law: legal argument, legal research, and legal interpretation; and (4) participation in a dialogue with others about these shared interests and commitments.¹⁴ Although much legal populist discourse takes place offline in workshops and seminars and through books available for purchase, I have focused on free documents available online.

In real space, legal populism emerges from several distinct regions of the United States. Whereas many of the for-profit seminars on tax avoidance are centered in the Midwest, for instance, the far West is the geographic ground zero of constitutional study by lay persons. (Indeed, an

series of notions impressed upon the minds of the people by examples, precepts and declarations.

Id. at 1208 n.341 (citing 2 THE COMPLETE ANTI-FEDERALIST 382-84 (Herbert Storing & Murria Dry eds., 1981)).

13. *Id.* at 1210; see also AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS (1998).

14. I would therefore not include within "legal populism" those whose appeals to the legal system seem prompted more by mental illness than political protest. Some conspiracy theorists seem to be engaged in a solitary effort to battle internal, personal demons rather than collective culture. For example, in *Tyler v. Carter*, 151 F.R.D. 537 (S.D.N.Y. 1993), *aff'd*, 41 F.3d 1500 (2d Cir. 1994), a federal district court dismissed the claim of one Teri Smith Tyler, who had sued former President Jimmy Carter, then-President William Clinton, Ross Perot, American Cyanamid, Iron Mountain Security Corporation, the Defense Intelligence Agency, IBM, "David Rockefeller [sic], Rockefeller [sic] Fund," BCCI, and NASA. *Id.* at 537. Ms. Tyler, representing herself, filed a federal complaint in December, 1992, alleging what the court called "a bizarre conspiracy involving the defendants to enslave and oppress certain segments of our society." *Id.* Tyler's understanding of this conspiracy, however, was internally generated: "Plaintiff contends she is a cyborg, and that she received most of the information which forms the basis for her complaint, through 'proteus,' which [the Court] read to be some silent, telepathic form of communication." *Id.*

article published in 1995 in the journal *Government Executive* declared constitutional interpretation “the newest hobby in the rural West.”¹⁵ In cyberspace, however, legal populism forms a single, many-layered “subaltern counterpublic”—a public world within a world, distinct both from the formal world of state politics and from the civic life of the general public.¹⁶ Legal populism is closely connected with what its participants sometimes call the “Patriot” movement. One writer describes the Patriot movement this way:

The Patriot movement is an American political ideology based on an ultranationalistic and selective populism which seeks to return the nation to its “constitutional” roots—that is, a system based on White Christian male rule. Its core myth is that such a reactionary revolution will bring about a great national rebirth, ending years of encroaching moral and political decadence wrought by a gigantic world conspiracy of probably Satanic origins.¹⁷

Central to the Patriot movement is a deep engagement and familiarity with legal texts.¹⁸ Indeed, Amar’s work suggests that the legal populists would have been smiled on by the Founding Fathers. They are carrying on the tradition of a citizenry that is not passive but instead actively educated in its rights, a citizenry that takes the Constitution and constitutional questions very seriously, as a matter of day-to-day life and not just as something one learns in school.¹⁹ At a legal and philosophical

15. Robert E. Taylor, *Vitriol and Violence*, GOV’T EXECUTIVE (July 1995).

16. See NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POST-SOCIALIST” CONDITION 81 (1997); see also Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 58 (Seyla Benhabib ed., 1996). As Jane Mansbridge writes:

The goals of these counterpublics include understanding themselves better, forging bonds of solidarity, preserving the memories of past injustices, interpreting and reinterpreting the meanings of those injustices, working out alternative conceptions of self, of community, of justice, and of universality, trying to make sense of both the privileges they wield and the oppressions they face, understanding the strategic configurations for and against their desired ends, deciding what alliances to make both emotionally and strategically, deliberating on ends and means, and deciding how to act, individually and collectively.

Id. at 58.

17. DAVID A. NEIWERT, IN GOD’S COUNTRY: THE PATRIOT MOVEMENT AND THE PACIFIC NORTHWEST 4 (1999).

18. *Id.* at 3 (noting that the Patriot movement intends to politically transform the United States “through the creation of its own alternative legal, political and economic system, which it promotes largely through so-called ‘common-law’ schemes”).

19. Consider, as an example, the online “Dixieland Law Journal,” maintained by a Huntsville, Alabama attorney named Lowell H. “Larry” Becraft, Jr. *Introduction*, The

level, moreover, they carry on the debates that emerged around the drafting and ratification of the Constitution and the subsequent debates that emerged around the time of the first Reconstruction. Indeed, because these debates have never been settled even within the mainstream of jurisprudential thought, these groups are engaged in an ongoing conversation in American society about a matter that everyone in the conversation agrees to be important, even fundamental: how shall “We the People” constitute ourselves?

Ironically, however, the very seriousness with which these groups engage in the debate also makes them a threat to the existing social order, particularly the federal government—an institution which these groups treat as more or less illegitimate. In Patriot circles, the federal government is often referred to as “ZOG,” which stands for Zionist Occupied (or Occupation) Government;²⁰ and the federal government—including but not limited to the IRS—has a similar level of respect for them. The places where the legal populists come into contact with the mainstream legal system, then, rather than being places where edifying debates shape formerly passive nonvoters into thoughtful and caring civic republicans, are places fraught with tension, if not open conflict.²¹

Dixieland Law Journal, at <http://home.hiwaay.net/~becraft/INTRO.html> (last visited Mar. 29, 2005). Becraft describes himself as “nothing but a country hillbilly lawyer . . . who find[s] the company of ‘bubbas’ more enjoyable and preferable than that of socialites.” *Id.* He describes his journal’s mission thus:

During and after the Revolutionary War, European scholars noted that Americans were not only highly literate, but very knowledgeable about the “law” as well. Part of the reason for the legal literacy of those Americans is attributable to that magnificent work, Sir William Blackstone’s Commentaries on the Laws of England, which was a best seller in the colonies. But the circumstances of Americans have changed over the last 200 years and today too many lack a working knowledge of the “law,” and especially of “freedom law.” . . . The purpose of this site is to assist those who seek legal tools for the battle to restore liberty and freedom to this country.

Id.

20. See Colin Flint, *United States Hegemony and the Construction of Racial Hatreds, in SPACES OF HATE: GEOGRAPHIES OF DISCRIMINATION AND INTOLERANCE IN THE U.S.A.* 165, 172 (Colin Flint ed., 2003) (“[T]he far right claims the government is the illegitimate Zionist Occupied Government (ZOG), a conspiratorial Jewish and leftist authority that operates against [W]hite Americans.”). The term is featured in William Pierce’s 1978 novel, *THE TURNER DIARIES*, a book that has greatly influenced various groups involved in legal populism. See JAMES CORCORAN, *BITTER HARVEST: GORDON KAHL AND THE POSSE COMMITATUS: MURDER IN THE HEARTLAND* 37 (1990). For a further discussion of *THE TURNER DIARIES*, see *infra* text accompanying note 162.

21. Given this conflict, mainstream republican academics and practicing republicans tend to avoid each other. See, e.g., AMAR & HIRSCH, *supra* note 13 (disclaiming any alliance with present-day militia groups). One legal scholar, conversely, has accused Amar of being a “‘thinking man’s Freeman,’ a person who waives [sic] the Constitution, the Federalist Papers, and other founding era texts in our faces in an effort to promote unfounded and

Legal populism can be divided into at least four overlapping conversations about the law and its institutions. The first conversation is associated with money in general and taxes in particular and concerns the legitimacy of the federal income tax, economic institutions such as the Federal Reserve Bank, and various international organizations such as the International Monetary Fund. The second conversation is associated with the militia movement specifically and "gun culture" more generally and concerns the meaning of the Second Amendment, the structure and function of state and local militias, and the legitimacy of the federal government. The third conversation is associated with efforts (often illegal or extra-legal) to reconstitute or invent new legal sovereignties, often through defying or "jamming" existing legal institutions and actors. The fourth conversation is associated with the "Freemen" or "Sovereign Citizen" movement and concerns the effort to redeem national citizenship.

People may enter these unofficial legal conversations through one or more of these interests and for various reasons: greed and the desire to make money, gullibility, and/or straitened economic circumstances; a radical disillusionment with the political economy of the United States and the world more generally; a commitment to White race pride and separatism; the desire to deeply engage with the legal documents that formed the United States; libertarian political views; the conviction that governments and corporations have too much money and power; or a desire to live in a world where political economy is actively being made, not passively received. In this Article, my aim is not to provide a complete account of these world-views but only to highlight some of the complex ways legal populism simultaneously rejects and embraces official state law. The following sections provide a brief glimpse into the four worlds of legal populism just described.

A. Taxes and Money

The affidavit Senator Rogers filed emerges from the convergence of at least two long, rich traditions in American life: tax protest and hucksterism.²² The American addiction to get-rich schemes, including tax evasion schemes, needs no introduction. It is not surprising that people hoping to get rich themselves have used various legalistic arguments in books, tapes, and workshops to help people persuade the IRS that they do not actually have to pay taxes. Nor is it surprising that this industry is now accessible through the Internet. Type the word "taxes" into any Internet

sometimes bizarre ideas based on a background reading of the American historical narrative." Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 612 (2000).

22. See ROBERT J. HAWS, *A BRIEF HISTORY OF AMERICAN RESISTANCE TO TAXATION IN INCOME TAX COMPLIANCE* 115 (Phillip Sawicki ed., 1983).

search engine and you will quickly tap into a series of sites that promise, if you simply give them your credit card number, that you can buy books or pamphlets or audiotapes with titles like "IRS Under Indictment" and "Vultures in Eagle's [sic] Clothing." These materials explain how the Internal Revenue Service actually has no claim on you. Freedom from federal tax liability is only a few hundred dollars away.

Reliable estimates of the actual number of tax protesters and the amount the federal government loses annually to tax evasion and fraud are hard to find.²³ Anecdotal evidence of a thriving industry in tax scamming, however, is not so hard to find. As one example, the urban legend that the IRS permits African Americans to claim a "reparations credit" has circulated in various iterations for years, finding particularly fertile ground in Black churches in the South and West.²⁴ In January 2002 the IRS announced it had received nearly 80,000 returns for the previous tax year claiming more than \$2.7 billion in false reparations refunds, and it filed civil suits in United States federal district courts in Richmond, Virginia, and Jackson, Mississippi, against two tax preparers spreading this gospel.²⁵ In the fall of the previous year, Florida law enforcement officials put a Miami-Dade mother and daughter team that had been promoting a similar scam out of business.²⁶

Within the world of tax protest, a number of arguments, although repeatedly rejected by the courts, have become canonical in legal populist communities. A few of them follow:

23. Estimates like \$200 billion to \$300 billion per year in lost federal revenue are sometimes thrown around. See, e.g., *Taxpayer Beware: Schemes, Scams, and Cons: Hearing Before the Senate Comm. on Finance, 107th Cong., 2-4* (2001) (comments of Sen. Max Baucus (D-MT) and Sen. Frank Murkowski (R-AK)). A more conservative estimate puts the "tax gap"—the difference between the amount of tax owed to the government and the amount actually paid—at something over \$127 billion annually. Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams, and Thieves*, 29 ARIZ. ST. L.J. 639, 639 (1997).

24. See Laura Vozzela, *Man Faces Prison for Tipping Others to 'Black Tax Credit'*, COM. APPEAL (Memphis, Tenn.), June 20, 1999, at A10.

25. Jerry Seper, *Justice Sues Tax Preparers over Slavery Refund Quest*, WASH. TIMES, Mar. 7, 2002, at B2.

26. Susan R. Miller, *Tax Scam Shut Down; South Florida Mother-Daughter Team Told African American Clients They'd Get Tax Credits as Reparation for Slavery*, BROWARD DAILY BUS. REV., Oct. 3, 2001, at A9; see also IRS Fact Sheet, *Reparation Scams Carry a Price*, Release No. FS-2002-08 (Jan. 2002), available at <http://www.irs.gov/pub/irs-news/fs-02-08.pdf> (reporting five criminal cases resulting in convictions of "[B]lack tax" credit promoters).

These reparations scams are not necessarily directly related to tax fraud. A flyer advertising \$5000 "reparations checks"—sent to people of "Black ethnic race" born prior to 1928—encouraged elderly African Americans to supply their names, addresses, phone numbers, Social Security numbers, and dates of birth to an organization with a Washington, D.C. post office box. *Misleading Mailings Targeted to Seniors: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 107th Cong.* (2001) (statement of Darrin Williams, Chief of Staff and Counsel, Office of the Arkansas Atty. Gen.). Federal investigators tracking the organization down found no evidence of identity fraud but did discover a database compiled for the purpose of further mailings. *Id.*

1. Federal Reserve Notes Are Not Legal Tender

Because the United States monetary system is no longer secured to the gold standard, this argument posits that federal reserve notes do not constitute actual money in themselves but instead are mere “promises to pay.” One version of this claim is based on the Par Value Modification Act, Section 2,²⁷ which established a new par value of the dollar in terms of gold such that forty-two and two-ninths dollars would equal one fine troy ounce of gold. Citing to this statute, one federal defendant claimed that, for tax purposes, his income should be calculated in terms of the market price of gold.²⁸ Another, more sweeping argument is that federal reserve notes, because they are not backed by gold, are not lawful tender within the meaning of Article I, § 8 of the United States Constitution,²⁹ which gives Congress the power “to coin Money, regulate the value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.”³⁰ This argument is closely related to the argument that Article I, § 10, clause 1—“No State shall . . . coin Money; Emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts”³¹—“prohibits the States from utilizing any paper note or credit issued by any private banking institution, whether the same be Federal Reserve Notes, bookkeeping entries of liability or otherwise.”³²

2. Wages Are Not Income

The argument that wages are not income was widely circulated in the late 1970s and early 1980s, encouraged by popular books such as *Are You Required?* by Bob Golden and Pete Soehnlén and *Judicial Tyranny* by Jeff Dickstein.³³ The classic form of the argument draws on a Supreme Court decision that defined income as “the gain derived from capital, from labor, or from both combined.”³⁴ If income means profit, then wages are (arguably) not income because the exchange of labor for compensation is

27. 31 U.S.C. § 449.

28. *Birkenstock v. C.I.R.*, 646 F.2d 1185 (7th Cir. 1981).

29. See, e.g., *United States v. Jones*, 628 F.2d 402 (5th Cir. 1980); *United States v. Ware*, 608 U.S. 400 (10th Cir. 1979); *United States v. Schiff*, 612 F.2d 73 (2d Cir. 1979); *United States v. Wangrud*, 533 F.2d 495 (9th Cir. 1976).

30. U.S. CONST. art. I, § 8.

31. *Id.* at § 10, cl. 1.

32. Larry Becraft, *Memorandum of Law: The Money Issue*, *The Dixieland Law Journal*, at <http://home.hiwaay.net/~becraft/> (last updated Sept. 1, 1999).

33. See Larry Becraft, *Sovereignty: On Patriot Mythology*, at <http://www.cascadian.com/CRC/Court/OnPatriotMythology.html> (last visited Mar. 4, 2000).

34. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

an "even exchange" and thus creates no profit.³⁵ A variant of the argument is that wages are not income because they are derived from the taxpayer's person, which is a depreciable asset.³⁶

3. The Sixteenth Amendment Was Never Properly Ratified

A host of challenges are regularly asserted against the propriety of the Sixteenth Amendment, which was ratified in 1913 and gave Congress the authority to impose income taxes without regard to apportionment.³⁷ To prove that the Sixteenth Amendment was never in fact ratified, it must be shown that at least three states' ratifications were improper and void.³⁸ In their efforts to do this, protesters have called attention to the existence of numerous procedural and clerical errors in the ratification process in several states.³⁹ The ratification process in Oklahoma was particularly riddled with mistakes and lapses in procedural regularity, and so the argument that Oklahoma's ratification was improper is a favorite of protesters.⁴⁰

35. *United States v. Davenport*, 824 F.2d 1511, 1520 (7th Cir. 1987); *Lonsdale v. C.I.R.*, 661 F.2d 71, 72 (5th Cir. 1981).

36. *See Coleman v. C.I.R.*, 791 F.2d 68, 72 (7th Cir. 1986).

37. Prior to 1913, federal tax revenues were derived from miscellaneous taxes imposed on a case-by-case basis. A tax imposed to pay for the Civil War expired under its own terms in 1872. Jackson, *supra* note 6, at 291. A second income tax imposed in 1894 was held unconstitutional by the Supreme Court in a 5-4 decision because it violated the Apportionment Clause. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895). According to one commentator, "the 1894 income tax represented a victory for citizens in the economically depressed South and West, who had asserted with increasing intensity that the corporate barons of the East should be compelled to 'share the wealth' resulting from the booming industrial economy." Jackson, *supra* note 6, at 299 n.59 (citing DAVID BURNHAM, *A LAW UNTO ITSELF: POWER, POLITICS, AND THE I.R.S.* 14 (1989)).

38. Jackson, *supra* note 6, at 305.

39. *Id.* at 302.

40. *Id.* at 305. Tax protesters have also argued that Ohio was not a state admitted into the Union until 1953 and thus President William H. Taft of Ohio was not legally the president of the United States in 1913, making his appointment of Secretary of State Philander C. Knox, who verified that the Sixteenth Amendment was properly ratified, null and void. *Id.* Other arguments "contend that Secretary of State Knox committed fraud when he certified the amendment as ratified because he was aware of the differences between the congressional and state versions of the proposed Sixteenth Amendment" and "assert that the Secretary of State's certification of the Sixteenth Amendment was an unconstitutional delegation of legislative authority and a violation of the constitutional separation of powers." *Id.* at 306.

4. The Tax System Is Unlawful Because It Violates Individual Constitutional Rights

Many different provisions of the Constitution have unsuccessfully been invoked to support the conclusion that the tax system is unlawful because it violates individual constitutional rights. For example, filing tax returns is said to be proscribed by the Fifth Amendment as a form of self-incrimination,⁴¹ or to violate the constitutional right to privacy encompassed by the Ninth Amendment. Income taxes are said to constitute a taking of property without just compensation in violation of the Fifth Amendment,⁴² and the obligation to pay taxes is said to be a form of involuntary servitude unconstitutional under the Thirteenth Amendment.⁴³

5. Paying Income Taxes is Voluntary

Finally, it is often said in the tax protest literature that the income tax is "voluntary" and therefore optional,⁴⁴ as there is no statute that makes any American citizen liable to pay the income tax.⁴⁵ The IRS response is that "voluntariness" refers to the fact that you are responsible for

41. See *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987); *United States v. Malquist*, 791 F.2d 1399, 1401 (9th Cir. 1986); *Stubbs v. Comm'r*, 797 F.2d 936, 938 (11th Cir. 1986).

42. See *Schiff v. United States*, 919 F.2d 830, 832 (2nd Cir. 1990).

43. See *Lonsdale v. Egger*, 525 F. Supp. 610, 612 (N.D. Tex. 1981); *United States v. Roberts*, 425 F. Supp. 1281, 1282 (D. Del. 1977); *Beltran v. Cohen*, 303 F. Supp. 889, 891 (N.D. Cal. 1969).

44. See *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir. 1990); *Wilcox v. Comm'r*, 848 F.2d 1007, 1008 (9th Cir. 1988); *United States v. Witvoet*, 767 F.2d 338, 339 (7th Cir. 1985).

45. Thus, the online "Freedom Law School" promises a cash reward to anyone who can prove, among other things, that such a statute exists. *\$300,000 Income Tax Reward Offer*, Freedom Law School, at <http://www.livefreenow.org/freedomopportunity/> (last visited Apr. 1, 2005). The Freedom Law School's reward offer is as follows:

Freedom Law School will offer \$100,000 to the first person, who can demonstrate any of the below propositions. The winner can collect up to \$300,000 if he/she can demonstrate all of the 3 propositions listed below:

[1] Show what statute written by the Congress of the United States requires me to file an Income Tax Confession (Return) and pay an Income Tax. [2] How can I file an Income Tax Confession (Return) without waiving my 5th Amendment protected right to not give any information to the government that may be used to prosecute me? [3] Prove that the 16th Amendment of the United States Constitution, the Amendment of the U.S. Constitution, which, according to the IRS and modern American courts permitted the Income Tax to exist, was lawfully added to the U.S. Constitution.

assessing your own tax liability and is not the same as having the option not to pay taxes.⁴⁶

Each of these arguments appears repeatedly in the tax protest literature, sometimes dying down for a few years only to flourish again when a new purveyor of tax avoidance services discovers it. Each of these arguments has also appeared repeatedly, and been repudiated, in the courts. Courtrooms represent one front line where tax protesters and their vision of an alternative legal universe meet the official legal universe, and the results have not been happy. From a mainstream judicial perspective, tax protesters are threatening because of the trouble their behavior creates for the judicial bureaucracy; because their arguments are not just wrong but deeply, complexly wrong, requiring time and energy to refute; because they refuse the authority of the judicial system, re-trying arguments that have long since been rejected, filing papers that violate conventions of argumentation and citation, and seeking remedies that cannot be granted; because their arguments are grounded in political convictions that have long since been consigned to the dustbin of history or that are repugnant to most upper-middle class liberal professionals; because their interpretive logic follows the rules of conspiracy theorizing; and perhaps because their thoroughgoing skepticism reveals to a discomfiting degree the conventional roots of legal institutions and legal practices.

Emblematic of these protesters might be Eugene M. and Patsy Lonsdale, who throughout the 1980s tirelessly pressed their claims about the invalidity of the tax system in both the Fifth and the Tenth Circuit Courts of Appeals. In *Lonsdale v. United States*,⁴⁷ for example, the Lonsdales filed what they described as a “quiet title” action against the federal government, seeking to prevent Internal Revenue Service levies for unpaid income taxes on their wages and on a credit union account.⁴⁸ Upholding the district court’s decision that their request was barred by the Anti-Injunction Act, the Tenth Circuit recounted:

The bulk of the Lonsdales’ suit constitutes a refrain about the federal government’s power to tax wages or to tax individuals at all, which the Lonsdales have been pursuing for at least fourteen years.⁴⁹ After exercising considerable patience and tolerance, the

46. Internal Revenue Serv., Dep’t of the Treasury, *Why Do I Have to Pay Taxes?*, available at www.irs.gov/compliance/enforcement/article/0,,id=119100,00.html (last visited Apr. 1, 2005) [hereinafter *Why Do I Have to Pay Taxes?*].

47. 919 F.2d at 1440.

48. *Id.* at 1441–42.

49. See *Lonsdale v. Smelser*, 709 F.2d 910 (5th Cir. 1983); *Lonsdale v. C.I.R.*, 661 F.2d 71 (5th Cir.), *aff’g*, *Lonsdale v. Comm’r*, 41 T.C.M. (CCH) 1106 (1981); *Lonsdale v. Smelser*, 553 F. Supp. 259 (N.D. Tex. 1982); *Lonsdale v. Egger*, 525 F. Supp. 610 (N.D. Tex. 1981). The Tenth Circuit provided a sample of the Lonsdales’ legal argumentation:

Fifth Circuit finally imposed money sanctions totaling \$1,445.55 on the Lonsdales for their repeated attempt to relitigate issues already adjudicated by the courts.⁵⁰

As in the case of the Lonsdales, tax protesters attract the ire not only of the Internal Revenue Service, which rejects their substantive arguments, but of the court system itself, which finds tax protesters a drain on precious judicial resources of time and energy. Thus judges fight back with court-imposed sanctions for frivolous filings and appeals. The Seventh Circuit Court of Appeals, because it includes a region of the country—Illinois, Indiana, and Wisconsin—in which the tax protest movement has traditionally been exceptionally active, has fought a low-level campaign against tax protesters for years. For example, in *United States v. Buckner*, the trial court granted the prosecutor's request for an order forbidding the defense to bring:

to the attention of the jury by argument or evidence any matters relating to five enumerated issues: That the Sixteenth Amendment to the U.S. Constitution was improperly ratified and therefore never came into being; That wages are not income and therefore are not subject to federal income tax laws;

The Defendant United States through its Internal Revenue Service employees erroneously illegally unlawfully and unConstitutionally made an Amendment 4 seizure of the Plaintiff(s) PROPERTY PERSONAL AND REAL in the form of their LABOR PROPERTY/LABOR SERVICES PROPERTY and their WAGE COMPENSATION PAYCHECK MONEY INCOME SPECIALIZED TYPE OF PROPERTY they receive directly from their OCCUPATION OF COMMON RIGHT by their LABOR PROPERTY and/or LABOR SERVICES PROPERTY the United States tax laws at the Federal Code of Tax Regulations at 26 C.F.R. 301.6331-1 and TITLE 26 U.S.C. Sec. 6331 since they have no lawful color of Constitutional taxing and tax collecting authority and jurisdiction to apply any Article 1, Sec. 8 INDIRECT EXCISE TAXES upon the Plaintiffs OCCUPATION OF COMMON RIGHT, their LABOR PROPERTY, their LABOR SERVICES PROPERTY, and their WAGE COMPENSATION PAYCHECK MONEY INCOME SPECIALIZED TYPE OF PROPERTY WITHOUT APPORTIONMENT., or with any 16th Amendment INDIRECT EXCISE INCOME TAX upon the Plaintiff(s) OCCUPATION OF COMMON RIGHT, their LABOR PROPERTY, their LABOR SERVICES PROPERTY, or their WAGE COMPENSATION PAYCHECK MONEY INCOME SPECIALIZED TYPE OF PROPERTY WITHOUT APPORTIONMENT., or with any 1939 PUBLIC EMPLOYEE SALARY TAX ACT "WITHHOLDING" DIRECT TAX which pertains strictly to federal government officers, employees, and elected officials., and; which is absolutely unConstitutional as shown by SECTION # 4 of the ACT and TITLE 4 U.S.C. Sec. 111., without APPORTIONMENT.

Lonsdale v. United States, 919 F.2d at 1447 n.4.

50. *Id.* at 1447 (citing Lonsdale v. Smelser, 709 F.2d at 911).

That tax laws are unconstitutional; That filing a tax return violates the privilege against self incrimination under the Fifth Amendment to the U.S. Constitution; That Federal Reserve Notes do not constitute cash or income.⁵¹

The Seventh Circuit upheld the district court's action, describing these five defenses as "tired" and, when raised in civil litigation, as (in Judge Easterbrook's words) "sanction-bait."⁵²

The Internal Revenue Service, in its brochure entitled "Why Do I Have to Pay Taxes?"⁵³ includes some of these arguments as well, describing them as "myths." Larry Becraft, with some exasperation, identifies thirty Patriot arguments "destroyed" by the courts.⁵⁴ Why do these arguments nonetheless proliferate? One reason might be strategic. Under the Supreme Court's ruling in *United States v. Cheek*,⁵⁵ a person cannot be criminally prosecuted for tax fraud unless the government can prove beyond a reasonable doubt that he or she did not simply break the tax laws, but did so willfully. A person has acted willfully if she knows that she is legally obligated to pay taxes but she disagrees with the law or otherwise chooses not to comply. A person has *not* acted willfully if she sincerely believes that she has no tax liability.⁵⁶ Thus, there is a legal incentive for tax protester arguments to be not just wrong, but richly, densely, extravagantly wrong.⁵⁷ The more obscure the argument, the more plausible it might be that the taxpayer actually believed it.

51. *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

52. *Id.* (citation omitted).

The Eighth Circuit has also shown a certain lack of patience with respect to tax protesters. *See, e.g.*, *United States v. Moss*, 604 F.2d 569, 570 (8th Cir. 1979) (upholding the defendant's conviction on five counts of aiding and abetting the filing of false withholding information based on a radio interview the defendant gave on how to avoid federal withholding tax); *United States v. Buttorff*, 572 F.2d 619, 622-23 (8th Cir. 1978) (upholding the defendant's conviction on nine counts of aiding and abetting people to file false or fraudulent income tax returns in violation of 26 U.S.C. § 7205 and 18 U.S.C. § 2, despite evidence showing that aside from providing one person with a fraudulently completed W-4 form, defendant's activities consisted of speaking at seminars); *see Francis X. Sullivan, The "Usurping Octopus of Jurisdictional/Authority": The Legal Theories of the Sovereign Citizen Movement*, 1999 Wis. L. REV. 785, 816-17 (advocating aggressive prosecution of tax protesters based on these precedents).

53. *Why Do I Have to Pay Taxes?*, *supra* note 46.

54. Larry Becraft, *Destroyed Arguments*, *Dixieland Law Journal*, at <http://home.hiwaay.net/~becraft/deadissues.htm> (last updated June 30, 2003).

55. 498 U.S. 192 (1991).

56. *Id.* at 201-02.

57. As a preventive measure, however, the majority drew a distinction between being mistaken about the law and disagreeing with the law that neatly placed tax protesters on the wrong side:

Claims that some of the provisions of the tax code are unconstitutional . . . do not arise from innocent mistakes caused by the complexity of the Inter-

Another reason why the same destroyed arguments seem to rise eternally from the ashes might be the one identified by P.T. Barnum: there's a sucker born every minute. New converts to the tax protest movement likely are not aware of which arguments have already been rejected.⁵⁸ The mainstream legal system remembers, however, and as the same arguments are recycled over and over, the courts are increasingly skeptical of the good faith in which litigants claim to offer them. These claims are increasingly described as "frivolous," a word freighted with the potential of monetary sanctions, and in the Seventh Circuit, cause for sanction whether raised in a civil or a criminal case.⁵⁹

B. *Of Guns and Militias*

Of the various movements that generate legal populism, the militia movement is far smaller than the "common law" and "personal sovereignty" movements described in subsequent Sections.⁶⁰ The militia

nal Revenue Code. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable. Thus in this case, Check paid his taxes for years, but after attending various seminars and based on his own study, he concluded that the income tax laws could not constitutionally require him to pay a tax.

We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions.

Id. at 205–06.

58. Larry Becraft's "Dixieland Law Journal" has a section devoted to scam artists, whom he calls out by name, "so that others may learn what has happened and protect themselves." See Larry Becraft, *Scams*, Dixieland Law Journal, at <http://home.hiwaay.net/~becraft/scams.htm> (last updated Nov. 29, 2002).

59. See *United States v. Cooper*, 170 F.3d 691, 692 (7th Cir. 1999) (finding no reason why sanctions for "frivolous squared" arguments—such as Cooper's arguments that only residents of Washington, D.C., and other federal enclaves are subject to the federal tax laws because they alone are citizens of the United States, and that wages are not income because they are compensation for working rather than a pure economic rent—cannot be imposed under Rule 38 of the Federal Rules of Appellate Procedure in criminal as well as civil cases).

60. See Daniel Lessard Levin & Michael W. Mitchell, *A Law unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9, 10 (1999):

A recent report by the Anti-Defamation League found that new militia groups have "expanded in only five states, remained relatively stable in about 20 states, and declined elsewhere" since the Oklahoma City bombing; militia activists have instead been advising members to keep a low profile. In contrast, the common-law court and personal sovereignty movements have

movement's emphasis on the need for revolutionary violence, however, has attracted a great deal of media attention.

The Second Amendment of the United States Constitution reads: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."⁶¹ There is little case law on the meaning of the Second Amendment, but an enormous literature, much of it popular, has arisen concerning the question of the constitutionality of gun control laws and the meaning of the constitutional right to bear arms. Constitutional scholar David Williams sums up the legal debate over the meaning of the Second Amendment guarantee as one that has hardened into two opposing positions—the "states' rights" position that the Amendment does not convey an individual right to bear arms, and the "individual rights" position that it does.⁶²

Large mainstream organizations like the National Rifle Association obviously prefer the second interpretation of the Second Amendment, and they have assiduously promulgated it in academic, popular, and political venues.⁶³ The militia subculture also adheres to the individual rights interpretation of the Second Amendment, albeit from a slightly different direction.⁶⁴ Consider, for example, a document called the "Declarations of Alteration and Reform," published by a group called the Committee of the States in Congress and dated July 4, 1984.⁶⁵ This document declares that the Department of Health, Education, and Welfare, among other agencies, is operating outside the United States Constitution and is thus "hereby dissolved."⁶⁶ It concludes:

Wherein, the delegates of the sovereign states of the Union do hereby declare as the COMMITTEE OF THE STATES assembled IN CONGRESS, that the above adopted Articles of the Declarations of Alteration and Reform are the "law of the land." Any interference with the implementation and execu-

gown rapidly, with the Anti-Defamation League noting ever-increasing cross-fertilization between militia and common-law court activists.

61. U.S. CONST. amend. II.

62. Williams, *Constitutional Tales of Violence*, *supra* note 8.

63. See National Rifle Association of America, Institute for Legislative Action, *NRA and the Second Amendment*, at <http://www.nra.org/Issues/FactSheets/Read.aspx?ID=108> (last visited Apr. 19, 2005) ("Based on the English Common Law, the Second Amendment guaranteed against federal interference with the citizen's right to keep and bear arms for personal defense.")

64. Chuck Dougherty, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. MARSHALL L. REV. 959, 960-61 (1995).

65. Committee of the States in Congress, *Declarations of Alteration and Reform*, DUCK CLUB NEWS DIG. 3, no. 12 (1984), reprinted in *EXTREMISM IN AMERICA* 291-92 (Lyman Tower Sargent ed., 1995).

66. *Id.*, reprinted in *EXTREMISM IN AMERICA*, *supra* note 65, at 292.

tion of said Articles shall be considered an act of SEDITION against the government of these United States of America and shall be punishable under the law. Any interference or attempt to obstruct the functions of this Committee of the States or any of its delegates, shall result in imposition of the death penalty upon conviction by the Committee sitting as the Congress of the United States.⁶⁷

This manifesto is the sort of thing that mainstream observers usually dismiss with epithets like “loony,” “irrational,” and “paranoid.” Yet this radical opposition to the national government starts from intellectual principles that are not that far from professional constitutional theory. For example, Amar argues that federalism requires checks and balances between state and federal power in at least three areas: military, political, and legal.⁶⁸ Under this view, state and local militias were envisioned under the constitutional scheme as checks on the power of the national army:

The very existence of small but expandable popular “shadow” armies organized by state governments could deter abuse of a much larger professional standing army organized by the national government. . . . The national government could forcefully put down any purely local coup or insurrection threatening the republican government of a single state, but could be thwarted in any genuine scheme of national tyranny by an alliance of local militias led by state governments.⁶⁹

Amar is quick to contain his suggestion by saying that resort to the military can only be justified if political and legal challenges to national power have failed—if the national courts have shut down or their judgments are unenforceable and “the only applicable law is martial law, enforced by gun and sword.”⁷⁰ But in the world of legal populism, political and legal challenges have already failed, so we are already living under martial law.

C. Brave New Legal World: The Common Law Movement

More significant than militias in terms of its effects on the mainstream world is so-called “paper terrorism”—the use of legal documents to harass public officials. The filing of pseudo-legal papers is associated

67. *Id.*, reprinted in *EXTREMISM IN AMERICA*, *supra* note 65.

68. Akhil Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1494 (1987) [hereinafter *Amar, Of Sovereignty*].

69. *Id.* at 1497.

70. *Id.* at 1499.

with the so-called "common law court movement."⁷¹ Common law courts represent a civil equivalent of private militias: they declare the existing legal infrastructure illegitimate and establish their own. Daniel Levin and Michael Mitchell explain the phenomenon:

Once organized, common-law courts publish their rules in the local newspapers and begin holding court sessions. These common-law courts hold sessions in garages, restaurants, churches, homes, convention centers, bingo parlors, hotel rooms, and for one common-law court, a multi-use room at the state capitol building. Judges are elected, or self-appointed, and the number of judges varies from court to court although the appointment of "twelve justices" is favored "in purview of Chapter 45 of [the] Magna Carta." Common-law courts may also appoint their own sheriffs, marshals, bailiffs, notaries, juries, clerks, and other officers associated with the legitimate legal system.

Enforcement of common-law courts' decisions first falls upon local sheriffs, the only office that common-law courts recognize as legitimate. In some instances after the local sheriffs have not recognized their authority, common-law courts have appointed their own sheriffs and marshals who enforce the laws of the court. There have even been instances when common-law court marshals have "burst into federal courtrooms wearing official-looking badges and uniforms to serve their papers." As a last resort, some common-law courts call upon militia groups for enforcement when the "people have no place to go but to the constitutional militia."⁷²

71. Daniel Levin and Michael Mitchell describe the 1980s farm crisis as a moment when this activity reached a peak:

During this time, farmers faced with foreclosure began to file bogus land patents which they believed would shield their property from any encumbrances by state or local officials, including county sheriffs serving eviction notices or warrants to seize their property. All of these attempts failed in the courts in which they were heard. Such land patents only demonstrated that the federal government no longer holds title to the land; none of the patents canceled out interests held by other parties. The largest of these schemes, promoted by a group called the National Agricultural Press Association (NAPA), assured farmers that none of their loans acquired since 1974 were legal and that they could have those loans declared null and void by filing lawsuits and avoiding the use of lawyers.

Levin & Mitchell, *supra* note 60, at 14-15.

72. *Id.* at 29-30.

Instances of physical violence against the state by legal populists—such as those committed by militia group members—are sporadic and frequently committed by “lone wolves,” but acts of discursive violence against public officials in particular and against the legal system more generally are a hallmark of the common law court movement. As Levin and Mitchell observe, “Seeking to redress the grievances of their members, activists reverse court rulings, issue threatening subpoenas, and generally harass those they deem as enemies.”⁷³ Sometimes harassment by activists comes in retaliation for government action against one of their members.⁷⁴ Levin and Mitchell note that common law activists have also singled out particular state officials as political targets.⁷⁵ Much of the activity of common-law courts involves the reversal of earlier rulings by legitimate state and federal courts, including divorces and parental custody disputes.⁷⁶ Sometimes, however, their activities are more ambitious; the Montana-based Freemen, for example, apparently spearheaded a multi-state trend of passing bad checks and money orders, based on the notion that Federal Reserve Notes are not legal money.⁷⁷

These programs of harassment or legal “jamming” coexist with and draw strength from a more positive project: the rediscovery by ordinary Americans of the “common law tradition.” For some legal populists, the

73. *Id.* at 31.

74. Mark Pitcavage, Anti-Defamation League, *Common Law and Uncommon Courts: An Overview of the Common Law Court Movement*, Militia Watchdog Archives, at <http://www.militia-watchdog.org/common.htm> (last updated July 25, 1997).

75. *Public officials and private citizens alike have been subjected to liens on their property in retaliation for acts that bothered the Montana Freemen.* Levin & Mitchell, *supra* note 60, at 31–34.

76. *Id.* at 31.

77. *Id.* at 35. Levin and Mitchell provide greater detail about the nature of common law court actions:

Common-law courts claim investigative powers, often demanding that the accused parties appear before their court. If their order is refused, the court “generally finds them guilty in absentia and issues punishment-liens and threats of arrest, jailing, or death to be enforced by militia or the ‘constable.’” In some instances, common-law court activists have demanded that their cases be removed from legitimate courts “into a superior court, Our One Supreme Court.” When such attempts fail, activists convene their common-law courts anyway. The result is usually an acquittal, with an “indictment” being placed on the judge presiding over the legitimate court. According to the U.S. Marshals Service, common-law courts issued about 20 known “indictments” against federal judges nationwide. Similar “indictments” have been issued against local judges throughout the country including the recent “common-law court” indictments of ten municipal court judges in Orange County, California. In enforcing one of these indictments, three men, in Arkansas, impersonated U.S. Marshals and “attempted to arrest a municipal judge and bring him to a Common Law court in Kansas.”

Id. at 31–32.

common law tradition is rooted in English history and stands for the absolute protection of private property, the illegitimacy of “courts of equity” and “law merchant” (which have usurped the rightful common law tradition), and thus the illegitimacy of any state or federal statutes abridging private property rights.⁷⁸ For others, the common law tradition is ultimately rooted in the Christian Bible and the Judeo-Christian tradition.⁷⁹

Some websites concerning the common law are devoted to constructing histories of how the common law was usurped by other, illegitimate forms of law. Others are devoted to reconstructing that law. The Common Law Court of the United States of America, for example,

78. One website thus explains:

Since the formation of our Republic, the local County (or Parish) has always been the seat of government for the body politic (the People). A County (or Parish) government is the highest authority of government in our Republic as it is closest to the body politic (the People) who are, in fact, THE GOVERNMENT.

The Common Law of the States is founded and grounded upon substantive titles in real property, and no mere legislative enactment by Congress, State legislature or County Commissioners. Neither can judicial ruling by Federal, State or County Courts operate to deprive the People of their Rights at Law, including the Rights inherent in their Allodial Land Title Rights. The Constitution of the United States of America, Article III, Section 2, authorizes Courts of Law and Courts of Equity; Judicial Equity is authorized; but nowhere does the Constitution of the United States of America authorize a single bit of either Federal Executive branch of government Equity jurisdiction, or Federal Legislative branch of government Equity jurisdiction. In other words, the promulgation and enforcement of Presidential/Congressional/Judicial edicts, dictates, rules, regulations or policies whether directly or through any Federal agent or agency such as the FBI, CIA, EPA, OSHA, IRS, etc. or with the aid and assistance of State or local lackeys is unauthorized.

HOWARD FISHER & DALE POND, *OUR AMERICAN COMMON LAW*, available at <http://www.svpvril.com/OACL.html> (last visited Apr. 4, 2005).

79. Thus, the “Common Law Review” announces:

THIS web site presents a new kind of conservatism, actually only a new-seeming kind; it is rather the legacy of the Christian West: *Common Law Review* is dedicated to the proposition that true conservatism lies “Beyond Whig and Marxist.” *This* brand of conservatism is dedicated to preserving and carrying forward the legacy of Western civilization as it really stands, rather than in either the denatured form of classical liberalism or the perverse organicism of socialism, social democracy, fascism, communism. . . . The true nature of Western civilization, which both liberalism and socialism have striven mightily to abolish, is Christian and classical, and it is legal: the legacy of citizenship and liberty under law.

Welcome, Common Law Review, at <http://www.commonlawreview.com/> (last visited Apr. 4, 2005) (alteration in original). The website contrasts the common law with the civil law tradition. *Id.*

declares its project as founding a new society bound together by the common law and promises that this law will gradually supplant the (illegitimate) federal law as the members of the new society introduce their law into federal courts.⁸⁰

Finally, concerns about citizen privacy have converged with legal populism in a narrative concerning the federal government's efforts to create a One World Government or New World Order through placing all American citizens under surveillance.⁸¹ In this narrative, Social Security numbers and drivers' licenses are the first step toward this surveillance.⁸² A new legal twist in this fight appears in a suit filed in an Alabama state court, in which Lowell H. Becraft Jr. is representing Scott McDonald in an action for declaratory judgment against the State Department of Motor Vehicles. McDonald and his sons objected to the administrative rule under which applicants for a driver's license were required to submit their Social Security numbers. The legal basis for their objection was the First Amendment: McDonald and his sons "believe that the federal SSN is at least the precursor to the Biblical 'Mark of the Beast' described in Revelation," and

80. As the website declares:

The goal of these courses and this study material is to restart a common law society such as the ones existing in this country in the last century. 100 years of public law making has created a society that is contrary to our basic nature as a Christian people. This process will allow a reformed jural society to retain laws favorable to our inherent nature.

The College of Common Law, *The Common Law Court of the United States of America*, at <http://www.civil-liberties.com/commonlaw/common.html> (last visited Mar. 23, 2004).

81. One author notes:

Both "an enemy" and a concept, the new world order represents a changing relationship of power to space. Patriots believe that international organizations, spearheaded by the U.N., are busily working to form a one-world government in which nation-states will no longer exist, American citizens will lose their constitutional rights, and the U.S. will be forced to redistribute its wealth and power to poorer countries. The result will be global communism.

Carolyn Gallaher, *Mainstreaming the Militia*, in SPACES OF HATE: GEOGRAPHIES OF DISCRIMINATION AND INTOLERANCE IN THE U.S.A., *supra* note 20, at 186–87. Another asks:

What is the New World Order? In the Patriots' world, it is simply the same dirty conspirators (the Council on Foreign Relations and the Trilateral Commission) who have been in cahoots with World Communism all these years, and now they're creating pretexts for moving in with military equipment and instituting a police state.

NEIWERT, *supra* note 17, at 5.

82. See, e.g., *Resist Enumeration*, at <http://www.networkusa.org/fingerprint/page6/fp-resist.html> (last visited Apr. 11, 2005) (linking Social Security numbers with plans to register every human being on the globe in a single database, and offering Bible-based reasons why people should resist).

therefore the Social Security number requirement violated the Free Exercise Clause.⁸³ This case joins other litigation on the issue taking a free exercise approach.⁸⁴

D. *The Sovereign Citizenry*

As Professor Amar notes, during the American Revolution and immediately after it, “constitutional debate focused on whether sovereignty resided in government or in the People, and on how federalism should operate within Empire and Confederation.”⁸⁵ The American revolutionary view was that true sovereignty resided in the People themselves.⁸⁶ In one sense this idea was not new: John Locke, for example, had recognized the inalienable right of the People to alter or abolish their government through the exercise of the transcendent right of revolution, and long before 1776 the British had exercised this right in the Glorious Revolution of 1688.⁸⁷

In another sense, however, the American view of sovereignty was new. Eighteenth century English theorists like William Blackstone blunted the possible radical implications of Locke’s theory by arguing that the King-in-Parliament—the government—embodied the sovereignty of the People.⁸⁸ In contrast, the American view was that the People at all times

83. See Brief of Appellant Scott McDonald, *McDonald v. Alabama Dep’t of Pub. Safety*, (Ala. filed Oct. 30, 2001) (No. 1002114), available at <http://www.networkusa.org/> (last visited Mar. 23, 2004). McDonald is also a legal populist who runs a pro-privacy website called “Fight the Fingerprint.” See *Fight the Fingerprint!*, at <http://www.networkusa.org/fingerprint.shtml> (last visited Apr. 13, 2004).

84. See *Callahan v. Woods*, 736 F.2d 1269 (9th Cir. 1984); *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981); *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977); see also *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C. Cir. 1987); *Yeager v. Hackensack Water Co.*, 615 F. Supp. 1087 (D.N.J. 1985).

85. Amar, *Of Sovereignty*, *supra* note 68, at 1429.

86. *Id.* at 1435.

87. See *id.*

88. *Id.* at 1431. As Amar explains:

God Almighty—the indivisible, unlimited sovereign of the universe—had vested indivisible, unlimited temporal authority in the King. God’s sovereign agent on earth. After the English Civil War of the 1640’s and the Glorious Revolution of 1688, however, few in England embraced royal supremacy. According to the new understanding, ultimate political authority derived not from the divine right of kings, but from the consent of the governed. Legitimacy flowed up from the People, not down directly from God. Yet the unorganized polity at large could not effectively wield sovereign power on a day-to-day basis in fashioning and administering laws. At best, the People could assert their power in those rare meta-legal moments, like the Glorious Revolution itself, when one monarch was ousted and another consented to. In ordinary times, then, where did effective sovereignty lie?

retained full sovereignty: the government was only a representative, agent, delegate, deputy, or servant of the People.⁸⁹ James Wilson thus argued that government never had "sovereignty," only "power."⁹⁰ Others, like Alexander Hamilton, James Madison, John Marshall, and James Iredell, used the word "sovereignty" to mean the government's power within its limited sphere of delegation.⁹¹ But the problem of how to make such a theory workable in practice still remained. The Articles of Confederation eventually fell apart because the center did not hold with sovereignty placed in the People of each state.

The new Constitution placed sovereignty in a different People: the People of the United States. But, as Amar notes, this formulation did not end the debate. As the Civil War approached, the question was what the phrase "We the People" in the Constitution really meant. Did it represent a sharp break from the Articles of Confederation? Was there now a new national People? Or did the People of each state remain sovereign? On one side, states' rightists argued that Americans had never become one people; on the other, nationalists argued that Americans had been one people since Independence. The middle ground, staked out by Chief Justice Marshall in the nineteenth century, was that the many peoples became one people through the ratification of the Constitution.⁹²

The eighteenth-century debate between the federalists and the anti-federalists, and the nineteenth-century debate between the states' rightists and the nationalists, still echo on the Internet. But the legal populists have come to a different resolution than the professional constitutional scholars. This difference can be seen clearly in the debate surrounding the Fourteenth Amendment. Professor Amar argues that the Fourteenth Amendment, ratified in 1866, offers a different vision of citizenship than did the original Constitution and Bill of Rights:

The original Bill . . . focused centrally on empowering the people collectively against government agents following their own agenda. The Fourteenth Amendment, by contrast, focused on protecting minorities against even responsive, representative,

By the eighteenth century, the answer in Britain seemed clear: Sovereignty resided in the King-in-Parliament, that indivisible entity consisting of King, Lords, and Commons. Since all three "estates," or social orders, of the realm—the one, the few, and the many—were "virtually represented," the King-in-Parliament became the virtual embodiment of the abstract sovereignty of the People.

Id.

89. *Id.* at 1436.

90. *Id.* at 1437 (citing R. Ross, *The Federalists and the Problem of Sovereignty* (1984) (unpublished manuscript)).

91. *Id.* at 1450–51.

92. *Id.* at 1460–61.

majoritarian government. Over and over, the 1789 Bill proclaimed the “right[s]” and “the powers” of “the people”—phrases conjuring up civic republicanism, collective political action, public rights, and positive liberty. The complementary phrase in the 1866 Amendment—“privileges or immunities of citizens”—indicates a subtle but real shift of emphasis, reflecting a vision more liberal than republican, more individualistic than collectivist, more private than public, more negative than affirmative.⁹³

Meshing these two subtly different visions of constitutional government together has been the subject of one of the greatest debates of the twentieth century among lawyers, justices, and law professors: What is the relationship between the Bill of Rights and the Fourteenth Amendment? One legal focus of this debate is the so-called doctrine of incorporation: Does the Amendment “incorporate” the Bill, making the Bill’s restrictions on federal power applicable against the states?⁹⁴ A second focus, more pressing for our purposes, concerns the meaning of citizenship. Section 1 of the Fourteenth Amendment only states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁹⁵ The Constitution provides no clear definition of national citizenship. Yet, as Amar points out:

[I]f the People of America were sovereign, then one’s American citizenship was all-important, and should never have been treated as simply derivative of one’s state citizenship under state constitutions, or subject to virtually limitless manipulation by ordinary legislation. . . . The complex legal issues concerning the source of antebellum citizenship were never fully resolved.⁹⁶

Some legal populists take up these same problems: the relationship between the Bill of Rights and the Fourteenth Amendment generally and the puzzle of national and state citizenship more specifically. But their resolution is quite different. Whereas the professional constitutionalists assume that the antebellum and Reconstruction Constitutions must somehow be meshed together, the legal populists argue that the antebellum Constitution and the Reconstruction Constitution are in effect two separate Constitutions that create two different classes of citizenship. Un-

93. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1260–61 (1992).

94. *Id.* at 1194.

95. U.S. CONST. amend. XIV, § 1.

96. Amar, *Of Sovereignty*, *supra* note 68, at 1464.

der this theory, sovereign citizenship is the original form of citizenship and carries with it the inalienable political rights enumerated in the Bill of Rights. The Fourteenth Amendment, in contrast, created a different and inferior kind of citizenship, one which carries with it "civil rights," rights that are in fact mere privileges granted by the government and revocable at its whim. Jared Held, *Sui Juris*, explains it in this way:

The "citizens of the United States" did not exist until after the Civil War. In 1866, as the forerunner of the 14th amendment, Congress passed the Civil Rights Act. Through this law, Congress created a new class of rights for freed former slaves who were not included with these sovereign rights by the Treaty of Peace and who, therefore, had no access to the courts. These newly classified "persons" [My note: "persons," that is, as opposed to "People," who hold sovereignty] were thereby given *civil rights*.

Civil rights were *said* to be the same as those that the state Citizen already had, by virtue of his/her birth and blood. Through the alleged "ratification" of the 14th Amendment and later through the Social Security Act, these civil rights extended, through deliberate non-disclosure, to almost everyone in America. As one request[s] a Social Security (account) number, one claims to be a U.S. citizen; all benefits and civil rights then become part of the now converted "person's" life. In this way, nearly everyone in the states has "voluntarily" [given] up their inalienable rights, God-given fundamental rights and sovereign status to [be] granted the "privileges and immunities" of civil rights as *subjects of Congress*, i.e., U.S. citizens.⁹⁷

Held goes on to explain that:

[O]ne's civil rights, unlike one's inalienable rights, are regulated by the government (Congress), who grants them and who, therefore, can take them away. . . . People . . . were informed of their civil rights, not of their inalienable rights or sovereign rights, because most Americans have been tricked into believing they are "citizens of the United States." Most have no idea that by claiming U.S. citizenship, they voluntarily choose civil rights instead of their natural birthright.⁹⁸

What are the implications of this very different theory of the relationship between the Bill of Rights and the Fourteenth Amendment?

97. Jared M. Held, *Rights*, Packet Storm, at <http://packetstormsecurity.nl/poisonpen/govtxts/rights.txt> (last updated Apr. 16, 1997).

98. *Id.*

First is the legalistic idea that by discovering and proclaiming your true Sovereign Citizenship, the federal government no longer has any claim on you—which includes the government's claim of tax liability. Thus, one can purchase books such as *Vultures in Eagle's Clothing*,⁹⁹ which “will show you how to change your current acquired legal status of ‘Voluntary U.S. Enslaved Subject’ back to your original born Status of ‘Freeborn Sovereign American Citizen’ who has the same Rights and prerogatives as the King of England.”¹⁰⁰ I've called this notion legalistic, but of course it is also profoundly romantic. It draws on the American penchant for conspiracies, the fantasy that there really is another, secret America behind the façade of this one, and that with an act of will one can simply step through the door to a world in which one can be reborn as the King of England . . . and, of course, not have to pay any taxes.

A second and more troubling implication of this theory is that only certain people can be Sovereign Citizens while others are relegated to Fourteenth Amendment citizenship only. The precedent for this, of course, is the *Dred Scott* case:

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of these people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement [i.e. negroes] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power the Government might choose to grant them.¹⁰¹

99. LYNNE MEREDITH, *VULTURES IN EAGLE'S CLOTHING* (1994).

100. *Re: The Buck Act*, Mirrors, at <http://web.elastic.org/~fche/mirrors/old-usenet/irs-words-of-art> (last visited May 5, 2005).

101. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1856).

Now we are finally in a position to make sense of Senator Rogers' affidavit, with which I began this Article: "I, Donald A. Rogers, being of sound mind and lawful age, do solemnly declare: I was born in Louisiana State of parents who were [W]hite, who were Citizen-Principals and whose parents time out of mind were and always had been [W]hite."¹⁰² The main purpose of Section 1 of the Fourteenth Amendment was, indeed, to establish the citizenship of the Negro by overruling *Dred Scott*. "And because such a [W]hite man's citizenship was not restricted by the 14th Amendment and because he receives no protection from it, he has no reciprocal obligation to a 14th Amendment allegiance or sovereignty and owes no obedience to anyone under the 14th Amendment."¹⁰³ For the Sovereign Citizen, Reconstruction never occurred.

II. INTERPRETING LEGAL POPULISM

Legal populism is a subversive movement. All tax evasion and fraud is politically subversive, particularly in a society where one's status as a taxpayer is an important index of citizenship. But those who avoid paying taxes or seek to pay less than the government allows on the ground that our taxation system is itself unlawful are subversive in a particularly interesting way. Tax protesters, and legal populists more generally, attempt to use the machinery of law to defeat the law. They refuse to be represented by lawyers and file massive papers in court citing obscure and overruled cases. They cite as authority sources that mainstream lawyers believe to be empty of content, like the Declaration of Independence, or lacking in legitimacy, like *Black's Law Dictionary* or *Bowyer's Law Dictionary*.¹⁰⁴ They pursue their own legal actions against the government and its officers, often filing multiple claims that repeat the same assertions. As in the Common Law movement, they sometimes create their own legal fora and anoint their own counter-authorities.

One popular mainstream reaction to legal populists is to depict them as living outside the bounds of rationality.¹⁰⁵ In this conception, legal populists are both ridiculous and to be feared. They are the cultural equivalent of people who push heavily-laden shopping carts down the street while mumbling to themselves; or the collective equivalent of John Walker Lindh—the domestic face of anti-American terrorism; or an ideological

102. Gunnison, *supra* note 2.

103. *Id.*

104. A recent article by a law librarian explores the different communities constituted by people who rely on BLACK'S LAW DICTIONARY and people who rely on BOUVIER'S LAW DICTIONARY. Mary Whisner, *Practicing Reference . . . Bowyer's, Black's, and Tinkerbell*, 92 LAW LIBR. J. 99 (2000).

105. See, e.g., Judy Thomas, *Movement's Leadership Left in Disarray: Lives Have Mirrored the Groups' Rise, Fall*, KANSAS CITY STAR, Mar. 20, 2005, at A9, available at 2005 WLNR 4315541.

arm of racist extremist groups like the Ku Klux Klan, repudiated by contemporary America yet lingering menacingly in the shadows. A somewhat more sympathetic reaction, popular in the late-1980s, is to see them as ordinary but uneducated folks who innocently fall prey to a few extremists during economic hard times. Finally, legal populists are sometimes understood as religious fanatics, people who inappropriately use the frame of the divine to understand social practices that are in reality wholly secular.¹⁰⁶ Although each of these perspectives is useful, in this section and the next I put forth three additional accounts of legal populism, with the intent of moving deeper into both sympathy and critique than typical mainstream accounts.

A. Legal Populism as Conspiracy Theory

As Richard Hofstadter's famous essay, *The Paranoid Style in American Politics*, observes, politics is made not only by elites, but also by the public; in the public sphere, "political life acts as a sounding board for identities, values, fears, and aspirations."¹⁰⁷ For Hofstadter, with the help of new

106. Susan Koniak's otherwise brilliant reading of legal populist narratives suffers a bit from this perspective, I think. See Koniak, *supra* note 5. Koniak uses Robert Cover's theories of *nomos* and narrative, which are based on the interweaving of Talmudic and legal theories and practices of interpretation, to explain the legal populist world. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). This is strikingly appropriate, given the close connection of much of legal populism to Christian Identity ideology, which of course is explicitly religious and fundamentalist. On the other hand, Koniak's reading of legal populism seems to identify the discomfiting relationship between popular and professional constitutionalism as purely a matter of using the wrong frame, the religious instead of the secular. This understanding, in turn, activates the usual binaries trotted out to describe the gun culture, for example: city versus rural, religious fundamentalist versus secular humanist, and so on. The reading Daniel Levin and Michael Mitchell offer—legal populism as social contract fundamentalism—is more satisfactory in my view, in that it suggests at once the distance from and the closeness to certain professional legal projects.

107. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* ix (1966). Hofstadter's essay set the framework for an extensive literature in political and cultural studies on conspiracy theorizing and paranoia in American life. See, e.g., JOHN H. BUNZEL, *ANTI-POLITICS IN AMERICA* (1967); *CONSPIRACY: THE FEAR OF SUBVERSION IN AMERICAN HISTORY* (Richard O. Curry & Thomas M. Brown eds., 1972); SEYMOUR MARTIN LIPSET & EARL RAAB, *THE POLITICS OF UNREASON: RIGHT WING EXTREMISM IN AMERICA, 1790–1970* (1970); *THE FEAR OF CONSPIRACY: IMAGES OF UN-AMERICAN SUBVERSION FROM THE REVOLUTION TO THE PRESENT* (David Brian Davis ed., 1971).

More recently another spate of books on conspiracy theory and the "paranoid style" in American politics has arisen. Some works in this vein include, for example, GREGORY S. CAMP, *SELLING FEAR: CONSPIRACY THEORIES AND END-TIMES PARANOIA* (1997); *CONSPIRACY NATION: THE POLITICS OF PARANOIA IN POSTWAR AMERICA* (Peter Knight ed., 2002) [hereinafter *CONSPIRACY NATION*]; PETER KNIGHT, *CONSPIRACY CULTURE; FROM THE KENNEDY ASSASSINATION TO "THE X-FILES"* (2000); TIMOTHY MELLEY, *EMPIRE OF CONSPIRACY: THE CULTURE OF PARANOIA IN POSTWAR AMERICA* (2002); PATRICK O'DONNELL,

technologies of mass communication, politics becomes not only a site of reasoned debate about the institutions and processes that regulate our common lives, but also a theater in which images and emotions can be projected and played out.¹⁰⁸

Hofstadter identified a distinctive "paranoid style" in politics. Conspiracy theorizing is a paradigmatic example of politics in the public sphere expressed in the paranoid style, and one way to understand legal populism is to treat it as a form of conspiracy theory. Certainly as a substantive matter, conspiracy theory and legal populism overlap considerably. The constitutional literature of tax protest, for example, provides an easy portal into venerable conspiracy theories. The first step is to recognize that the Internal Revenue Service and the Federal Reserve Bank are legally rogue organizations because they are ungrounded in the original Constitution. The second step is to see them politically as a threat to liberty because of their enormous power over ordinary citizens; because of the secrecy and obscurantism with which they operate; and because they are controlled by elites, enabling a small group of people to amass wealth and power for themselves at the expense of the masses. The third step is to recognize the link between these rogue organizations and the larger conspiracy to establish a global New World Order. The idea of the New World Order is that a small coterie of bankers and politicians, using international political institutions such as the United Nations, will create a unified world government and through this project achieve political and economic tyranny over the rest of the world.¹⁰⁹ From here it is only a small step into the sordid depths of Christian Identity doctrine¹¹⁰ and the

LATENT DESTINIES: CULTURAL PARANOIA IN CONTEMPORARY U.S. NARRATIVE (2000); DANIEL PIPES, CONSPIRACY: HOW THE PARANOID STYLE FLOURISHES AND WHERE IT COMES FROM (1997); ROBERT S. ROBINS & JERROLD M. POST, POLITICAL PARANOIA: THE PSYCHOPOLITICS OF HATRED (1997).

108. HOFSTADTER, *supra* note 107, at 63. As Hofstadter opined:

The growth of the mass media of communication and their use in politics have brought politics closer to the people than ever before and have made politics a form of entertainment in which the spectators feel themselves involved. Thus it has become, more than ever before, an arena in which private emotions and personal problems can be readily projected. Mass communications have made it possible to keep the mass man in an almost constant state of political mobilization.

Id.

109. See *supra* note 81.

110. MITCHELL, *supra* note 4. See generally JAMES A. AHO, THE POLITICS OF RIGHTEOUSNESS: IDAHO CHRISTIAN PATRIOTISM 85 (1990). Anthropologist Richard Mitchell describes the ideology of Identity Christianity briefly:

Identity Christians (called Identity "Christians," by some) continue a theological line of argument begun by Edward Hine in nineteenth-century England and rejuvenated in post-World War II United States by Wesley Swift and his followers. Distinctive Identity tenets are few but stand in dramatic

old canards of anti-Semitism, such as the claim that Jews, bankers, financiers, and internationalists are working in secret to control the course of political events.

Another example of the link between legal populism and conspiracy theory is the idea, popular within legal populism, that we in the United States are living under a false legal system (identified variously as “law merchant,” “equity,” or “maritime law”), and that a conspiracy exists to perpetuate this false legal system as a way of tricking Americans out of their true rights. The ultimate roots of this conspiracy are disputed. One website, for instance, locates the beginnings of the supplanting of the common law by admiralty law in the doings of the George Rapp Harmony Society, a nineteenth-century utopian community founded by one George Rapp in 1805.¹¹¹ As the website declares,

Evidence will show that the tremendous wealth accumulated by this society was subsequently used to fashion a George Rapp Society on a much larger scale—with plans to ultimately encompass the world in a “superstate” controlled and governed by mercantile interests, under the law of admiralty—a superstate wherein all the property in the world, and all the people on space-ship “Earth,” are pledged to the benefit of this World-wide mercantile association. The “New World Order?”¹¹²

Other legal populists identify bankers, bureaucrats, or internationalists as the shadowy figures behind the conspiracy.¹¹³ Still others focus on particu-

contrast to mainstream beliefs. In Identity doctrine the biblical Lost Tribes migrated from the Middle East to settle the “Anglo-Saxon, Celtic, Scandinavian, Teutonic” nations of western Europe and North America. The United States, not Israel, is the genuine promised new Holy Land. White aryan are the authentic Israelites. Jews are said to be descended from Cain, the literal spawn of Eve and Satan, and are the mortal enemies of Identity Christians. Blacks, Hispanics, Asians, and other non[W]hites, the “mud peoples,” are said to have branched from the evolutionary tree long before Adam, the first “[W]hite” Homo sapiens appeared, making them spiritually soulless and culturally and intellectually on a par with higher animals.

MITCHELL, *supra* note 4, at 122–23.

111. Eldon G. Warman, *The British Legal System of Mixed Common and Roman Law Has Been Used to Enslave US(A), DetaxCanada*, available at <http://www.detaxcanada.org/cmlaw1.htm> (last visited Mar. 23, 2004).

112. *Id.*

113. For example, John Trochmann, leader of the Militia of Montana (“MOM”), identifies as conspirators “the President, the Speaker of the House, and most financial and political leaders around the world.” NEIWERT, *supra* note 17, at 17. The United Nations is also a popular target of fear and hatred. As one commentator observes, “The Posse Comitatus website contains an image of the U.S. flag, the Stars and Stripes, fusing with the flag of the United Nations under the caption ‘Which Will It Be?’” Another author notes:

lar techniques used to further the conspiracy, such as the manipulation of public opinion¹¹⁴ and, of course, failing to inform people of their true rights.

Legal populism and conspiracy theory are linked not only substantively but also in terms of common interpretive practices. Many legal populist texts exhibit both the desire for and endless deferral of a secret answer (frequently deferred on websites for the purpose of getting the reader to pay money for the book, video, or kit), and the painful but also giddy excess of meaning this endless interpreting brings about. By rejecting the traditional means by which professional legal insiders produce interpretive closure—most notably, the acceptance of the Supreme Court as the final authoritative arbiter of “what the law is”—legal populists introduce the possibility of endless interpretation.¹¹⁵

Legal populists also produce the possibility of endless interpretation by rejecting the limits professional legal interpreters place on what constitutes a legitimate text for interpretation. Legal populists find meaning in signs professionals find meaningless. For some, the fact that certain American flags in courtrooms have a gold fringe betrays that these are admiralty courts and not courts of United States domestic law.¹¹⁶

Capitalization is also an important resource for hidden meaning within legal populism. For some legal populists, a party's name when written entirely in capital letters represents a different legal entity than when only the initial letters are capitalized.¹¹⁷ Other writers, noting that

The Viper Militia Website shows a cartoon of a S.W.A.T. team of law enforcement officers wearing U.N. armbands raiding an anti-government activist's home. . . . The image is one of the “glocalization” of police power, the fusing of local and global law enforcement agencies to form a violent and anonymous force that threatens innocent citizens.

Flint, *supra* note 20, at 173.

114. See, e.g., *The Delphi Technique*, *Dixieland Law Journal*, at <http://home.hiwaay.net/~becraft/Delphi.htm> (last visited Apr. 1, 2005) (describing various means of manipulating survey and focus group results allegedly developed by the Rand Corporation in the early 1960s).

115. Levin & Mitchell, *supra* note 60, at 39–40.

116. *But see* *McCann v. Greenway*, 952 F. Supp. 647, 648 (W.D. Mo. 1997) (rejecting conspiracy claim following child custody case when plaintiff's “main complaint is that the state court did not have jurisdiction over the custody dispute because the court flew a ‘maritime flag of war,’ which invested the court with admiralty jurisdiction to the exclusion of its lawful jurisdiction over family law disputes”); *Vella v. McCammon*, 671 F. Supp. 1128, 1129 (S.D. Tex. 1987) (“The remaining claims that Petitioner has asserted by way of motion to dismiss, e.g. Court lacking jurisdiction because the Court's flag has yellow fringes on it, were denied and the Court considers them to have not only been without merit but also to have been totally frivolous.”).

117. Jon Roland, *Typographic Conventions in Law*, at <http://home.hiwaay.net/~becraft/NamesInCaps.htm> (last visited Apr. 4, 2005). *But see, e.g.,* *Russell v. United States*, 969 F. Supp. 24, 25 (W.D. Mich. 1997) (holding frivolous petitioner's argument that “he is not

Article III of the Constitution vests the judicial power of the United States in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,”¹¹⁸ sometimes argue that the lower case spelling of “supreme” in that clause and in Article I means that “the United States Supreme Court of the Judiciary Act of 1789 is not the supreme Court of Article III.”¹¹⁹

The careful delineation of Patriot theorists between “citizenship” and “Citizenship” provides another example of the importance of capitalization. According to some Patriot narratives, “Sovereign Citizenship is the original form of citizenship, and carries with it the inalienable political rights enumerated in the Bill of Rights.”¹²⁰ In contrast, “Fourteenth [A]mendment citizenship is a second class citizenship, one which carries with it only ‘civil rights,’ rights that are in fact mere privileges granted by the government and revocable at the government’s whim.”¹²¹ The divergence between these two forms of citizenship can be tracked by observing that the word “citizen” is always capitalized in the Constitution until 1868, when the Fourteenth Amendment was adopted.¹²²

subject to the summons”); *Rosenheck & Co. v. United States*, 79 A.F.T.R.2d (RIA) 2715 (N.D. Okla. 1997) (“The Court expressly finds that Defendant WALTER EDWARD KOSTICH JR. is the person identified in the Notice of Levy, irrespective of the commas, capitalization of letters, or other alleged irregularities Kostich identifies as improper. Similarly, the Court’s finding applies to the filed pleadings in this matter.”); *United States v. Washington*, 947 F. Supp. 87, 92 (S.D.N.Y. 1996) (holding “baseless” the contention that the defendant’s name “spelled out in capital letters, is a fictitious name used by the Government to tax him improperly as a business”).

Jon Roland of the Constitution Society has this to say about beliefs about capitalization in the Patriot community:

One of the persistent myths among political dissidents is that such usages as initial or complete capitalization of names indicates different legal entities or a different legal status for the entity. They see a person’s name sometimes written in all caps, and sometimes written only in initial caps, and attribute a sinister intent to this difference. They also attach special meanings to the ways words may be capitalized or abbreviated in founding documents, such as constitutions or the early writings of the Founders.

Such people seem to resist all efforts to explain that such conventions have no legal significance whatsoever, that they are just ways to emphasize certain kinds of type, to make it easier for the reader to scan the documents quickly and organize the contents in his mind.

Roland, *supra*.

118. U.S. CONST. art. III.

119. See KONIAK, *supra* note 5, at 72.

120. See Scott Eric Rosenstiel, *Fourteenth Amendment Citizenship*, at <http://www.civil-liberties.com/pages/art2.html> (last visited Apr. 25, 1996).

121. *Id.*

122. *Id.*

Sometimes the gap between popular and professional constitutionalism reflects convention more than substance. For example, one online article raises the interesting and legally legitimate question of what United States citizenship meant before and after passage of the Fourteenth Amendment.¹²³ Its main source of legal authority, however, is *Black's Law Dictionary*. At other times, the gap seems due to the different interpretive methods of professional constitutional scholarship and legal populism. Legal populism, influenced by the interpretive methods of conspiracy theory, assumes the existence of secret meanings and hieroglyphs, whereas professional constitutionalism assumes that there is only one law and that it is (in theory) transparently available to all; there is only surface, no depth.

The result is that legal populist analysis, though it resembles legal reasoning, turns legal reasoning on its head. Where legal insiders stake their claim to the law's legitimacy and primacy over "politics" on the idea that legal reasoning is a stable, "closed" interpretive practice that aspires to the prestige of science, the outsiders who maintain legal populism turn law into an "open" discourse, a practice that endlessly generates more and more interpretation.¹²⁴

Legal populism resembles conspiracy theorizing as well in the emotions it generates and in the invitations it offers to the participant. It invites one not only to be outraged and frightened by the efforts of various conspiracies to usurp the rights of American citizens but also to be enlightened and empowered to claim one's own rights (usually by purchasing something). The dethroning of the state's monopoly over interpretation itself is empowering. Private legal interpretation makes possible the collective founding of new legal worlds, as in the Common Law Court of the United States of America. It also promises individuals emancipation from the bureaucracies that govern most citizens' everyday lives. Indeed, the do-it-yourself mentality of legal populism offers a capacity for agency seldom found in everyday public life.

B. Conspiracy Theory as Political Practice

Although Hofstadter saw the paranoid style as a long-standing but ultimately minor strain in American politics, more recently cultural studies academics have argued that it has become ubiquitous. Peter Knight notes that "we're all conspiracy theorists now."¹²⁵ Timothy Melley agrees: "Conspiratorial explanations have become a central feature of American political discourse, a way of understanding power that appeals to both

123. See *id.*

124. On closed and open discourses, see Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1572-73 (1990).

125. KNIGHT, *supra* note 107, at 6.

marginalized groups and the power elite.”¹²⁶ In this section and the one that follows, I explore both perspectives: conspiracy theorizing generally and legal populism in particular as a symptom of modern political culture generally, and as the voice of a specific subculture.

If it is true, as some authors contend, that conspiracy theorizing has become a “central feature of American political discourse,”¹²⁷ why is this so? Several social theorists argue that conspiracy theorizing is the result of a shock wave generated when deeply-rooted narratives of individualism and agency hit the reality of a world increasingly controlled by large, impersonal forces: economic, political, and ecological. In this world, selves are asked to respond with an ever-increasing velocity and flexibility to an onslaught of information and disciplinary demands.¹²⁸ William Connolly describes this contemporary predicament vividly, in what is perhaps the academic equivalent of apocalyptic fiction:

There is, first, an intensification of the experience of owing one’s life and destiny to world-historical, national, and local-bureaucratic forces. There is, second, a decline in the confidence many constituencies have in the probable future to which they find themselves contributing in daily life. There is, third, an even more ominous set of future possibilities that weigh upon life in the present.¹²⁹

According to Connolly, the first element of this predicament is an intensification of social discipline: “One must now program one’s life meticulously to meet a more detailed array of institutional standards of normality and entitlement.”¹³⁰ The second element is the now well-known disenchantment of broad swaths of the public with political representatives and politics generally.¹³¹ The third element is the threat of various sorts of disaster:

Thus climactic changes generated by late-industrial society may eventually sink large chunks of inhabitable and arable land under the sea; crises in essential supplies of oil or safe water or good soil or oxygen may flow from the effort to industrialize the entire world; state and nonstate terrorism may escalate into a condition of continuous insecurity and violence unconfined by state boundaries; and the impotency of a late-modern state

126. Timothy Melley, *Agency Panic and the Culture of Conspiracy*, in CONSPIRACY NATION, *supra* note 107, at 57.

127. *Id.*

128. WILLIAM E. CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 24–25 (1991) (describing the “globalization of contingency”).

129. *Id.* at 20.

130. *Id.* at 21.

131. *Id.* at 23.

or a nonstate fragment may produce a nuclear exchange that destroys civilization or removes human life from the face of the earth.¹³²

Conspiracy theory thus expresses both the desire for political agency and the fear that such agency is no longer possible. In the academic literature, this idea comes in various shades of sympathy or contempt for the conspiracy theorists themselves. With more than a whiff of condescension toward the mass man, Fredric Jameson describes conspiracy theorizing as "the poor person's cognitive mapping in the postmodern age; it is a degraded figure of the total logic of late capital, a desperate attempt to represent the latter's system."¹³³ More recent writers see conspiracy theorists as less "poor" and "desperate," and as more representative of everyone. Mark Fenster argues that those who see key world-historic decisions being made by tiny elites have, after all, a point: "[O]ne need not . . . assume that the state is the direct instrument of a hidden, transhistorical ruling class or elite to recognize the degree to which economic and political power are concentrated in the hands of a tiny sector of the national and international population."¹³⁴ Fenster describes conspiracy theorizing as a response to "the tendency toward excluding real social antagonisms and debate from the public sphere, and the logic of control that has come to permeate the decaying institutions, structures, and spaces that compose what remains of civil society."¹³⁵ For Fenster, "the conspiracy narrative needs to be recognized for what it is: a utopian desire to understand and confront the contradictions and conflicts of contemporary capitalism."¹³⁶

Jodi Dean argues that the torrent of information, some accurate and much not, available through the Internet necessarily makes everyone into a conspiracy theorist.¹³⁷ Dean notes that both the endless drive for more

132. *Id.* at 24–25.

133. Fran Mason, *A Poor Person's Cognitive Mapping*, in *CONSPIRACY NATION*, *supra* note 107, at 40 (quoting Fredric Jameson, *Cognitive Mapping*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 356 (Cary Nelson & Lawrence Grossberg eds., 1988)).

134. FENSTER, *supra* note 7, at 63.

135. *Id.* at 69.

136. *Id.* at 116.

137. Jodi Dean, *If Anything Is Possible*, in *CONSPIRACY NATION*, *supra* note 107, at 88–89:

Like conspiracy theorists, we're imbricated in evidence and suspicion. We're entangled in a world of uncertainties, a world where more information is available, and hence, a world where we face daily the fact that our truths, diagnoses, and understandings are incomplete—click on one more link, check out one more newscast, get just one more expert opinion (and then, perhaps, venture into the fringe; after all, some HMOs cover alternative remedies). . . . The sense that anything might be possible haunts the interface of national and global, modern and postmodern power formations. It is an uneasy sense

and more interpretation toward a closure that can never take place and the “pleasure in pain” that constructing conspiracy theories produces is a response to contemporary “technoculture” and an age of ever-proliferating information, symbolized by the World Wide Web and what she calls “cyberia.”¹³⁸

Timothy Melley, examining American conspiracy thinking post-World War II, argues that conspiracy theorizing results from the attempt to come to terms with the social theorist’s familiar dilemma of agency versus structure.¹³⁹ What he terms “agency panic” emerges from the desire to preserve the fantasy of perfect individual power, freedom, and responsibility that constitutes an essential element of the American Dream, while at the same time taking account of the undeniable fact, made vivid in the popular culture of the 1950s and 1960s, that behavior can be manipulated and that the “self” is thus much more vulnerable than the fantasy suggests.¹⁴⁰ Conspiracy theory is thus attractive—and wholly American, one might add—in the way that it imagines the possibility of pure agency, setting up a clean battle between heroic individuals and sinister forces rather than recognizing the always compromised nature of agency in the midst of structural constraint.

As I have suggested, conspiracy theory is embedded in legal populism. But where conspiracy theory alone seems to offer only the rush and

of the links that have not yet been made, a sense expressed as conspiracy theory.

138. *Id.* (describing “cyberia”).

139. Melley, *supra* note 126, at 62.

140. *Id.* at 77–78. Melley writes:

[Conspiracy culture] stems from a paradoxical desire to conserve one of the central fantasies of liberalism—the notion that Eve Sedgwick has called “pure voluntariness,” an absolute freedom from social control. But in the postwar period this fantasy has come under considerable stress, and the postwar rhetoric of diminished individual agency has often registered this stress with a sense of shock or surprise. Texts from the last half of the twentieth century are replete with the frightening “discovery” that human behavior can be regulated by social messages and communications. What is striking about such texts is their concomitant assumption that, once revealed, social controls should be so ubiquitous, so effective, so *total*. It is this all-or-nothing conception of agency that in turn feeds the imaginative projection of the liberal self—with all its rationality, autonomy, and self-enclosure—onto the level of the social order, onto the very bureaucracies, information-processing systems, communication networks, and institutions that seemed so threatening in the first place. The most significant cultural function of these texts has been to sustain an increasingly embattled notion of individualism. Conspiracy theory, paranoia, and anxiety about human agency, in other words, are all part of the paradox in which a supposedly individualist culture conserves its individualism by continually imagining it to be in imminent peril.

anxiety of endlessly proliferating clues to an endlessly deferred truth, legal populism offers a sturdier resolution of the dramas of agency and power it presents. In this respect, legal populism strongly resembles survivalism. In his book *Dancing at Armageddon*, cultural anthropologist Richard Mitchell investigates the "troubles that might be coming to America, and the people looking forward to them."¹⁴¹ These troubles include "environmental catastrophe, economic collapse, seditious insurrection, widespread civil strife, internecine race war, thermonuclear holocaust, invasions from within, abroad, or above, and other calamities."¹⁴² Survivalism as an American cultural practice relies on a narrative Mitchell calls a "survival scenario." Mitchell writes, "Survival scenarios exhibit four essential criteria: they posit conditions that are *global*, *caused*, amenable to *technique*, and susceptible to *individual* solutions."¹⁴³ Survivalists tell stories about the troubles to come and identify the shadowy elites behind them, but they are even more interested, argues Mitchell, in developing the knowledge and skills necessary to weather these troubles when they arrive.¹⁴⁴ Buying firearms and learning how to use them, building bomb shelters, buying and hoarding freeze-dried food, and going off the power grid are all forms of survivalist social creativity.¹⁴⁵

In the narratives of legal populism, the troubles described are political not environmental, but they offer the same tantalizing promise of cultural creation. Legal populism, like survivalism more generally, rests on the creation of survival scenarios. The betrayal of the American people by the forces of secret societies; global finance; and national, possibly international, political elites is a crisis that affects the entire nation and eventually the world (at least if the New World Order is successfully put into place, as the elites hope). This betrayal was not divinely caused but came about

141. MITCHELL, *supra* note 4, at 3.

142. *Id.*

143. *Id.* Mitchell elaborates:

Survival scenarios build on plights that are *global*, not individuated. Survival problems are not merely circumstantial or random. There are logical, secular reasons for these problems. Survivalism is not action toward manifestations of inscrutable divine will or inexorable historical process. The problems confronted are *caused* by agents, agencies, and processes survivalists may discover and understand with appropriate effort and access to relevant information. Once understood, survival problems are amenable to *technique*—combinations of resources, rational procedures, and standardized practices potentially at hand. Finally, the solution to survival problems lies with individuals and small groups, not collectives. Survivalism is the exercise of *individual* skill and will, the expenditure of personal effort and possessions, not political activism, community organization, or a social movement.

Id. at 242 n.9.

144. *See id.* at 9–10.

145. *Id.*

for specific historical reasons, and much of legal populism involves tracing this history and pinpointing just where the corruption began. The theft of the true Constitution and its recovery are, moreover, luckily both amenable to technique and susceptible to individual and collective solutions.

Essential to both legal populism and survivalism generally is the possibility of agency through technical mastery. Survivalists take pride in their mastery over the physical and craft skills necessary to survive mass natural and/or political disaster. Legal populists seek to develop a different kind of mastery. By personal study, collective investigation, and (of course) purchasing the right guidebooks and products, ordinary people can learn to read and understand the law—one of the most complex and abstruse bodies of text in existence, and one with enormous power in modern society. Indeed, legal populism offers the possibility of mastery over the law, the ability to know what is true and what is false, not by relying on someone's authority but by wielding key texts that make internal analysis and critique possible. In this way legal populism, in its practical aspect, offers the promise of individual solutions, not (only) by learning to make one's own gas masks or to fire a gun, but by learning the law. Learning the law, in turn, creates political agency. The delegitimation of the United States government and the reestablishment of legitimate legal authority is only a land patent or tax return away.

Scholars of conspiracy frequently identify contemporary capitalism as the major social institution which conspiracy theorists and survivalists resist.¹⁴⁶ With respect to legal populism, however, politics is the key site of struggle. To the extent that legal populism holds out hope for political reconstruction and re-empowerment through the rediscovery of the true law and the restoration of the Sovereign Citizen's relationship to that law, its narratives can be understood as nostalgia for relations of power that have long been eclipsed by other, more modern forms of domination. Indeed, its narratives can be understood as nostalgia for relations of power that never actually existed.

Michel Foucault is often cited as saying that in contemporary society, institutional power appears in at least three different forms that form a mutually supporting triangle: sovereign or juridical power, disciplinary power, and governmentality.¹⁴⁷ Foucault suggests in a famous passage,

146. For Fenster, "the conspiracy narrative needs to be recognized for what it is: a utopian desire to understand and confront the contradictions and conflicts of contemporary capitalism." FENSTER, *supra* note 7, at 116. Mitchell similarly identifies consumer capitalism, or "Planet Microsoft," as survivalism's foe. MITCHELL, *supra* note 4, at 200.

147. See, e.g., ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 310–11 (1993). Foucault describes sovereign power as emanating from the will of a political subject, a sovereign. It is centralized and centralizing. In earlier times, of course, the sovereign was a king; in contemporary democratic theory the king has been deposed and the People speaking through their representatives are the sovereign. Nevertheless, Foucault argues, the idea of a central will effectuating its wishes remains at the center of contemporary theories of political sovereignty. See, e.g., Michel Foucault, *Two*

moreover, that the old discourse of sovereignty acquires a new and sinister usefulness in the modern era, because theories of sovereign power may obscure and give legitimacy to domination that takes place through disciplinary means.¹⁴⁸ From a Foucaultian perspective, legal populists might be understood as resisting both governmentality and the discipline of experts and seeking instead the restoration of S/sovereignty.

Their creativity in re-imagining citizenship as Sovereign Citizenship is reminiscent of Kirstie McClure's ruminations about the meaning of rights talk in the work of the eighteenth- and nineteenth-century political theorists Malthus, Owen, and Hazlitt.¹⁴⁹ McClure's concern is whether any political space exists outside Foucault's triangle, or whether resistance

Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 94 (Colin Gordon ed., 1980) ("I believe that the King remains the central personage in the whole legal edifice of the West."). Law appears in this theory as the command of the sovereign.

Foucault argues, however, that understanding the problem of domination only by reference to sovereign power renders our understanding of contemporary issues of justice inadequate, and he introduces two other forms that organized, institutional power may take: discipline and governmentality. With the emergence of Enlightenment science and new technologies concerning the human body, it became possible to regulate, control, and exploit people in ever more refined and sophisticated ways. Foucault describes this as "the development of power techniques oriented towards individuals and intended to rule them in a continuous and permanent way." Michel Foucault, *Politics and Reason*, in *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984*, at 60 (1988). When taken up by the state, this disciplinary power is described as "governmentality." As Alan Hunt elaborates:

Most significantly governmentality comes to focus on the economic life and well-being of "the nation," and the order, health, and prosperity (or lack of it) of its citizens. The "national economy" and "the population" become the key targets of calculated administration; one of its most important intellectual manifestations is the invention of political economy.

HUNT, *supra*.

148. Foucault, *Two Lectures*, *supra* note 147, at 105. As Foucault explains:

[T]he theory of sovereignty, and the organisation of a legal code centred upon it, have allowed a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights. The juridical systems—and this applies both to their codification and their theorisation—have enabled sovereignty to be democratised through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratisation of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.

Id.

149. See Kirstie M. McClure, *Taking Liberties in Foucault's Triangle: Sovereignty, Discipline, Governmentality, and the Subject of Rights*, in *IDENTITIES, POLITICS, AND RIGHTS* 149, 152 (Austin Sarat & Thomas R. Kearns eds., 1995).

to one form of power necessarily means the strengthening of the others.¹⁵⁰ She argues that these theorists use the language of rights but in ways that do not necessarily reinforce the triangle; they offer critiques of disciplinary and governmental power that do not simply reinscribe sovereignty.¹⁵¹

Like Malthus, Owen, and Hazlitt, legal populists exhibit a thoroughgoing skepticism about both discipline and governmentality. But the sovereignty they yearn for in its stead is not only a “permanent instrument of criticism of the monarchy” but also a critique of sovereign theory as Foucault saw it—the theory that permitted “a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the state, the exercise of his sovereign rights.”¹⁵² Instead, as McClure suggests, the legal populists attempt to be “‘subjects of rights’ that are ‘before the law’ in a[n] . . . equivocal sense—variously within and without the discourse of sovereignty, at once indebted and excessive to the forms of subjectivity and self-assertion made licit by legal guarantee.”¹⁵³ In their attempt to rewrite what it means to be a subject before the law—their attempt to radically recenter the authority of law not only in the Word but in the protestant body of the People that interprets it—their Sovereignty does not resemble Foucault’s sovereignty at all. For the legal populists have returned to the well of American revolutionary theory, identifying true law with the will of the Sovereign People and seeking to reconstitute that People as protection against the nightmare of bureaucratic domination represented for many by Social Security cards, drivers’ licenses, and above all the Internal Revenue Service, that *ur*-agency of governmentality.¹⁵⁴ In the place of modern disciplinary power, they assert their own power—typically based in protestant Christianity—to recreate and regulate family and social relations and construct the self.¹⁵⁵

Toward the end of his book, Mitchell poignantly locates the way in which contemporary consumer capitalism is able to bring even survivalism into its warm embrace. Mitchell visits a “Preparedness Expo” held at

150. *Id.*

151. *Id.*

152. *Id.* at 153.

153. *Id.* at 187.

154. Alan Hunt has argued that Foucault wrongly “expels” law from disciplinary and governmental power, identifying it narrowly with sovereign power. See Alan Hunt, *Foucault’s Expulsion of Law: Toward a Retrieval*, in *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW*, *supra* note 147, at 272. Legal populism makes a similar mistake.

155. Consider in this light, for instance, the link between legal populism and fathers’ rights, which also sometimes spills over into anti-Nineteenth Amendment polemics. See, e.g., Fathers’ Manifesto and Christian Party, *The 19th Amendment & the Totalitarian State*, at <http://christianparty.net/fedgov.htm> (last visited Apr. 4, 2005). The Christianity espoused on this site is clearly of the Protestant fundamentalist, patriarchal kind.

the Seattle Center, at which all manner of vendors are hawking various preposterous wares with the same implied message: "Buy this, buy that. Get rich. Go free. Stay young."¹⁵⁶ Mitchell argues that this spectacle is the beginning wedge of the incorporation of survivalism into its antithesis—what he describes as "Planet Microsoft."¹⁵⁷ Planet Microsoft offers culture as a commercialized, packaged experience, something you buy in order to express your identity (Microsoft might say "lifestyle") in your leisure time (when you are not submitting to the rigorous disciplines of global production on behalf of the corporations that sell you the experience of freedom). Survivalism, he argues, is in the most sympathetic account a means of resistance to Planet Microsoft.¹⁵⁸ It offers a world of impending, near-apocalyptic "troubles" in which survival is hard in order for individuals to experience the exhilaration of making, not buying, their culture from the ground up, creating everything from sources of potable water to constitutional history.

With respect to legal populism, the problems are not only the recuperative powers of consumer capitalism, but also the forms of expertise that Foucault identified as central to discipline and the state's ability to count, classify, and ultimately exercise surveillance over its citizens in the name of the public good. The flaws in legal populism are, accordingly, not only its vulnerability to Planet Microsoft, but also its romantic assumption that the mere assertion of Sovereignty can magically make one invulnerable

156. MITCHELL, *supra* note 4, at 186.

157. *Id.*

158. Mitchell's prose is at its most passionate (and purple) when he defends survivalists against Planet Microsoft:

Modernity trades complexity and challenge for efficiency and abundance, and most are satisfied enough with the exchange. Safe, synthetic, Expo-like titillations suffice. But not for survivalists. Weber and Simmel foresaw an omnipresent order of repressive formalism against which social actors must resist to retain their identities. But the metaphor of modernity's iron-caged existence is gone to rust. Modernity's most obvious manifestation is not tyrannic restraint but Planet Microsoft. No resistance in sight. The store is open, the TV on, all welcome. The shelves and channels are full of options. Pick this, try that, they come in all sizes, all colors too, something for every budget, every taste. Modernity gives us more: more things to own and consume, more facts to analyze, more ways to communicate. But it also leaves us less: aimless, rootless, formless, meaningless, groundless, useless. Among the vaporous vagaries of Planet Microsoft neither anomie nor alienation prevail. Ennui does. In this devalued world survivalists search and struggle *for* resistance not against it.

Survivalists don't want liberation from oppressive yokes or demystification of grand confusions. They want a place between a rock and a hard spot. A place of resistance. A firm, gritty antithesis against which to test their talents, measure their mettle, and gauge their gumption.

Id. at 200.

to Foucault's triangle and its nostalgic assumption that once upon a time, all Citizens really did have the same power as the King of England.

III. A PEDAGOGY OF THE MARGINALIZED

In the previous section, I developed an account of legal populism that, in line with recent scholarship on conspiracy theory, sympathized with its impulses of resistance toward various forms of domination in everyday American life. In this section, I develop a more skeptical account, one that focuses on the legal populist not as Everyman but as occupying a very particular niche in the American class and race hierarchy.

We may start again with Hofstadter, who argues that the paranoid style of politics emerges when struggles over "status" as opposed to "interests" consume the public sphere. The paranoid style, he suggests, is mobilized by "social conflicts that involve ultimate schemes of values and that bring fundamental fears and hatreds, rather than negotiable interests, into political action."¹⁵⁹ Hofstadter specifies the issues with which status politics has traditionally been concerned:

First is the problem of American identity, as it is complicated by our immigrant origins and the problems of ethnic minorities; second, the problem of social status, defined as the capacity of various groups and occupations to command personal deference in society; and, finally, the effort of Americans of diverse cultural and moral persuasions to win reassurance that their values are respected by the community at large.¹⁶⁰

Hofstadter's view that interest politics represents the norm and status politics the exception is, of course, subject to debate. His link between status politics and the "paranoid style," however, has been reaffirmed by many others. Peter Knight, for example, associates conspiracy theory with an American nationalism that relies on narratives of ascriptive identity, specifically narratives of White supremacy.¹⁶¹ The question of who is genuinely American and who is not—a question that has played out in the theater of race since D.W. Griffiths' "Birth of a Nation"—lies at the center of both Patriot ideology and the literature of disaster on which survivalist fantasies thrive. Take, for example, one of the seminal texts in the literature of disaster and survivalism: *The Turner Diaries* by Andrew Macdonald (a pseudonym for William Pierce, leader of the neo-Nazi

159. HOFSTADTER, *supra* note 107, at 39.

160. *Id.* at 87.

161. CONSPIRACY NATION, *supra* note 107, at 4 ("From the first encounters with the land and the people of the New World, the conspiratorial imagination of sinister forces has helped to constitute a sense of American national unity through a notion of racial identity.").

National Alliance). *The Turner Diaries* describes the activities of a racist, anti-Semitic underground movement called "The Order," which, through a series of violent acts during the 1990s, gains power in the United States and eventually the world.¹⁶²

Falling at the most overtly racist end of a spectrum of American disaster fiction,¹⁶³ *The Turner Diaries* and its author have figured in a number of real-life rebellions against the United States government in the name of a new political-legal order. In the mid-1980s, for example, Robert J. Mathews founded an Order of his own, composed of several men who committed a string of robberies and bombings and finally murdered the talk show host Alan Berg.¹⁶⁴ After informants passed information about

162. See ANDREW MACDONALD, *THE TURNER DIARIES: A NOVEL* (1996). In the novel, The Order's actions are prompted by the legal actions of ZOG, the Zionist Occupation Government, under whose regime a series of catastrophic social events take place:

The "Cohen Act" leads to the confiscation of all private firearms. The Supreme Court rules anti-rape laws unconstitutional because they imply differences between the sexes. This results in waves of rapes, particularly of [W]hite women by [B]lack men. Banks are required to provide low-interest loans to mixed-race couples buying property in [W]hite neighborhoods. Dystopian America decomposes into a "cesspool of mongrels and [B]lacks and Jews and sick, twisted White Liberals."

Id. at 162–63, quoted in MITCHELL, *supra* note 4, at 142–43.

Then, the Order strikes back. Among the violent events necessary for the Order to accomplish its cleansing of America are the bombing of FBI headquarters in Washington, a mortar attack on the Capitol, the destruction of public utilities and communication systems, and the liberation of the nation after atomic bombs have been dropped on several East Coast cities.

163. See MIKE DAVIS, *ECOLOGY OF FEAR: LOS ANGELES AND THE IMAGINATION OF DISASTER* 286–87 (1998). Davis, examining the destruction of Los Angeles in countless novels and films since the late nineteenth century, argues that American disaster fiction originally emerged as fantasies of racial anxiety:

Overwhelmingly a literature written for and consumed by the urban middle classes, it depicted the nightmare side—chaos and violence as the necessary expression of "survival of the fittest"—of the crude social Darwinism that was the pitiless ethos of the age of the robber barons. In such stories, growing fears of violent social revolution and of the "rising tide of color" accompanied increasing anxieties over the inevitability of future world wars between the imperialist powers. New means of mass destruction—microbes, radioactivity, poison gases, and flying machines—conquered the pulp press years, sometimes decades, before they were added to the arsenals of the major powers. At the same time, the purported discovery of "canals" on Mars by several eminent astronomers gave plausibility to fears that the earth was menaced by malevolent extraterrestrials. The result was a proliferation of doom fiction that established virtually all the conventions of the genre still in use today.

Id.

164. See NEIWERT, *supra* note 17, at 57–58.

Mathews' activities and whereabouts to federal authorities, Mathews and three companions were isolated on Whidbey Island, north of Seattle in Puget Sound, and killed at the end of a thirty-six hour gun battle with the FBI in December 1984.¹⁶⁵ According to Morris Dees, founder of the Southern Poverty Law Center, William Pierce, author of the novel that apparently inspired Mathews to action, said this about Mathews' revolutionary career:

Bob gave us a very important symbol. He did what was morally right. He may have been a bit premature . . . and he may have made many tactical errors. But he reminded us we are not engaged in a debate between gentlemen. . . . Bob elevated . . . our struggle. He took us from name calling to blood-letting. He cleared the air for all of us. In the long run that will be helpful.¹⁶⁶

Mitchell notes that wreaths were laid at the gate where Mathews died.

Thus fantasies of apocalyptic violence occasionally erupt into reality. Not only Mathews but also other members of self-styled Patriot groups killed by the United States government have seen their deaths celebrated as martyrdom. The shooting by the FBI of Randy Weaver and his family in Ruby Ridge in 1992, and of David Koresh and his flock in Waco in 1993, for example, confirmed the importance of the cause to sympathetic onlookers and made clear to them that even greater violence would be necessary to destroy ZOG.

Two years to the day after the Waco assault—at 9:01 a.m. on April 19, 1995—a rental truck packed with fertilizer mixed with diesel fuel exploded outside the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.¹⁶⁷ The blast killed 168 people, including nineteen children in an on-site day care center. Until the destruction of the World Trade Center twin towers on September 11, 2001, the “Oklahoma City Bombing” was the deadliest terrorist attack in United States history. About an hour and a half after the explosion, Timothy McVeigh was arrested for not having a license tag and for being in possession of a weapon.¹⁶⁸ He was wearing a t-shirt which had on its front a picture of Abraham Lincoln and

165. *Id.* at 59.

166. MITCHELL, *supra* note 4, at 145 (quoting MORRIS DEES WITH JAMES CORCORAN, *GATHERING STORM: AMERICA'S MILITIA THREAT* 144–45 (1996)).

167. *THE TREE OF LIBERTY: A DOCUMENTARY HISTORY OF REBELLION AND POLITICAL CRIME IN AMERICA; A LEGAL, HISTORICAL, SOCIAL, AND PSYCHOLOGICAL INQUIRY INTO REBELLIONS AND POLITICAL CRIMES, THEIR CAUSES, SUPPRESSION, AND PUNISHMENT IN THE UNITED STATES* 776 (Nicholas N. Kittrie & Eldon D. Wedlock, Jr., eds., rev. ed. 1998) [hereinafter *THE TREE OF LIBERTY*].

168. Complaint, *United States v. McVeigh* (W.D. Okla. 1995) (No. M-95-98-H), reprinted in *THE TREE OF LIBERTY*, *supra* note 167, at 777.

the words of Lincoln's assassin, John Wilkes Booth: "*Sic Semper Tyrannis*."¹⁶⁹ On the back of the shirt was the famous quote from Thomas Jefferson: "The tree of liberty must be refreshed from time to time with the blood of tyrants."¹⁷⁰

McVeigh, an Oklahoma military veteran, although not a member of any organization, reportedly held a number of right-wing views and "was particularly agitated about the conduct of the federal government in Waco. . . . After visiting the site, McVeigh expressed extreme anger at the federal government and advised that the Government should never had done what it did."¹⁷¹ McVeigh was convicted on June 2, 1997, under federal law for the murder of eight federal employees who died in the explosion.¹⁷² The jury recommended that McVeigh receive the death penalty.¹⁷³ The Supreme Court upheld the murder convictions, and McVeigh was executed on June 11, 2001, by lethal injection at the United States federal prison in Terre Haute, Indiana.¹⁷⁴ It was the first execution of a convicted criminal by the federal government of the United States since the execution of Victor Feguer in Iowa on March 15, 1963.¹⁷⁵

The fertilizer-diesel fuel mixture used as the incendiary device in the Oklahoma City bombing closely resembled a similar mixture described in some detail in *The Turner Diaries*.¹⁷⁶ Again, Pierce offered his post-hoc commentary, although with more caution and fewer complimentary words than he had offered about Mathews. Pierce acknowledged that "someone may have read the book," which he termed a possible "inspiration," and predicted that there would be further acts like the attack, but he opined that what happened in Oklahoma made little political sense because it was not sustained.¹⁷⁷ "One day," Pierce insisted, "there will be real, organized terrorism—aimed at bringing down the government."¹⁷⁸

It is wrong, therefore, to read legal populism only as the voice of Everyman struggling against the forces of contemporary domination. This

169. THE TREE OF LIBERTY, *supra* note 167, at 776.

170. *Id.*

171. Complaint, *McVeigh* (No. M-95-98-H).

172. See *Timothy McVeigh*, Wikipedia, at http://en.wikipedia.org/wiki/Timothy_McVeigh (last visited Apr. 5, 2005).

173. See *Newshour with Jim Lehrer* (PBS television broadcast, June 13, 1997), available at http://www.pbs.org/newshour/bb/law/june97/mcveigh_6-13.html (last visited Mar. 31, 2005).

174. See *Timothy McVeigh*, *supra* note 172.

175. *Id.*

176. See Howard Pankratz, *Writer Predicts More Blasts; 'Turner Diaries' Author Denies Okla. Bomb Link*, DENVER POST, May 5, 1996, at A-29.

177. See The Nizkor Project, *Paranoia as Patriotism: Far-Right Influences on the Militia Movement: William L. Pierce and The Turner Diaries*, at <http://www.nizkor.org/hweb/orgs/american/adl/paranoia-as-patriotism/william-pierce.html> (last visited Apr. 3, 2005).

178. *Id.*

voice of resistance adopts a very particular subject position: White, radical, and Christian.¹⁷⁹ Both its radical tendencies and its openly avowed Whiteness apparently set it apart from the American political mainstream. In this section, however, I will argue that the political attitudes of legal populism are not as far from those of political elites as it might first appear. In its anti-government energies, its claim to an originalist understanding of the canonical legal texts and political traditions of the United States, and its felt sense of betrayal and disenfranchisement, legal populism is allied closely with many powerful voices, and in this way serves as a commentary on the political mainstream rather than as its antithesis.

A. *The Attack on Government*

Legal populism's virulent hatred of the federal government, perhaps the movement's most obviously radical feature, is nevertheless in sympathy with political-legal agendas being pursued by right-wing elites. *Economist* and *New York Times* columnist Paul Krugman, for instance, has suggested that the aim of the Bush II administration is to drive the federal government as we know it out of existence, and with it all traces of the Great Society welfare state.¹⁸⁰ With respect to law, Frank Valdes argues that for many right-wing activists, all constitutional and administrative law since the New Deal is suspect; the aim of what the right repeatedly refers to as the "culture wars" is to accomplish "a kind of 'cultural cleansing' that in the course of events will leave the purified society looking and feeling like the 1780s as much as politically and physically possible."¹⁸¹

179. Although I do not explore the links between disaster motifs in fundamentalist Christianity and in legal populism here, the link certainly exists. See Koniak, *supra* note 5, at 65. It is interesting to note in this regard that another entry in the survivalist literature has been penned by Christian Coalition founder Pat Robertson. In Robertson's novel, *THE END OF THE AGE*, "God himself decides to flush Los Angeles down the toilet with a 'giant meteor' and a mile-high tsunami." DAVIS, *supra* note 163, at 286-87 (discussing PAT ROBERTSON, *THE END OF THE AGE* (1995)). The Christian interest in disaster stems from the millenarian strain within fundamentalist Protestantism. See PAUL BOYER, *WHEN TIME SHALL BE NO MORE: PROPHECY BELIEF IN MODERN AMERICAN CULTURE* 259 (1995). The best-selling *LEFT BEHIND* series of novels written by Tim LaHaye and Jerry B. Jenkins, for example, is inspired by the idea that the world will end in a cataclysm, after which Jesus will return to earth. See, e.g., TIM F. LAHAYE & JERRY B. JENKINS, *LEFT BEHIND: A NOVEL OF THE EARTH'S LAST DAYS* (*LEFT BEHIND* No. 1) (1996).

180. PAUL KRUGMAN, *THE GREAT UNRAVELING: LOSING OUR WAY IN THE NEW CENTURY* 6 (2003).

181. See Francisco Valdes, *Culture, "Kulturkampf," and Beyond: The Anti-discrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 271, 284 (Austin Sarat ed., 2004).

The redemptive projects of both professional right-wing and legal populists frequently focus on the New Deal, a key moment in the emergence of the modern administrative state and a moment that liberals celebrate and conservatives mourn. Cass Sunstein, for example, praises "the Revolution of 1937" (1937 being the year in which the

Similarly, the legal populists' love for the common law can be seen as in solidarity with the right-wing elite's jurisprudential efforts to revive the private law jurisprudence of the nineteenth century. Critical legal scholar Jay Feinman argues that property, contract, and tort law are undergoing a quiet "classical revival," in which the central jurisprudential developments of the twentieth century are being rolled back.¹⁸² Jay Feinman describes the nineteenth-century vision that is being revived thus:

The substantive vision of classical legal thought is a world of independent individuals, each of whom acts within a broad sphere of legal autonomy to pursue his own self-interest. The role of government is precisely defined and narrowly circumscribed. The legislature has limited authority to regulate narrowly and traditionally defined harmful activities. The

Supreme Court decided *West Coast Hotel v. Parrish*, upholding a statute providing a minimum wage for women workers) that, in his view, marked the judicial "vindication" of the New Deal. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 51 (1993).

Sunstein's colleague at the University of Chicago Law School, Richard Epstein, vigorously disagrees. According to Epstein, nearly all of the modern administrative state and its jurisprudence, including environmental regulation and anti-discrimination law, is unconstitutional because it involves "takings" of private property without compensation and infringes on personal liberty. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

Michael Sandel locates in the New Deal, and particularly in the advent of Keynesian fiscal policy, the seeds of the liberal "procedural republic":

[Keynesian economics] displayed two features of the liberalism that defines the procedural republic. First, it offered policymakers and elected officials a way to "bracket," or set aside, controversial conceptions of the good life, and so promised a consensus that programs for structural reform could not offer. Second, by abandoning the ambition of inculcating certain habits and dispositions, it denied government a stake in the moral character of its citizens and affirmed the notion of persons as free and independent selves, capable of choice.

MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 262 (1996). This move to liberalism is precisely what legal populists, along with social conservatives, mourn. According to Eugene Schroder, a Patriot:

In 1933, President Roosevelt took office and proclaimed that a state of emergency existed in the nation, the Great Depression. . . . Roosevelt, backed by a subservient Congress, proceeded to suspend the Constitution to deal with this so-called emergency, a patently unlawful act. The unlawfully declared state of emergency has never been rescinded. . . . The federal government has thus been operating unlawfully, i.e., outside the shackles of the Constitution, since 1933.

See Koniak, *supra* note 5, at 79 (citing EUGENE SCHRODER WITH MICK NELLIS, *CONSTITUTION: FACT OR FICTION* (1995)).

182. Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 *SEATTLE U. L. REV.* 1 (2004).

courts, applying a complete, coherent, and formal body of law, police the boundaries of legislative authority and define the ground rules for interaction among private individuals, namely, the rules of contract, tort, and property.¹⁸³

Like Valdes, Feinman argues that the classical revival is driven by right-wing ideology.¹⁸⁴ For Feinman, however, the transformation of private law is driven by a vision of laissez-faire capitalism:

The master narrative of the vision of market centrality is Reaganesque: Once upon a time there was a golden age when a man (always a man) could stand on his own two feet, his rights inviolate. Individual liberty, personal responsibility, and economic opportunity were the foundations of American life. Society was organized and controlled by two institutions: the market and the state. The market was primary; through it, people could maximize their potential, realize their dreams, and rise or fall on their own merits. The state was subordinate; beyond its minimal functions of guaranteeing physical security, providing public goods, and protecting individual rights, government offered only the possibility of unwise and pernicious interference in the social order created by the market.¹⁸⁵

B. *The Return of Formalism*

The vision of a dramatically shrunken public sphere and a correspondingly robust private sphere is not the only thing legal populists and right-wing elites share. In their commitment to originalist readings of canonical American legal texts, the legal populists are also not as marginal as they might initially seem. As Thomas Grey observes, a “new formalism” has recently emerged among legal scholars and jurists, related to the current ascendance of right-wing elites. Grey defines the new formalism as consisting of four tendencies: “a preference for rules over standards, textualism (emphasis on plain meaning in legal interpretation), originalism (emphasis on original understanding), and conceptualism (emphasis on the importance of principle and coherence in doctrine and adjudication).”¹⁸⁶

183. *Id.* at 4.

184. *Id.* at 56 (“The unmaking of the common law is consistent with the contemporary campaign by political conservatives and business interests to reshape American government, law, and society.”).

185. *Id.* at 56–57.

186. SUNSTEIN, *supra* note 181, at 51; Thomas C. Grey, *The New Formalism* 2 (Apr. 2002) (unpublished manuscript presented at Boalt Hall Legal and Political Theory

The most famous proponent of the new formalism is Justice Antonin Scalia of the United States Supreme Court.¹⁸⁷ Scalia's written decisions, speeches, and essays are characterized by a willingness to overturn long-settled precedent on the basis of historical evidence about the original or "plain meaning" of texts. Scalia's textual originalism is taken to its limit by legal populists, for whom most of the official law since the original Constitution is illegitimate. Though they differ greatly in degree, the formalist textual method and the legal populist textual method share what Mitchell and Levin, drawing on the work of Sanford Levinson, describe as a "protestant" approach to interpretation:

[T]he "protestant" tradition, states that the "source of [the] doctrine . . . is the constitutional text alone." The authoritative interpretation is "based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation." The second position, labeled the "catholic" tradition, holds that constitutional interpretation should be based on "the Constitution plus unwritten tradition." Under the "catholic" position, "the Supreme Court is the dispenser of ultimate interpretation." Common-law court theory insists on the authority of individual interpretation of the constitutional text, but is distinctive in how it approaches the authority of the original text and the use of supplementary texts. While common-law theorists draw upon a number of other documents beyond the Constitution, including the Magna Carta, Articles of Confederation, Federalist Papers, Northwest Ordinance, Virginia and Kentucky Resolutions,

Workshop, on file with author). Cass Sunstein calls the formalists "legal authoritarians" and describes their jurisprudential temper in this way:

[Legal authoritarianism] sees laws, constitutional or otherwise, as deals among self-interested actors. It is usually skeptical of all efforts to reason about social and economic problems. It disparages such efforts as a mere mask for self-interest or as incapable of resolving social and political disputes, which it treats as based on premises too fixed and incommensurable to be a subject of deliberation. . . . Resolution is possible only by warfare or compromise among self-interested bargainers. . . .

Disagreements about ethical and political problems are not an occasion for shared reasoning but instead proof of its impossibility. "Value judgments," understood as prejudices, are the consequence. If we depart from the enterprise of tracing legal outcomes directly to a legitimating decision, usually an exercise of force, we will fall into the chaos of evaluation, something on which there are deep cleavages in society. . . . No judge can claim the ability or the warrant to say anything about those cleavages.

SUNSTEIN, *supra* note 181, at 51.

187. Grey notes that although Robert Bork calls himself an originalist and a textualist but not a formalist, he can be placed in this company as well. Grey, *supra* note 186, at 2; see also ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

English common law and Black's Law Dictionary, they deliberately disregard a large part of the American constitutional and legal tradition, particularly the Fourteenth Amendment, court rulings from 1937 to the present, and congressional legislation from 1933 to the present. Common-law theory is thus a modified, but relatively pure form of "protestant" interpretation, in which theorists use those texts which pass into their canon in a literalist fashion, and discard all texts which do not meet their ideological standards as either nonexistent or as evidence of the illegitimacy of the government of that time.¹⁸⁸

C. *Marginalization and Melancholia*

Finally, legal populism's rhetoric of political disenfranchisement, dispossession, and resentment can also be understood as a property held in common with the new right and with neoconservatism. As Valdes argues, contemporary right-wing elites see themselves engaged in a *Kulturkampf*, which crystallized in the 1980s in the "culture wars" concerning the teaching of the humanities canon in American universities and has since focused on the protection of so-called "family values."¹⁸⁹ Both the culture wars and family values campaigns, like the "angry White male" anti-affirmative action backlash of the 1980s, have been characterized by the conviction that "traditional" (read "White") Americans are today hemmed in and threatened by politicized identity politics to the extent that they, not traditionally subordinated groups, have become the truly dispossessed. This sense of disenfranchisement is vividly echoed in the literature of legal populism.

By no objective political or economic measure can those who speak in the voice of the "angry White male" or (in the shorthand of the November 2004 presidential election) "the red states" be described as dispossessed or subordinated. Yet rhetorically speaking, the "transparent White American" has certainly been unsettled—forced to publicly justify himself by insurgent identity groups who have successfully made Whiteness visible and questioned the unthinking identification of White supremacy and the American nation. This transformation is indeed symbolically threatening—even if the material distribution of power and wealth has not changed. The free-floating anxiety represented by the conspiracy narratives of legal populism seem to draw at times on the energies of political resentment that similarly fuel the current attack on same-sex marriage and fueled earlier attacks on affirmative action and feminism. In this context, legal populism's stories of the theft of law and the possibility of escape from the governmental grid, the founding of new American

188. MITCHELL, *supra* note 4.

189. See Valdes, *supra* note 181, at 284.

republics, and the claiming of Sovereign Citizenship are creative and romantic metaphors to express a sense of betrayal and disenfranchisement, emotions that in turn represent a real (though not material) political loss.¹⁹⁰

From this perspective, even legal populism's peculiar appeals to Sovereign Citizenship are more mainstream than they might first appear. The un-self-conscious pro-Whiteness in these narratives, though jarring in contemporary political discourse, was once unproblematic. In his famous dissent in *Plessy v. Ferguson*, Justice Harlan wrote:

The [W]hite race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.¹⁹¹

It is the loss of this heritage and this liberty that legal populism longs for, in the name of a Sovereign Citizenry that contemporary governance has betrayed. As David Williams observes:

The overt racists . . . have adopted an incisive strategy for constituting a people in late twentieth-century America: the militia writers solve the problem of diversity among the citizens by defining the citizenry to include only those like them. That strategy has a certain historical resonance: eighteenth century civic republicanism could posit the existence of a common good because it restrictively defined the citizenry. And if it were normatively defensible, that strategy might still work; [W]hite conservative Christians, even today, might have enough commonality to constitute a people and to possess a common good.¹⁹²

Indeed, some observers argue that White, conservative Christians in the Bush II Administration are preparing for just such a victory of homogeneity, represented by the "Rapture" they believe to be imminent.¹⁹³

Despite the many affinities between legal populism and some right-wing elite agendas, however, legal populism ultimately puts its faith in self-help rather than representative government. This suggests to me a fundamental difference between the two movements: the constituency to which legal populism speaks is not a constituency which fears the loss of its privileges; it is a constituency which has never experienced those

190. See BENNETT M. BERGER, AN ESSAY ON CULTURE: SYMBOLIC STRUCTURE AND SOCIAL STRUCTURE 34–35 (1995).

191. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

192. Williams, *The Militia Movement*, *supra* note 8, at 930.

193. Bill Moyers, *Welcome to Doomsday*, 52 N.Y. REV. BOOKS 5 (Mar. 24, 2005).

privileges except by way of nostalgia. Even its open appeal to Whiteness comes less from anti-Black animus than from an un-self-conscious nostalgia for a pre-Reconstruction world: a nation of citizens that would hold property in land and in a common heritage such that they would have no need for “equality,” only liberty.

Howard Winant’s taxonomy of racial projects in contemporary American politics distinguishes five such projects: “far right, new right, neoconservative, neoliberal, and new abolitionist.”¹⁹⁴ Within the far right, Winant identifies two ideological strands, which he names “fascist” and “neofascist”:

On the far right the cornerstone of [W]hite identity is belief in an ineluctable, unalterable, racialized difference between [W]hites and non[W]hites. . . .

Explicitly fascist groups on the far right openly admire Nazi race-thinking, fantasize about racial genocide, and dream of establishing an all-[W]hite North American nation, or, failing that, seceding from the United States to establish such a nation, possibly in the Northwest. . . . [Winant places Pierce and Christian Identity in this category.]

“Neofascism’s” response has been political mobilization on racial grounds: if [B]lacks have their organizations and movements, why shouldn’t [W]hites? The various activities of David Duke exemplify the new trend: his electoral campaigns, his attempts at student organization (for example his effort to create [W]hite student unions on college campuses), and his emblematic National Association for the Advancement of [W]hite People.¹⁹⁵

194. Howard Winant, *Behind Blue Eyes: Whiteness and Contemporary U.S. Racial Politics*, in *OFF WHITE: READINGS ON RACE, POWER, AND SOCIETY* 40, 43 (Michelle Fine et al. eds., 1997).

195. *Id.* at 43. James Corcoran describes some of this political activity further:

In March of 1986, two Lyndon LaRouche supporters [noted White supremacists] won in the Democratic primary race in Illinois. The victories forced Democratic gubernatorial candidate Adlai E. Stevenson III to form the Solidarity party and run candidates against the LaRouche supporters in the general election. . . .

Then, in February of 1989, David Duke, former Imperial Wizard of the Knights of the Ku Klux Klan, ran as a Republican and won a seat in the Louisiana state senate. Duke claimed that he was no longer a [W]hite supremacist. Instead, said Duke, he was a [W]hite civil rights activist.

David Duke, in *CONTEMPORARY VOICES OF WHITE NATIONALISM IN AMERICA* 166, 167 (Carol M. Swain & Russ Nieli eds., 2003) (relating an interview with Duke during which he

Winant distinguishes both these elements of the far right from what he terms the "new right," which was born with the Republican "Southern Strategy" and its successful capture of White backlash against the Civil Rights Movement, and which prefers not to openly claim a White identity.¹⁹⁶

If explicit references to White pride distinguish the far right from the new right, then legal populist narratives like that of Sovereign Citizenship would seem to constitute a far right racial project. But, in contrast with the anti-Black resentment mobilized by the Duke campaign, Sovereign Citizenship seems preoccupied with Whiteness. The drama of equality versus inequality—central to both the rhetoric of the "new social movements" of the 1960s–1970s and Winant's neofascism—is supplanted entirely in legal populism by the rhetoric of liberty versus slavery: a rhetoric in which Whites, not people of color, occupy the position of the slaves longing for freedom. From this perspective, the language of Sovereign Citizenship is an analogue of the nineteenth-century language of "wage slavery." Historian David Roediger argues that when nineteenth-century White factory workers described their own conditions as slavery, they took up a rhetorical stance that allied them with Black slaves yet erased the crucial differences between wage labor and slave labor, substituting their own struggle for the abolitionist struggle.¹⁹⁷ The rhetoric of Sovereign Citizenship similarly substitutes a narrative of White marginalization for non-White subordination.

It is important, I think, to distinguish this nostalgic racism from the rhetoric of victimhood and Nietzschean *ressentiment* that political theorists Wendy Brown and William Connolly identify as characteristic of modern

described his organization, the National Organization for European-American Rights ("NOFEAR"), as a "civil rights group").

196. Howard Winant writes:

Like the far right, the new right seeks to present itself as the tribune of disenfranchised [W]hites. But the new right is distinguished—if not always sharply—from the far right by several factors. First, rather than espouse racism and [W]hite supremacy, it prefers to present these themes subtextually: the familiar "code-word" phenomenon.

Winant, *supra* note 194, at 44. Winant's reference to the "code word" phenomenon touches on the fact that in contemporary times, White resentment against people of color is often muted, expressed through code issues like welfare, crime, and affirmative action. For an exploration of the Republican "Southern Strategy" from this perspective, see, for example, THOMAS BYRNE EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991).

197. See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 55–60 (1991) (exploring the use of slavery rhetoric by White wage laborers, in which they both identified with and came to displace slaves themselves, eventually experiencing their identities as precisely not-Black).

American politics.¹⁹⁸ Some right-wing racial projects, such as David Duke's Association for the Advancement of White People and the heavily racialized backlashes against affirmative action and "welfare as we know it," do carry with them an emotional valence of seething resentment, and some Whites do seem obsessed with alternately mimicking and denouncing the racist demagogues they believe to be leading the identity movements of subordinated people.¹⁹⁹ But the main body of legal populist literature saves its hatred for the government, not misbegotten Fourteenth Amendment citizens. Whereas the far right, new right, and neoconservatives obsess about the wrongful development of "special rights" for others, the legal populists concentrate on their own, very personal loss of citizenship, a citizenship that they, in fact, have never experienced. Their racism is aversive, pro-White, rather than anti-Black.²⁰⁰

Legal populism is a practice of those who are *marginalized* but not *subordinated*. It is primarily composed by and for people who are symbolically on the side of power yet outside the political and economic elite, a population that feels cheated out of a birthright it believes it has been promised.²⁰¹ It thus stages a direct claim to the loyalty of the American

198. See WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 60–61 (1995) (distinguishing Whiteness as a "reactive" identity as opposed to "middle-class" identity, which she views as the ground for subordinated claims of injury and identity). In a similar vein, political theorist William Connolly posits that a free-floating resentment that is easily turned against the disenfranchised characterizes contemporary politics. CONNOLLY, *supra* note 128, at 23.

199. For good examples of this kind of rhetoric, see the interviews in CONTEMPORARY VOICES OF WHITE NATIONALISM IN AMERICA, *supra* note 195.

200. See SAMUEL L. GAERTNER ET AL., *Does White Racism Necessarily Mean Antiblackness? Aversive Racism and Prowhiteness*, in OFF WHITE: READINGS ON RACE, POWER, AND SOCIETY, *supra* note 194, at 167.

201. Roxanne A. Dunbar speaks eloquently of this group:

Poor, rural [W]hites (the original [W]hite trash) have lived by dreams, at least the ones I come from did and, in a perverse way, still do, albeit reacting to "broken dreams." (Someone or some force has hijacked their country and now controls the government—Jews through the supposed "Zionist Occupation Government," the Federal Reserve, Communists, Liberals, the United Nations, Gays and Feminists, Satan, etc.) Certainly it can be argued that all the immigrants from all over the world who have been drawn by the "American dream" from then to now believed and continue to believe in "it"—the American dream. But there is a distinct difference between the post industrial revolution, mostly urban immigrants who created the concept of "a nation of immigrants," and the original rural frontier settlers. The latter were landless or land-poor peasants given "free" (stolen) land on the edge of the colonies (later the states of the U.S. Republic). The price they had to pay for land and potential wealth was blood—to drive out the indigenous farmers, the Indians. They lived in terror, isolated, surrounded. . . .

Those who didn't make it, and even some of those who did, moved on, shed blood opening new lands, usually lost again, and moved on again. Foot soldiers of empire I call them/us. They unleashed rivers of blood, torrents of blood, unimaginable violence, murder, slaughter, which we refuse to ac-

nation that cannot be made by non-White identities except through indirect, tortuous claims for "equality."²⁰²

Whereas right-wing elites have political and economic power, and some "red state" voters have religious faith, legal populists have only their own fantasies of agency to fall back on. Conspiracy theorizing, the apocalyptic imagination, and legal populism compose, I think, a kind of pedagogy for the marginalized: those who are symbolically on the side of power yet materially disenfranchised, a population that has historically received "the wages of Whiteness" and continues to seek what it believes it has been promised even as that dream slides further into obscurity.

CONCLUSION

In 1996, when I first read the report in the *San Francisco Chronicle* about California state senator Donald Rogers and his attempt to claim his "[W]hite man's citizenship," my shock was, in part, one of recognition. To his dying day, my paternal grandfather, a committed "race man," believed that the American moon landing was a hoax perpetuated in order to cow the Black man into submission. I was also familiar, from my own friends and family, with the various conspiracy theories that run through African American communities.²⁰³ As a critical race theorist, I was used to understanding these theories as a form of populist resistance to racial

knowledge and confront but which cannot be dislodged from our collective memory. In the process of that struggle the trekker, the frontier settler, imagined himself and his progeny transformed into *the* native Americans, the true Americans. *Blood-right*, it could be called.

Roxanne A. Dunbar, *Bloody Footprints: Reflections on Growing up Poor White*, in *WHITE TRASH: RACE AND CLASS IN AMERICA* 75–76 (Matt Wray & Annalee Newitz eds., 1997).

202. See, e.g., *The Nation of Moorish Americans: A Social Service Agency to Reclaim Your Nationality*, at <http://www.tnoma.org/bey.htm> (last visited Apr. 13, 2004). The legal populist projects I have run into that are self-consciously non-White in their subject position do not take the original United States Constitution as their starting point, but rather begin with international human rights language and the international norm of sovereignty for peoples. The website of Minister Louis Bey, for example, founder of The Nation of Moorish Americans, declares:

The Nation of Moorish-Americans calls all free Negroes of the African race to reclaim their nationality. Free Negroes of the African race are not technically "citizens" within the meaning of the Constitution of the United States.

Since 1776, Negroes of the African race, whose ancestors were brought to this country and sold as slaves, have been existing in America without their legitimate identity. Brought to America as slaves and as property to be bought and sold, the U.S. Constitution and the U.S. Supreme Court have never changed that definition of the Negro.

Id.

203. See generally PATRICIA A. TURNER, *I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN AMERICAN CULTURE* (1993).

domination. How unsettling, then, to run across a wellspring of conspiracy theorizing colored White, taking the heart of American political culture as its starting point.

What links the marginalized but not subordinated with the marginalized and subordinated with whom critical race scholars are traditionally concerned is the work that Norman Spaulding calls “the Constitution as countermonument.”²⁰⁴ As Spaulding writes, “The Reconstruction Amendments . . . mark injustices that cannot be disowned, injustices opaquely but deliberately inscribed in the founding instrument itself, injustices that are unavoidably American—inseparable from the national body.”²⁰⁵ Spaulding is concerned with how, in contemporary times, we can keep alive the anti-racist tradition memorialized in the Reconstruction Amendments, as against a contemporary jurisprudence of federalism that seems to have contracted amnesia with respect to this history of struggle. The legal populists are engaged in a similar struggle to keep visible the rupture in the constitutional text: the rupture not only between the old and new Constitutions, but also between Whiteness and Americanness.

What keeps these two projects of counter-memory apart is their political valence—progressive versus reactionary—as well as their constituencies—subordinated versus marginalized. The anti-racists look forward in time to an imagined multicultural future; the populists look backward to an imagined monocultural past. The anti-racists are politically, economically, and culturally stigmatized by their identification with traditionally despised groups; the populists are not. But politics and race are entwined for legal populism as for critical race theory. Whiteness and Americanness—and their complex entwinement—are simultaneously the marks of legal populism’s marginalization and its centrality to American political culture, and the marks of critical race theory’s disenfranchisement and its centrality to that same culture. Critical race theory and legal populism agree, then, if for very different reasons, on the legal and political significance of race. And although the marginalized and the subordinated’s visions of America are incompatible, the marginalized and the subordinated share a commitment to the Constitution as counter-memory that the liberal center has often worked to avoid. If anything links my grandfather to Senator Rogers, it is their mutual recognition that the past is never really past, and that the past contains other Americas waiting to be born.

204. Norman Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

205. *Id.* at 2000.