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POPULIST PROPERTY LAW

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Populist Property Law

ANNA DI ROBILANT

Property scholars think of property law as consisting of a small number of highly technical forms created a long time ago by “experts,” i.e., legislatures and courts, which are hardly accessible to non-lawyers. This Article explores a new idea: the possibility that ordinary people, with little or no legal training, can become active participants in the creation of property law, directly intervening in the development of new property forms. The Article tells the story of two nineteenth-century American social movements that represented the “little guys”—workers and farmers—who used their “folk legal” imagination to develop new property forms that would solve their most pressing needs by improving access to key economic resources such as land or credit. The story of “populist property law” deepens our understanding of property law in three important ways. First, it gives us a new appreciation of how property law is produced and organized, as well as a new perspective on the standard narrative of the historical development of property law in America. Second, the story of populist property law speaks to the democratic legitimacy of property law, suggesting that it has long sought a deeper level of democratic legitimacy stemming not just from democratically elected legislatures but from the people themselves. Third, populist property law helps us understand recent developments in property law. The rise in income and wealth inequality in recent decades has spurred a new wave of populist property law, and the story of nineteenth-century populist property law helps make sense of ideas and proposals that have arisen as a result.

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Populist Property Law

ANNA DI ROBILANT*

INTRODUCTION

Property scholars think of property law as organized around a limited number of property forms (the fee simple, future interests, the basic forms of concurrent interests, the four types of servitudes, and the leasehold)¹ that were created a long time ago by “experts,” i.e., legislatures and courts. The possibility that ordinary people, with little or no legal training, can become active participants in the making of property law, directly intervening in the creation of new property forms, has received virtually no attention in the relevant literature. This Article tells the story of two nineteenth-century American social movements that represented the lower working class of the time—the workers and the farmers—that used their “folk” legal imagination to develop new property forms that would solve their most pressing needs by improving access to key economic resources. The National Reformers’ Association was a group of labor leaders and politically ambitious newspaper editors who represented the interests of the impoverished eastern working class and who campaigned for land reform from the 1840s through the 1860s.² The National Farmers’ Alliance was an organization of farmers and landless tenants, active in the 1880s and 1890s, which sought to educate farmers about the causes of the problems they faced, such as access to land and credit, and to develop solutions to those problems.³

While historians have written extensively about these two groups, legal historians specifically have overlooked the role of property law. Here, I

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¹ On the *numerus clausus* principle, see Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1597–99 (2008) (defining *numerus clausus* as the principle of property law only recognizing a limited and standard list of mandatory forms); Anna di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367, 368 (2014) (“The idea that property law recognizes only a limited menu of mandatory forms is known as the *numerus clausus* principle.”); Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L.J. 467, 468 (2011) (defining *numerus clausus*); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–4 (2000) (same as above).

² MARK A. LAUSE, *YOUNG AMERICA: LAND, LABOR, AND THE REPUBLICAN COMMUNITY* 3, 9 (2005).

³ LAWRENCE GOODWYN, *THE POPULIST MOVEMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 25–26, 56, 125 (1978).

recast the stories of the National Reformers and the Farmers' Alliance as stories *about* property law. Workers and farmers sought to use property law to regain a measure of control over their lives, and to that end, they proposed new property forms. The National Reformers proposed a homestead law that would give impoverished eastern workers and landless farmers property rights over a piece of land and restraints on alienation designed to encourage security of tenure.⁴ The Farmers' Alliance developed the joint note cooperative; a cooperative of farmers in which landowning members would place their individual holdings as security to allow other members, landowners and tenants alike, to collectively purchase, on credit, yearly supplies.⁵ I call these property law innovations "populist property law" because the impulse to innovate came not from expert property circles, but from the "folk" legal wisdom of the leaders and strategic minds of these two social movements. These innovators were not judges, law professors, or practicing lawyers. Rather, they were labor leaders, farmers, journalists, and politicians, often with little or no legal training.⁶ Their discussions took place not in court opinions and law reviews, but in local newspapers, such as *The Working Man's Advocate*, *Young America*, *The New York Tribune*, and *The Topeka Advocate*. In other words, these are rare instances where property law was designed directly by those who were on the losing side of political and economic life.

Populist property law has been forgotten because its proponents lost important political battles; ultimately, they succumbed to the corporate state and saw their legal visions implode. A wide body of literature documents the flaws of the Homestead Act of 1862.⁷ The joint note cooperative was soon abandoned, and the form that was to replace and extend it, the Subtreasury System, was never implemented.⁸ This Article argues that, despite its failure, the story of populist property law is still relevant in three important respects.

First, recognizing the existence of popular lawmaking in property law is important both descriptively and normatively. Building on an extensive

⁴ LAUSE, *supra* note 2, at 3.

⁵ GOODWYN, *supra* note 3, at 57.

⁶ LAUSE, *supra* note 2, at 2, 9–10, 54–58.

⁷ For a comprehensive analysis of the flaws of the Homestead Act, see, e.g., Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652, 654–56 (1936) (highlighting the failure of the Homestead Act to change the land systems, to end speculation and monopolization, and explaining that other Acts limited its application); *infra* pp. 21–22 and related footnotes (highlighting the Homestead Act's limitations and failure to stop speculation to the highest land bidders).

⁸ On the failure of the Subtreasury plan, see *infra* pp. 965–66 and related footnotes (listing reasons why the Subtreasury plan failed to pass); GOODWYN, *supra* note 3, at 309–10 (summarizing the eventual downfall of the farmers' cooperatives).

body of “law & society” and “popular constitutionalism” literature,⁹ this Article deepens our understanding of how property law is produced and structured. In the prevailing account, property law has the special feature of being organized by the “*numerus clausus*” principle.¹⁰ While contract law is the domain of free innovation and customization, property law consists of a small menu of available forms that have remained relatively fixed in time.¹¹ Legislatures are the main institutional actors responsible for managing the menu of property forms, occasionally pruning old ones or creating new ones, and judges do most of the day-to-day work of tweaking existing forms.¹² The story of the National Reformers and the Farmers’ Alliance shows a greater degree of innovation in property law and magnifies the creative role of actors other than legislatures and courts. New property forms were continuously developed through the tugs and pulls between legislatures, courts, and ordinary citizens relying on their folk property craftsmanship.

The story of populist property law also has normative significance, enhancing the democratic legitimacy of property law. In recent years, democratic property theory has emerged as a powerful alternative to long dominant normative accounts focusing on efficiency and information costs.¹³ Democratic property theory argues that, substantively, property

⁹ On popular constitutionalism, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM & JUDICIAL REVIEW* 7–8 (2005) (providing that people engaged in constitutional politics make new constitutional law); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 186–87 (1999) (explaining that populist constitutional law belongs to the people acting through politics). For a useful summary of the debate on “popular constitutionalism,” see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 4–12, 18 (2007) (summarizing fluctuations in judicial interpretive authority); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 168 (“[P]opular constitutionalism ‘does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large.’”); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053 (2010) (proposing judicial elections as a form of popular constitutionalism).

¹⁰ On the so-called *numerus clausus* principle in property law, see *supra* note 1.

¹¹ Merrill & Smith, *supra* note 1.

¹² Dorfman, *supra* note 1, at 468 (arguing that the idea that legislatures are the agent responsible for change in property law “reflects a concern about legitimate political authority”); Merrill & Smith, *supra* note 1, at 60–61 (arguing that legislatures are the key agents of change in property law because they ensure clarity, universality, comprehensiveness, stability, and prospectivity).

¹³ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746–50, 769 (2009) (proposing a social obligation theory of property that holds that all individuals have an obligation to others in their respective communities to promote the capabilities that are essential to human flourishing); di Robilant, *supra* note 1, at 370–71 (arguing that for some critical resources that involve public interests, use and management decisions should be made not by a single owner, whether private or public, but through a process that is democratic and deliberative); Dorfman, *supra* note 1, at 468, 508–09 (proposing a theory of property that rests on the idea of democratic self-governance and collective self-authorship); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1304 (2014) (“Property Law establishes a baseline for social relations compatible

forms should reflect the values and aspirations of a robust democratic society and, procedurally, new property forms must be ratified through the democratically elected legislature.¹⁴ But, today, representative democracy is threatened by new anxieties. Its legitimacy is undermined by unequal access stemming from the interplay between wealth and politics, and its ability to make good policy is jeopardized by the dysfunction of legislatures. This crisis of representative democracy has led to a search for new and more authentic types of political participation that take place outside of representative institutions and closer to the people. The story of populist property law speaks to this aspiration, showing a still deeper dimension of property's democratic legitimacy, beyond legislative ratification, one that has received less attention in democratic property theory literature. In the stories told in this Article, the role of citizens in property law is not limited to approval through their representatives in the legislative process but starts at the level of inputs. The stimulus for innovation came from groups of ordinary citizens motivated by their own needs, narratives, public values, and developed informed views about property law.

Second, the story of populist property law complicates the dominant historical understanding of the development of American property law. The standard narrative suggests that changes in property doctrines in the nineteenth century reflect a steady progression towards free market alienability and the efficient use of property.¹⁵ Between the founding era and the 1890s, virtually every property doctrine was revised in service of the guiding idea of American republican government: dispersing land ownership to encourage self-government and making land freely alienable to allow citizens to support themselves through the productive use and exchange of land.¹⁶ Accordingly, primogeniture and the entail were

with democracy, both as a political system and as a form of social life. . . . Basic democratic values limit the kinds of property rights that the law will recognize and they define particular bundles of rights that cannot be created.”)

¹⁴ di Robilant, *supra* note 1, at 370; Dorfman, *supra* note 1, at 501–03.

¹⁵ GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* 12 (1997) (arguing that a vision emphasizing “will as a reservoir of great energy” is evident in the familiar interpretation of the historical development of Anglo-American property law as the steady expansion of individual freedom of ownership, especially freedom of transferability); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 131 (1977); Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1376–77 (1993) (arguing that modernity fosters alienability and that as groups modernize they tend to lengthen their standard time-spans of land ownership and to relax traditional limits on transfer); Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 *HARV. L. REV.* 385, 392–96 (2006) (discussing the two explanations of the development of an American property law in the colonial era, the “decline of feudalism” explanation and the “Republicanism” interpretation).

¹⁶ See ALEXANDER, *supra* note 15, at 1 (arguing that the development of American property law is characterized by the dialectic between the conception of property as market commodity and the conception of property as propriety which views property as the material foundation for creating and

abolished, restrictions on creditors' ability to seize land in satisfaction of debts were eliminated, and private restraints on alienation were declared "repugnant" to the nature of the fee simple.¹⁷ In this view, it is only later—for example, during the transformation of landlord and tenant law in the 1960s and 1970s—that concerns regarding the equitable distribution of resources start reshaping areas of property law.

The property reforms proposed by the National Reformers and the Farmers Alliance suggest that the evolution towards free alienability and efficient use was less steady than that narrative would suggest; in reality, there were periods of significant contestations and temporary reversals.¹⁸ Furthermore, considerations about equitable distribution existed consistently throughout the development of American property law, articulated with particular vehemence by people at society's margins. For vast segments of the population in the 1860s, the promise of a piece of land that could secure economic independence proved to be an illusion. Free alienability led to land speculation and to the creation of a property-owning aristocracy similar to that of Europe at the time. In the South, in the 1880s, the crop-lien system brutally shattered small farmers' dreams of self-sufficiency.¹⁹ The property innovations proposed by the National Reformers and the Farmers Alliance—homesteading, the joint note cooperative, and the Subtreasury—sought to restore the promise of economic independence and security for all. To this end, the Reformers and the Farmers pushed back against the trend towards free alienability and reintroduced some concepts from the old feudal property law, including restraints on alienation and exemption from creditors.²⁰ These features were restored in order to strengthen beneficiaries' ability to effectively use the land and hold on to it regardless of market pressure.

Third, the story of populist property law is important because the rise in levels of wealth and income inequality in recent decades has spurred a new wave of populist property law. The heirs of the National Reformers and the Farmers' Alliance are organizations such as "Americans for Financial Reform" or "Strike Debt." The two episodes narrated in this

maintaining the proper social order); see also *id.* at 26–42 (discussing Thomas Jefferson's civic conception of property); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 182–84* (1992) (attributing legal recognition of women's property rights to the republican values present in post-revolution America); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & ECON. 467, 476 (1976) [hereinafter "Katz, *Thomas Jefferson*"] (discussing Jefferson's argument about the connection between property and government).

¹⁷ For a discussion of this sweeping reform of several doctrinal subfields of property law, see *infra* Section III.B.

¹⁸ See Priest, *supra* note 15, at 394 (describing the homestead legislation as a reversal of the policy of free exemption of land from creditors).

¹⁹ See GOODWYN, *supra* note 3, at 20–21 (detailing the crop lien system).

²⁰ Homestead Act of 1862, Ch. 75, 12 Stat. 392 §§ 2, 4–5 (codified at 43 U.S.C. §§ 161–284) (repealed 1976)).

Article help make sense of the ideas proposed by these contemporary advocates of property reform, such as the concept of “pre-distribution.”²¹ Furthermore, the story of nineteenth-century populist property law helps answer questions regarding the prospects of success of the reforms proposed by contemporary advocates, such as offering homebuyers a “sticky opt-out plain vanilla mortgage”²² or using eminent domain to seize underwater mortgages and restructure them so that payments are affordable.²³ The story of nineteenth-century populist property law suggests we should not be too pessimistic. Despite its apparent failure, nineteenth-century populist property law had a *constitutive* effect, shaping people’s consciousness about what entitlements they deserve and suggesting avenues by which people can make new claims. Further, while these nineteenth-century reforms delivered solutions that appeared radical and unrealistic when they were first proposed, those solutions proved useful later, influencing some of the New Deal’s programs. In other words, while populist property law was not of immediate application, it expanded the repertory of solutions available in the future.

This Article is structured in three sections. Section I focuses on the first episode of populist property law—the homestead law proposed by the National Reformers’ Association in the 1840s. I explore the Reformers’ analysis of how a misguided property law system caused the concentration of land in the hands of the few. I then discuss the Reformers’ proposals: their vision of a democratic economy and their arguments about how a homestead law would realize this vision by expanding access to land and strengthening security of tenure. Section II turns to the second episode of populist property law: the new property forms proposed by the Farmers’ Alliance in the 1890s. I describe the Alliance’s analysis of how property and contract law fueled the credit problem afflicting Southern and Midwestern farmers. I then examine the National Farmers’ Alliance’s vision of a “democracy of producers” and describe the legal-institutional reforms that the Alliance proposed to ease the credit problem, including production cooperatives, the joint note cooperative, and the Subtreasury plan. Section III examines the legacy of populist property law. I discuss how the story of populist property law changes our understanding of how property law is produced and organized and I assess the normative

²¹ On the concept of pre-distribution, see *infra* Section III.C.

²² On the “sticky opt-out plain-vanilla mortgage,” see Michael S. Barr et al., *The Case for Behaviorally Informed Regulation*, in *NEW PERSPECTIVES ON REGULATION* 41–46 (David Moss & John Cisternino eds., 2009).

²³ See Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 *STAN. J.L. BUS. & FIN.* 121, 123–25 (2013) [hereinafter Hockett, *Village*] (suggesting that local governments utilize their eminent domain power to acquire and restructure underwater mortgages).

significance of popular lawmaking in property law. I then explain how populist property law deepens the dominant account of how property law developed historically in America. I conclude by exploring the parallels between nineteenth-century populist property law and current developments in property ideas and doctrines.

I. THE NATIONAL REFORMERS ASSOCIATION'S CAMPAIGN FOR LAND REFORM

A. *The National Reformers Association's Analysis of the "Land Crisis" of the 1840s*

The contest for land is one of the most important but understudied conflicts of the antebellum period.²⁴ In the decades before the Civil War, farmers, workers, and reformers throughout the United States fought proprietors, speculators, and railroads for greater access to land.²⁵ An organized land reform movement first coalesced in the wake of the Panic of 1837 and the "First Great Depression" that followed and continued to be felt into the 1840s.²⁶ Land speculation was one of the causes of the Panic: reckless credit policies had led to speculators accumulating massive quantities of Western public lands.²⁷ Hence, the economic depression brought into focus the contrast between the affluence of a relative few and the economic dependency of wide segments of the population, in particular the impoverished eastern working class and tenants in New York's large estates.²⁸

The 1840s were not only years of economic malaise, they also generated "one of the most fervent and diverse outbursts of reform energy"²⁹ in American history, where many men and women came to

²⁴ REEVE HUSTON, *LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK* 5 (2000).

²⁵ *Id.*

²⁶ William F. Deverell, *To Loosen the Safety Valve: Eastern Workers and Western Lands*, 19 W. HIST. Q. 269, 269–70 (1988) (discussing the origin of the movement that would eventually result in passage of the Homestead Act).

²⁷ Historians attribute the Panic of 1837 to a variety of political and economic variables, including President Andrew Jackson's war on the Bank of the United States, international capital flows, an influx of silver from Mexico, and land speculation. See, e.g., ALASDAIR ROBERTS, *AMERICA'S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND POLITICAL DISORDER AFTER THE PANIC OF 1837* 32–36 (2012) (discussing the factors leading to creation of the early 1800's real estate bubble).

²⁸ In the wake of the Panic, the theme of inequality and the need for re-shaping social relations became dominant in popular culture. See, e.g., Nathaniel Williams, *George Lippard's Fragile Utopian Future and 1840s American Economic Turmoil*, 24 UTOPIAN STUD. 166, 169 (2013) (discussing the work of novelist and activist George Lippard and arguing that Lippard's work, particularly his novel *The Quaker City*, "engaged the public's emotions by contrasting the economic instability of lower classes with the affluence of a relative few").

²⁹ See RONALD G. WALTERS, *AMERICAN REFORMERS 1815-1860* xiii (rev. ed. 1997) (offering a reading of the Reformers that emphasizes how the cultural and social context of the reform movements

believe that the world did not have to be the way it was.³⁰ At the time, this wave of reform energy was described as a “Sisterhood of Reforms,” uniting the efforts of many reform movements, from the anti-slavery movement to the women’s movement to the alcohol temperance movement.³¹

An organized land reform movement joined this “Sisterhood” at the initiative of the National Reformers Association. The National Reformers were a group of labor leaders and ambitious young newspaper editors, some with legal training, centered in New York and under the leadership of British-born editor George Henry Evans.³² Evans and the National Reformers campaigned for homestead legislation and a new land system primarily in the pages of Evans’s newspapers, *The Working Man’s Advocate* and *The Radical*.³³ Public lands had, until then, been seen as a source of revenue and were disposed through cash sales in an auction system.³⁴ The Reformers advocated for the end of cash sales and for legislation that would give free public land to settlers who moved west.³⁵

The National Reformers represented unemployed workers in Eastern cities, the main constituency who stood to benefit from homesteading.³⁶

shaped the reform rhetoric); *id.* at xiv–xvi (arguing that it takes something more than economic and social problems to generate reform movements, and that it takes more than the moral, psychological, or sociological character of the reformers to explain a given reform movement. Walters emphasizes what motivated individuals and the relationship between reform rhetoric and why it made sense at particular historical moments).

³⁰ See *id.* at 3 (arguing that by 1814, “a combination of theological and economic developments led many men and women to assume that the world did not have to be the way it was and that individual effort mattered”).

³¹ See *id.* at xiii–xiv (discussing utopian societies, the antislavery movement, the women’s movement, and the alcohol temperance movement).

³² See LAUSE, *supra* note 2, at 1–5 (providing a comprehensive introduction to the National Reformers).

³³ Deverell, *supra* note 26, at 270.

³⁴ See Gates, *supra* note 7, at 654 (contesting the conclusions of other Homestead Act scholars and noting that prior to 1880, “large areas of the best agricultural lands in the country were subject to sale”).

³⁵ See Deverell, *supra* note 26, at 270 (discussing the campaign of George Henry Evans and other reformers in support of free public land for settlers); Gates, *supra* note 7, at 679 (noting the strong opposition to the cash sale system).

³⁶ Deverell, *supra* note 26, at 269–70 (describing the composition of the reformers and their interest in homesteading). Scholarly discussion of the National Reformers’ land reform campaign tends to focus on the idea of the “West as safety valve” and its ultimate failure. See, e.g., *id.* at 269 (noting the campaign for the Homestead Act and the ultimate failure of the Act); Roy Marvin Robbins, *Horace Greeley: Land Reform and Unemployment, 1837–1862*, 7 AGRIC. HIST. 18, 18 (1933) (describing Horace Greeley’s push to “Go West”); Fred A. Shannon, *The Homestead Act and the Labor Surplus*, 41 AM. HIST. REV. 637, 637–38 (1936) (arguing that the Homestead Act’s record of success is subject to misinformation). Historians emphasize that the National Reformers built on a long tradition of American agrarianism that maintained that the West, the free land beyond the frontier, would operate as a “safety valve” to control social and economic strife in the East. See *id.* at 640–42 (discussing the role of “agrarian agitators” in the land reform movement). With land reform, disenchanted and unemployed Eastern workers would be “siphoned off” to the frontier. Deverell, *supra* note 26, at 271. As a

The economic depression had cast thousands of workers out of work and pushed low wages lower. Evans and his fellow reformers reasoned that, if emancipated through land ownership, Eastern urban workers would be freed from dependence on employers and would have their republican rights of independence and equality restored.³⁷ Eastern workers rallied under the banner, “Vote Yourself a Farm!”³⁸ At the same time, Horace Greeley—newspaper editor, reformer, and later a founder of the Liberal Republican Party—coined his famous slogan, “Go west, young man, go forth into the country.”³⁹ By the mid-1840s, “land reform had captured the imagination of almost every labor radical still active in New York.”⁴⁰

Along with Eastern labor, another group pushed for land reform: the anti-renters movement in New York. In the Hudson, Mohawk, and Susquehanna Valleys, some 260,000 tenants farmed on long-term leases in return for cash rents or payments in produce or labor.⁴¹ As changing economic conditions made these estates less profitable, landlords sought to squeeze more income from their tenants, and they began cracking down by suing and evicting tenants and switching from long-term leases to annual leases.⁴² Tenants soon abandoned individual obstructionism for collective strategies. By 1845, a powerful anti-rent movement had formed, dedicated to destroying New York’s large leasehold estates and to distributing the land to the renters who farmed it.

The National Reformers were initially cautious about an alliance with the anti-rent insurgents; Horace Greeley characterized them as “the unknown Gracchi of a rural neighborhood who had transformed the pregnant language of the Declaration of Independence into an agrarian

consequence, an “independent, substantial yeomanry” would be established on the public domain, wages would remain high in the East, and class conflict would be contained. *See* Robbins, *supra*, at 22–25 (discussing the benefits of land reform proposed by Horace Greeley). When, after two decades of efforts on the part of the land reform movement, the Homestead Act of 1862 finally passed, Horace Greeley enthusiastically declared that “the clouds that have darkened our National prospects are breaking away, and the sunshine of Peace, Prosperity and Progress will ere long irradiate the land.” HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* 201 (1970) (explaining how Greeley was one of the main proponents of the “safety valve” theory, which stated that the free lands beyond the frontier would operate as a safety valve to keep down social and economic conflict in the East).

³⁷ Deverell, *supra* note 26, at 270.

³⁸ *Id.*

³⁹ Robbins, *supra* note 36, at 18.

⁴⁰ Deverell, *supra* note 26, at 270 (internal quotations omitted).

⁴¹ *See* HUSTON, *supra* note 24, at 3, 5–6 (discussing the scale of the movement, which was one of the most powerful social movements of the Antebellum period and the largest and most sustained farmers’ movement in American history before the 1870s).

⁴² *See id.* at 77 (discussing how the crackdown triggered a new dynamic in landlord-tenant relations). Huston uses one of the largest landlords, Stephen Van Rensselaer, as an example. After seeing his finances thrown into shambles by the Panic of 1819, Van Rensselaer abandoned his past lenient attitude and began a campaign to press tenants to pay their back rents. *Id.*

attack on the laws of property.⁴³ However, by 1846, Greeley had begun working to cement a political alliance between the anti-rent movement and the land reform movement.⁴⁴

The National Reformers produced a lucid analysis of the land crisis. America had become too similar to feudal Europe. American independence offered a unique opportunity for Western civilization: "A new, stainless, and untrodden world . . . a vast, an unpolluted continent which might create a unique indigenous civilization, better, purer, higher than ever yet appeared in the World."⁴⁵ The equality declared by the Declaration of Independence was to be the spirit animating this new civilization. But that promise of equality had been broken, and the Reformers were left asking, "Why does our American Republicanism produce the same bitter fruit as the rotten Despotism of the Old World?"⁴⁶

The reformers identified developments in property law, the wage labor system, and slavery as the reasons why America had come to resemble feudal Europe. Reformer Lewis Masquerier argued that erroneous legal institutions—full-blown Blackstonian property rights such as the unlimited rights to exclude, use, and transfer—had favored the emergence of an American property-owning aristocracy and had ultimately ushered in an era of inequality.⁴⁷ The reformers noted that those who have a monopoly of the land gained a monopoly of money also.⁴⁸ In other words, the very modern, absolute, and freely alienable property rights that were supposed to liberate America from the vestiges of feudalism had paradoxically led to the opposite result. Blackstonian property had facilitated "a monstrous combination of king, temporal and spiritual lords, pensioners, professional crafts and large and small dealers of all kinds, who are united by one common interest to crush and plunder an unresisting people."⁴⁹

Massachusetts-born Reformer Joshua K. Ingalls, a former minister whose cause had changed from Quakerism to land reform, focused his analysis of the causes of the new American despotism on the relationship between ownership of land and the wage labor system.⁵⁰ Ingalls argued

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ LAUSE, *supra* note 2, at 51 (internal quotation omitted).

⁴⁶ *Id.* (internal quotation omitted).

⁴⁷ LEWIS MASQUERIER, *SOCIOLOGY: OR, THE RECONSTRUCTION OF SOCIETY, GOVERNMENT, AND PROPERTY* 12 (1877) [hereinafter "MASQUERIER, SOCIOLOGY"] ("We are now at the turning point of this era of inequality to its opposite of equality, as stated by Evans. We will first plan out such sliding measures as will take society out for the ring of the present erroneous institutions.")

⁴⁸ See W. Scott Morgan, *Land Monopoly*, in *A POPULIST READER* 18, 24–25 (George B. Tindal ed., 1990).

⁴⁹ JOHN HANCOCK KLIPPART, *BROTHERHOOD OF THE UNION* 14 (Sanford & Hayward eds., 1852).

⁵⁰ On Joshua K. Ingalls, see Bowman N. Hall, *Joshua K. Ingalls, American Individualist: Land Reformers, Opponent of Henry George and Advocate of Land Leasing, Now an Established Mode*, 39 *AM. J. ECON. & SOC.* 383, 384, 393 (1980) (discussing Joshua K. Ingalls's life and work).

that there are “two factors of production: labor and raw material.”⁵¹ Labor is the “active factor,” while all “raw material not affected by human activity” lies in the land.⁵² Labor is a normal condition of human existence, and

[l]abor only becomes irksome and repulsive when a few by shirking their share can throw burdensome proportions upon others, or when, excluded from the laboratory which nature has provided him, . . . the laborer has to beg the privilege to toil from his fellow, who slanders their common nature by assuming that it is laziness and not a sense of injustice and despair, which makes hirling labor distasteful.⁵³

It follows, Ingalls suggested, that “there must be complete freedom from any and all arbitrary control over” labor and land.⁵⁴ Any control over the soil other than by the cultivating occupant “can but fetter and cripple labor and retard production.”⁵⁵ “The freedom of man without the freedom of the land,” Ingalls claimed, “can benefit neither.”⁵⁶

Slavery was the other factor that allowed despotism to gain a foothold in America. Plantation slavery in the South had hardly been a concern for eastern workers, who were exclusively focused on local conditions. The Reformers brought the question of slavery to the forefront by coupling the question of free land with that of free labor and by emphasizing the fundamental affinities between non-free wage labor and non-free slave labor.⁵⁷ For Masquerier, the Reformers’ mission was to abolish the ownership of man’s body in chattel slavery and the ownership of a man’s muscles in wages slavery.⁵⁸ Similarly, Ingalls saw the wages system as the natural outgrowth of the historical process that commenced with slavery and lead to feudalism.⁵⁹ In each case—slavery, feudal serfdom, and wage labor—the result was that one man, whether called a master, lord or capitalist, secured the results of another man’s labor without payment in an equivalent of his own labor.

⁵¹ *Id.* at 390.

⁵² *Id.*

⁵³ J.K. INGALLS, SOCIAL WEALTH: THE SOLE FACTORS AND EXACT RATIOS IN ITS ACQUIREMENT AND APPORTIONMENT 177–79 (1885) [hereinafter INGALLS, SOCIAL WEALTH] (concluding that, on an island of uniform surface and fertility divided equally among a certain number of people, all of whom support themselves by raising grain, no rent would be paid because rent would be permanently and inequitably established).

⁵⁴ *Id.* at 187.

⁵⁵ INGALLS, SOCIAL WEALTH, *supra* note 53, at 187.

⁵⁶ *Id.*

⁵⁷ *Id.* at 70.

⁵⁸ MASQUERIER, SOCIOLOGY, *supra* note 47, at 104.

⁵⁹ J.K. Ingalls, *Man and Property: Their Rights and Relations*, in THE SPIRIT OF THE AGE 114–15 (WM. H. Channing ed., 1850).

In 1851, in his first speech on the Homestead Act, Indiana Representative George W. Julian, abolitionist and land reformer, argued that homesteading would provide a “formidable barrier” against the introduction of slavery into the territories.⁶⁰ Since homesteading provided for limited parcels of land and because slavery required extensive estates to flourish, Julian believed that slavery could never be established in the public lands under such a policy.⁶¹

B. The National Reformers’ Vision of Egalitarian Freedom in an Economic Democracy

The National Reformers contrasted the despotism that had gained a foothold in America through land accumulation, wage labor, and slavery with an egalitarian and radically democratic concept of freedom.⁶² They insisted that the American Revolution was still in progress, that the work of 1776 was yet to be finished, and that their concept of egalitarian freedom was faithful to the revolutionary spirit.⁶³ The Reformers rejected the usual property terminology of the age and, in particular, the Lockean triad of “life, liberty and estate.”⁶⁴ Instead, they invoked Jefferson’s triad of “life, liberty and the pursuit of happiness” and focused on the actual means of the pursuit of liberty and happiness.⁶⁵

Individual reformers produced different lists of the means that allow an individual to be free and happy. George Julian was inspired by a thought he found in a volume of essays by Unitarian theologian William Ellery Channing: “The grand doctrine that every human being should have the means of self-culture, of progress in knowledge and virtue, of health, comfort and happiness, of exercising the powers and effections of a man,—this is slowly taking its place as the highest social truth.”⁶⁶ Lewis Masquerier’s list was similar but couched in the language of natural rights.

⁶⁰ James L. Roark, *George W. Julian: Radical Land Reformer*, 64 *IND. MAG. HIST.* 25, 29 (1968) (quoting GEORGE W. JULIAN, *SPEECHES ON POLITICAL QUESTIONS* 57, 374 (1872) and *CONG. GLOBE*, 31st Cong., 2d Sess. (1850)).

⁶¹ *Id.*

⁶² Horace Greeley’s views on land reform were influenced by British philosopher Thomas Carlyle, who wrote that liberty did not mean simply the absence of oppression but rather requires “new definitions.” ROBERT C. WILLIAMS, *HORACE GREELEY: CHAMPION OF AMERICAN FREEDOM* 90 (2006).

⁶³ *Id.* at 315.

⁶⁴ *Id.* at 2–4.

⁶⁵ See RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW* 27 (1984) (“Although it can be argued that all reasonable men of that era assumed that property was a necessary (and perhaps sufficient) prerequisite to life, liberty and the pursuit of happiness, that Jefferson did not use the word is historically novel. Moreover, as will become clear later, property ownership per se was not considered by Jefferson to be an end in itself. Man was meant to be much more than either a mere consumer or an appropriator. . . . Jefferson’s vision of man and of man’s *telos* is much grander. Happiness is the *summum bonum*. More importantly every man has a natural right to pursue it.”).

⁶⁶ Roark, *supra* note 60, at 25.

Masquerier criticized Blackstone's "commentary on the laws of England" (which he mockingly called "the lawyers' Bible") for failing to enumerate the full list of an individual's "natural rights": the right of "*manhood, life, reproduction, labor or self-employment, sovereignty* or the power of *self-government*, a share of the *soil* and the whole *product* of manual and mental *labor*."⁶⁷

The National Reformers' mission was to realize this egalitarian concept of freedom by building genuinely new property institutions.⁶⁸ Homesteading was chief among them, as it would make real every individual's natural right to a share of the soil.⁶⁹ In Horace Greeley's words: "[The system of homesteading], with such modifications and safeguards as wisdom and experience may suggest would rapidly cover the yet unappropriated Public Domain with an independent, substantial yeomanry, enjoying a degree of Equality in Opportunities and advantages such as the world has not seen."⁷⁰ This "equality of opportunity and advantage" was to be secured for all, regardless of color or race. Masquerier talked about a national commitment to "invite every landless American, Mexican, Indian, White or Black Slave throughout the earth to claim his right to an equal, individual and inalienable homestead."⁷¹

Some scholars have read Greeley's reference to an independent substantial yeomanry as a sign of shortsighted conservative agrarianism.⁷² But, while the National Reformers built on the Jeffersonian idea that the state should provide all men with the land necessary to enable them to be good citizens in the republic, they were not agrarians animated by hostility to modernity, industry, or growth.⁷³ Rather, the National Reformers' ideas

⁶⁷ MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 38 ("The most known classification of rights and wrongs is that in Blackstone's commentary on the laws of England. . . . [I]t is one of the greatest drag chains against the progress of reform and liberty. In the first place, he entirely ignores the three essential and constituent principles of a perfect right—those of *equalness* in quantity, *inalienableness* in time or duration, and of *individuality* by a thorough separateness. . . . But he is equally deficient in enumerating all the rights. . . . Instead of classifying rights as being founded on the properties of the five great systems of the organs of the human body, as those of *manhood, life, reproduction, labor or self-employment, sovereignty* or the power of *self-government*, a share of the *soil*, and the whole *product* of manual and mental *labor*, he only particularizes the rights of 'life, liberty, and private property.'").

⁶⁸ See Note, *Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law Source*, 107 HARV. L. REV. 859, 868–76 (1994) [hereinafter *Distributive Liberty*].

⁶⁹ See MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 56–61 (arguing for an equal, inalienable and individual homestead).

⁷⁰ Robbins, *supra* note 36, at 25 (quoting Horace Greeley, N.Y. DAILY TRIB., Jan. 23, 1846).

⁷¹ LEWIS MASQUERIER, *A SCIENTIFIC DIVISION AND NOMENCLATURE OF THE EARTH, AND PARTICULARLY THE TERRITORY OF THE UNITED STATES INTO STATES, COUNTIES, TOWNSHIPS, FARMS AND LOTS* 12 (1847).

⁷² SMITH, *supra* note 36, at 201 (arguing that the failure of the Homestead Act shows how poor a tool the agrarian tradition was for dealing with nineteenth century industrial society and placing Greeley fully within this agrarian tradition).

⁷³ See Platte County Argus, *The Classes Against the Masses*, in *THE POPULIST MIND* 41 (Norman Pollock ed., 1967) ("Yet while this newspaper repudiated the existing form of industrial capitalism and

fit into an alternative reading of Jeffersonian republicanism. In this reading, Jefferson is “not the heroic loser in a battle against modernity, but the conspicuous winner in a contest over how the government should serve its citizens in the first generation of the nation’s territorial expansion.”⁷⁴ In other words, the Jeffersonian republicanism the National Reformers embraced is less about an agrarian, anti-commercial bias and more about the “commitment to growth through the unimpeded exertions of individuals whose access to economic opportunity was both protected and facilitated by government.”⁷⁵

The National Reformers were animated by their pledge to ensure “equality of opportunity and advantage” so that no redistribution would be necessary.⁷⁶ In fact, Evans presented their proposals as a way to eradicate the need for redistribution. As Evans put it:

Imagine the National Reform project to be rejected
Would not the oppressed millions, when driven to the last stage of oppression, rise up to the landholders [to say] “You have unjustly used our land and our labor to amass wealth to yourselves; we will therefore have a fair and equal division, and then begin anew with equal right to the soil?”⁷⁷

For the Reformers, redistribution raised fairness concerns and hence they envisaged land reform as a gradual and peaceful process. For example, for Ingalls:

[T]hose in present legal possession of land to remain so during life or for a certain term of years [N]o one would be dispossessed of any right he now enjoys, but be only denied the privilege of acquiring rights hereafter which are detrimental to the enjoyment of the natural rights of others, and to the public welfare.⁷⁸

The National Reformers realized that for the right to a share of the soil to be a meaningful reality, property rights in land were to be modified. In other words, the Reformers saw property rights not as immutable natural rights but as positive (i.e., created by the state) and instrumental rights that could be reshaped to secure the effective enjoyment of individuals’ natural

the values of social Darwinism, the concluding remarks make it clear that it did not repudiate industrialism per se.”).

⁷⁴ Joyce Appleby, *Commercial Farming and the “Agrarian Myth” in the Early Republic*, 68 J. AM. HIST. 833, 836 (1982).

⁷⁵ *Id.* at 849.

⁷⁶ See MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 12 (“[W]e propose then, as Evans did, no violent agrarian division. . . . [W]e propose the sliding measures . . .”).

⁷⁷ George H. Evans et al., *Our Principles*, WORKING MAN’S ADVOC., Apr. 6, 1844.

⁷⁸ INGALLS, *SOCIAL WEALTH*, *supra* note 53, at 288.

rights. Specifically, Evans and Masquerier believed that the natural right to a share of the soil has three fundamental features that need to be secured through carefully designed property laws: equality, perpetuity, and individuality.⁷⁹

The first feature, equality, points to the fact that while men are not equal (as differences in physical and intellectual abilities show), they are created with equal, basic, natural wants which can be satisfied only if men have equal and proportional access to the soil.⁸⁰ The second feature, perpetuity, means that what the principle of equality had granted, a share of the soil, was to be perpetually maintained, i.e., that no individual could alienate or be deprived of her share of the soil.⁸¹ Finally, the third feature, individuality, suggests that the right to a share of the soil is to be held individually rather than communally.⁸²

The emphasis on individuality is what sets apart the National Reformers from the European utopian socialists and land reformers they were in dialogue with. Although some of the Reformers had earlier adopted the ideas of the French socialist Charles Fourier and had organized their own communes as Fourierist phalanxes, the National Reformers as a group came to believe that common ownership of land was a mistake.⁸³ As Masquerier put it, work in phalanx-like communes would resemble a slave plantation.⁸⁴ By contrast, Masquerier continued, “in our inalienable homestead system all will have the sublime power of self-direction and self-employment, be stimulated to duty by the example of neighbors and an independent vote in the councils of the commune, and in all other things.”⁸⁵

C. *The National Reformers’ Legal Innovations: Homesteading*

How could property law make real the promise of an equal, perpetual and individual right to a share of the soil?

Few among the National Reformers had any legal training or familiarity with the technicalities of property doctrine. Evans had entered the printing business at an early age and was a publisher and political

⁷⁹ *Id.* at 40–41; see also George H. Evans, et al., *Equal Right to Land*, WORKING MAN’S ADVOC., Mar. 16, 1844 (noting that every man should be able to “apply his labor to the cultivation of the soil or in any other manner that may seem best to him, with full liberty to dispose of the fruits of that labor in any manner that shall not involve a monopoly of the land.”)

⁸⁰ MASQUERIER, SOCIOLOGY, *supra* note 47, at 40; Evans, et al., *supra* note 79.

⁸¹ MASQUERIER, SOCIOLOGY, *supra* note 47, at 40–41; Evans, et al., *supra* note 79.

⁸² MASQUERIER, SOCIOLOGY, *supra* note 47, at 41; Evans, et al., *supra* note 79.

⁸³ On Fourier’s influence on the National Reformers, see LAUSE, *supra* note 2, at 15; WILLIAMS, *supra* note 62, at 93.

⁸⁴ MASQUERIER, SOCIOLOGY, *supra* note 47, at 21.

⁸⁵ *Id.*

organizer throughout his life.⁸⁶ Joshua K. Ingalls was a self-taught economist who, in the words of his biographer, “failed to proffer any improvements in the method of the economic theorist” and did not even comprehend Ricardo’s rent theory, but Ingalls is worth remembering in the “history of opinions” branch of economic thought.⁸⁷ The only lawyer among the strategic minds of the National Reform Association was Lewis Masquerier. Masquerier studied law, “was examined and licensed by the celebrated Judges Bledso and Brown,” and established his own practice in Quincy, Illinois—though he quickly abandoned it.⁸⁸ As Masquerier recounted in his autobiography, “I . . . had such poor taste for it that I gave myself up to miscellaneous studies.”⁸⁹ Masquerier devoted the rest of his life to farming, inventing a new phonetic system, and writing and lecturing about sociology.⁹⁰

The Reformers believed in the need for periodic critical and democratic reevaluations of property rules by citizens. Masquerier noted that the Declaration of Independence asserts that “all the sovereign power of the government resides in the whole people; that they cannot be bound by a law which has not received their consent; that they can at all times alter or abolish any law, government or alliance which has become oppressive and substitute others.”⁹¹ Masquerier was elaborating on a Jeffersonian theme—Jefferson sought to keep the Spirit of 1776 perpetually alive by institutionalizing revolution.⁹² For Jefferson, the earth belongs to the living.⁹³ Each generation should exercise its natural right to create anew its political life and property rights. Jefferson illustrated this principle by pointing to France: if implemented by the French, this

⁸⁶ See MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 93–99 (detailing Evans’s history). Evans learned the printing business at an early age, established his own office and “commenced the publication of works of a reformatory character.” *Id.* at 93. Masquerier adds that Evans “early espoused the cause of the anti-monopoly workingman’s party, having for his co-laborers Thomas Skidmore and William Leggett. These made a powerful opposition to the banking system.” *Id.*

⁸⁷ Hall, *supra* note 50, at 395 (arguing that, “[i]t would obviously be naive to suggest Joshua K. Ingalls as a candidate for enshrinement as a figure worth remembering in the history of economic analysis. He failed to proffer any improvements in the method of the economic theorist and he was unaware, even as late as the 1890s, of the significance or apparently the existence of the marginal revolution. Worse still, he was writing about the land question without even comprehending the Ricardian rent theory. Yet he is of interest, and indeed significance, in . . . the ‘history of opinions’ branch of the history of economic thought. A study of Ingalls re-establishes the sometimes forgotten fact that land reform was a part of the radical movement in nineteenth-century America for an extended period of time and was also part of the beginnings of the progressive movement that was to blossom in the early 20th century.”).

⁸⁸ MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 135.

⁸⁹ *Id.*

⁹⁰ *Id.*; see also LEWIS MASQUERIER, *A NEW PHONOTYPIC PRONOUNCING AND DEFINING DICTIONARY OF THE ENGLISH LANGUAGE* (1877).

⁹¹ LAUSE, *supra* note 2, at 69.

⁹² See MATTHEWS, *supra* note 65, at 21 (noting Jefferson’s need for permanent revolution).

⁹³ *Id.* at 75.

radically democratic principle would have challenged the foundations of the feudal property structure of the *Ancien Régime*.⁹⁴ It would have encouraged citizens to confront such questions as:

[W]hether the nation may change the descent of lands holden in tail, [w]hether they may change the appropriation of lands given anciently to the church, to hospitals, colleges orders of chivalry, and otherwise in perpetuity[, and] whether they may abolish the charges and privileges attached on lands, including the whole catalogue ecclesiastical and feudal.⁹⁵

The Reformers were self-taught lawyers who gained a limited knowledge of property law for the purpose of sketching out their proposal for a homestead law. Their proposal was iconoclastic. It was based on the unorthodox belief that individuals' right to a share of the soil could be made effective and secured in the long term only by reversing the trend towards full-blown Blackstonian property rights and free alienability of land that had characterized American property law from the colonial era to the late-nineteenth century. The Reformers argued for restoring some of the elements of old common law property that had been rejected as "feudal" in the post-revolutionary era, such as restraints on alienation, exemptions from creditors, and owners' positive duties.⁹⁶

Historians of property have documented in detail this sweeping trend towards the free use and alienability of land. After the Revolution, the English common law was largely maintained in property law, where "exception was quickly and loudly taken."⁹⁷ The new American property law rejected the feudal features of the English common law.⁹⁸ By contrast, it would disperse ownership of land and promote free alienability and the productivity of land. This movement started with the reform of the law of inheritance, which Thomas Jefferson, in his *Notes on the State of Virginia*, ranked at the top of his list of needed alterations to the common law, even above the statute on religious freedom.⁹⁹ Many states soon passed statutes

⁹⁴ *Id.* at 21.

⁹⁵ *Id.*

⁹⁶ See *Distributive Liberty*, *supra* note 68, at 862–75.

⁹⁷ John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 L. & HIST. REV. 33, 33 (1992).

⁹⁸ *Id.* at 33–34.

⁹⁹ *Id.* at 33. The literature on the reform of the law of inheritance in America is vast. See, e.g., Holly Brewer, *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform*, 54 WM. & MARY Q. 307, 307–09, 345–46 (1997) (discussing the transformation of inheritance law in colonial Virginia); John F. Hart, "A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail, 58 WASH. & LEE L. REV. 167, 168–71, 193–94 (2001) (discussing James Madison's support for the abolition of fee tail and the practical, procedural and symbolic effects of the abolition of fee tail in Virginia); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1

abolishing primogeniture, the rule that real property held by a person who died without a last will passed to the first born child.¹⁰⁰ Virginia and North Carolina were the first to abolish the entail, a means of restricting future succession of real property to the descendants of a designated person.¹⁰¹

Restrictions on creditors' ability to seize land in satisfaction for debts were similarly abolished.¹⁰² Under the English common law, an individual's freehold interest in land was exempt from the claims of unsecured creditors.¹⁰³ With the "Act for the More Easy Recovery of Debts," the British Parliament had made land legally equivalent to chattel property for purposes of debt collection in all British colonies in America, even before the Revolution.¹⁰⁴ Claire Priest's wonderful study of the Act shows how it increased the treatment of land as a commodity and expanded the market for land in America.¹⁰⁵

Another landmark in the march towards alienability was the revision of restraints on alienation.¹⁰⁶ Chancellor Kent's *Commentaries on American Law* suggested that the courts should refuse to enforce restraints imposed by private will because they were "repugnant to reason."¹⁰⁷ Accordingly,

1-4, 26-29 (1977) (discussing the history of the laws of inheritance during the American Revolution era and the effects of reforms); Katz, *Thomas Jefferson*, *supra* note 16, at 467, 469-81 (discussing Thomas Jefferson's role in reforming the laws of inheritance); Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 24-27, 50-51 (1927) (discussing the "development of the doctrine of the descent of entails" and how "the rule of partible descent evolved"); Carole Shammass, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 145, 161-63 (1987) (comparing English inheritance law to the inheritance laws in the colonies).

¹⁰⁰ See Morris, *supra* note 99, at 25 (noting that the demise of primogeniture antedated the rise of republicanism). Every New England colony except Rhode Island had abolished it before the end of the seventeenth century and that by the outbreak of the Revolutionary War it had vanished everywhere north of the Mason-Dixon line except of aristocratic New York. The Southern colonies generally hewed closer to the old common law, and primogeniture in Revolutionary America was as peculiarly southern as slavery. Georgia led the way in abolishing primogeniture in 1777, and Virginia abolished primogeniture in 1785. *Id.*

¹⁰¹ *Id.* at 34.

¹⁰² See Priest, *supra* note 15, at 387-88 ("[In England,] [t]he legal restrictions on creditors' ability to seize land in satisfaction of debts helped to stabilize the landed class by protecting real property holdings from the risk associated with accumulated unsecured debt. This legal structure, however, on the margin, was likely to have reduced capital available for productive investment.").

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 395 ("[B]y making land legally equivalent to chattel property for purposes of debt collection in all British colonies in America, Parliament pushed colonial society away from the model of the English aristocracy in 1732. Thus, decades before the Revolution, English inheritance law was partially repealed at the instigation of the English, and not as the consequence of the ideological opposition to English political and social life.").

¹⁰⁵ See *id.* at 398 (arguing that the "most important consequences of the Act were . . . its role in prioritizing commercial interests over the inheritance of land[.] . . . its role in providing the credit conditions for expanding slave labor in America" and the fact that it "expanded the market for land, advanced the economy in America toward modern capitalism").

¹⁰⁶ See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 147-52 (2006) (discussing the transformations in the doctrine of restraints on alienation).

¹⁰⁷ *Id.* at 144.

nineteenth-century common law courts declared restraints on alienation to be unreasonable, or even repugnant to the very nature of the fee simple.¹⁰⁸

The Reformers' reasoned that the doctrines that were supposed to secure dispersed ownership of land for owners who were free to use and alienate their land had not prevented the accumulation of land in the hands of speculators, but instead facilitated it.¹⁰⁹ In an insecure and volatile economy, marked by the periodic "panics" that accompanied the development of capitalism in the United States, alienability doctrines made owners vulnerable.¹¹⁰ When faced with economic hardships, owners would lose their land to speculators or creditors.¹¹¹ The Reformers' intuition was that some security of tenure could be achieved by restoring the very features of property law that learned property lawyers and courts believed had allowed the formation of a property-owning elite in England.¹¹² Hence, in the Reformers' proposed homestead law, beneficiaries would get a parcel of land and a carefully crafted "bundle" of entitlements that included feudal, anti-alienability devices.¹¹³ This attempt to create a safety net for owners through anti-alienability mechanisms directly conflicted with the ideas of "official" property circles and was at odds with the logic and values of market capitalism.¹¹⁴

To ensure the principle of equality, the National Reformers argued that this "bundle" should include a land limitation, or a cap on the amount of land any individual could own.¹¹⁵ Allowing limitless ownership of a finite resource, the National Reformers felt, reduced the number of property owners, while placing a limit on land ownership "would increase the landed estates generally belonging to families."¹¹⁶ "The true measure for the size of an equal homestead," Masquerier reasoned, "must be determined by what the natural wants require for a family support, and as much as each can cultivate with proper recreation."¹¹⁷ Evans and Masquerier envisioned a system in which public lands would be divided into "township[s] of quarter sections of 160 acres each, and as population

¹⁰⁸ See *id.* at 145 (explaining the notion of repugnancy).

¹⁰⁹ See *Distributive Liberty*, *supra* note 68, at 862–75.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 56–57 (discussing the "equal homestead" principle).

¹¹⁶ LAUSE, *supra* note 2, at 3.

¹¹⁷ See MASQUERIER, *SOCIOLOGY*, *supra* note 47, at 56–57 ("The true measure for the size of an equal homestead must be determined by what the natural wants require for a family support, and as much as each can cultivate with proper recreation. Where population is sparse, each family might be allotted one hundred and sixty acres, then be quartered into forty acres, and again quartered down to the minimum of ten acre homesteads, as an increase of heirs, etc., demands.").

increases, into 40 acres, and then subdivided into four quarters again, down to 10 acres, the least number of acres possible for family support.”¹¹⁸

Additionally, the National Reformers proposed a positive duty to reside on and cultivate the land or, in towns, to use it for small manufacture for a period prior to receiving title and inalienability during that time. In arguing for a use requirement, the Reformers sought to make the promise of an equal right to a share of the soil a long-term reality and to avoid accumulation in the hands of large owners. They had in mind the failure of the military bounty acts in the United States and of the enclosures in continental Europe.¹¹⁹ In both cases, the new owners, pressed by economic need and discouraged by the costs and uncertainties of putting the land to productive use, ended up losing their newly acquired lots to speculators or, in Europe, to a rising middle class eager to invest in land.

The National Reformers also drastically restrained the beneficiary’s ability to alienate the lot in order to secure the benefits of land ownership in the long term. Evans and Masquerier reasoned that the “equalness . . . of each one’s natural right to a share of the soil will become alienated or destroyed without the guaranteeing principle of inalienation, perpetuity or prescription that attaches it to the person throughout life.”¹²⁰ Hence, “the homestead . . . which embraces the improvements as well as the soil, must never be subject to any liability to alienate for any consideration whatever, such as that of sale, debt, tax, mortgage, primogeniture etc.”¹²¹ The Reformers went so far as to suggest making the sale of a homestead for money a felony.¹²² Thus, homesteads could be traded for land to allow for migration and possible improvement, but they could not be traded for goods or money or offered as a lien and would be exempt from loss due to taxes and debts. This proposal was drastic, but it contributed to rehabilitating restraints on alienation and homestead exemption from creditors in official property circles. The Homestead Act, passed in 1862, introduced a temporary restraint on alienation in the five-year period

¹¹⁸ *Id.* at 19.

¹¹⁹ On the fate of the military bounty acts, see LAURA JENSEN, PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY 149 (2003) (arguing that “[v]eterans used their warrants as land-office money, exchanging their land entitlements for cash”). On the failure of land reform in Europe, see Anna di Robilant, *Common Ownership and Equality of Autonomy*, 58 MCGILL L.J. 263, 282–87 (2012).

¹²⁰ MASQUERIER, SOCIOLOGY, *supra* note 47, at 57 (“But as natural wants are not only equal but are also continued through life they become the true foundation also of inalienable homestead. As the principle, too, of time or duration is very different from that of magnitude or quantity, it becomes a distinct constituent of a thorough right, and is equally essential to its existence.”).

¹²¹ *Id.* at 58. Masquerier goes on to say that “[t]he exchange of homesteads is only proper for the necessary freedom of emigration. No one, then, must ever be found without a homestead. For nothing else will insure the protection of life from pauperism or starvation, the power of self-ownership, self-employment, and self-government to the latest posterity.” *Id.*

¹²² See *id.* at 57–58 (“But it must be made a felony to withhold a home from any person, or for any to part with it, except in exchange for another.”).

previous to receiving title as well as a duty to cultivate.¹²³

Section Four of the Homestead Act also reintroduced the homestead exemption for creditors, stating: “That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.”¹²⁴ Moreover, between 1848 and 1852, eighteen states passed homestead exemption laws.¹²⁵ While the details of these laws varied, such as who was eligible, what forms of property received protection, and how many acres lay beyond the reach of creditors, the overall purpose of these laws was to offer permanent security to families.

The Reformers believed that the bundle of ownership entitlements they imagined would democratize property ownership. They hoped that a more egalitarian distribution of land would diffuse wealth and democratize power, but this hope proved elusory.¹²⁶ A wide body of literature documents the failures of the Homestead Act of 1862. To begin with, the Homestead Act was superimposed on a public lands system that greatly limited its application.¹²⁷ Furthermore, Congress continued policies that vitiated the principle of land for the landless: railroad grants and the policy of granting to the states federal lands that would produce revenue or endowment for educational or other state institutions continued, and the

¹²³ Homestead Act of 1862, ch. 75, 12 Stat. 392, §§ 2, 5 (codified at 43 U.S.C. §§ 161–284) (repealed 1976).

¹²⁴ *Id.*

¹²⁵ Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to Market Revolution, 1840–1880*, 80 J. AM. HIST. 470, 470, 472 (1993).

¹²⁶ See Carlos A. Schwantes, *The Concept of the Wageworkers' Frontier: A Framework for Future Research*, 18 W. HIST. Q. 39, 41–44, 47–53 (1987) (writing on The Homestead Act, its fatal flaws, and how it failed to help Eastern workers). Unemployed workmen in eastern cities lacked the capital to travel west and to establish a farm, as well as technical farming skills. Hence, “the search for independence in the American West often ended where it began: with the dreariness of wage work.” Deverell, *supra* note 26, at 269 (referencing Schwantes’s article).

¹²⁷ Gates argues that the Homestead Act did not completely change our land system; it “merely superimposed upon the old land system a principle out of harmony with it.” Gates, *supra* note 7, at 654.

[S]peculation and land monopolization continued after [the Act’s] adoption as widely perhaps as before, . . . homesteading was generally confined to the less desirable lands distant from railroad lines, and . . . farm tenancy developed in frontier communities in many instances as a result of the monopolization of the land

Other acts in existence in 1862 [the Pre-Emption law, the commutation clause of the Homestead Act, the Timber and Stone Act, and the Desert Land Act] greatly limited its application and new laws further restricting it were subsequently enacted. The administration of the law, both in Washington and in the field, was frequently in the hands of persons unsympathetic to its principle, and western interests, though lauding the act, were ready to pervert it.

Id. at 655–56 (citation omitted).

cash-sale system was maintained until 1888.¹²⁸

The hopes of the Reformers proved elusory also in another respect. Evans and Masquerier had envisaged a homestead law that would benefit every landless person, whether White, Black, or Indian. The National Reformers' press had supported the Indian cause, protesting "Indian removal at home and U.S. involvement in suppressing a Mayan rising in the Yucatan."¹²⁹ Evans had "placed the words of Black Hawk alongside those of Jefferson in his publications."¹³⁰ However, developments in Indian land policy contradicted the Reformers' hopes.¹³¹ At the time the Homestead Act was passed, the government was concentrating the Indians on reservations and making their lands available, though no uniform principle concerning the final disposition of these lands was achieved. The only consistent rule was that they must be sold for a consideration. Hence, the lands taken from the Indians were redistributed not to white settlers, but rather sold in large blocks to the highest bidders, such as capitalists and railroads.¹³²

Despite the failures of the Homestead Act, the legacy of the Reformers' campaign for homesteading was not lost. The Reformers' belief that a homestead law could make individuals' right to share of the soil effective and secure remained alive and inspired later proposals to improve the Homestead Act of 1862. In the 1870s, a new "panic" worsened the situation of eastern laborers and further highlighted the limits of the Homestead Act as a source of relief. Plans to improve the Homestead Act were discussed in journals and newspapers.

In 1877, Representative Hendrick Bradley Wright introduced a bill in Congress that would expand the reach of the Homestead Act.¹³³ Wright realized that granting a parcel of land was not enough. The Homestead Act had failed to reach the impoverished workingmen of the east because travelling west was expensive and starting a farm required capital.¹³⁴ Hence, Wright's proposal was to provide government loans to workers who moved west and claimed homesteads. The proposed \$500 loans would aid homesteading families "in the commencement of a permanent farming residence."¹³⁵

Other proposals tended more towards the bizarre.¹³⁶ Representative

¹²⁸ *Id.* at 656–60.

¹²⁹ LAUSE, *supra* note 2, at 78–79.

¹³⁰ *Id.* at 78.

¹³¹ See Gates, *supra* note 7, at 661–62 (noting that Indian lands had to be "sold for a consideration, which, of course, denied the homesteader the right to enter them for free").

¹³² *Id.* at 661.

¹³³ Deverell, *supra* note 26, at 273.

¹³⁴ *Id.*

¹³⁵ *Id.* at 275 (internal quotations omitted).

¹³⁶ *Id.* at 274.

Benjamin Butler, for example, reasoning that the military was allied with capital against workers, suggested providing homesteaders with both money and guns.¹³⁷ Still other proposals focused on the homesteaders' need for a government supply of water for irrigation.¹³⁸ In other words, despite an initial failure, the ideas of Evans and his fellow Reformers encouraged others in the following decades to recognize the discrepancy between the promise and the reality of the Homestead Act and to seek innovative solutions.

II. THE NATIONAL FARMERS' ALLIANCE AND THE PROBLEM OF ACCESS TO CREDIT: COOPERATIVES AND THE SUBTREASURY SYSTEM

A. *The National Farmers' Alliance's Analysis of the Agricultural Crisis*

By the 1880s, when Agrarian Populism gained momentum, the question of land reform had become part of a larger agenda focused on access to the means of production, the most important of which was credit. The 1870s had been distressing years for the nation's farmers.¹³⁹ During the Civil War, Congress—under relentless spending pressure—had authorized the issuance of “legal tender treasury notes” (also known as “greenbacks” because of the color of their ink).¹⁴⁰ After the war, the return to hard money was facilitated by contracting the currency. To the nation's farmers, contraction was an enormous tragedy, resulting in a protracted and dramatic fall of farm prices.¹⁴¹ Farmers lost their land and lacked the capital needed to buy supplies. In the South, the crop lien system, whereby a farmer would buy supplies on credit from a furnishing merchant, became a form of bondage similar to slavery for millions of farmers.¹⁴² At the same time, the power of terminal grain elevator companies to fix prices and to establish both grading standards and railroad rate structure further

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ For an analysis of the causes, see NORMAN POLLACK, *THE POPULIST RESPONSE TO INDUSTRIAL AMERICA* 7 (1962) [hereinafter POLLACK, *THE POPULIST RESPONSE*].

¹⁴⁰ Timothy A. Canova, Symposium, *Lincoln's Populist Sovereignty: Public Finance of, by, and for the People*, 12 *Chap. L. Rev.* 561, 564 (2009).

¹⁴¹ See GOODWYN, *supra* note 3, at 10–12 (detailing the extent to which farmers were hurt through the following example: “[L]etting ten farmers symbolize the entire population, and ten dollars the entire money supply, and ten bushels of wheat the entire production of the economy, it is at once evident that a bushel of wheat would sell for one dollar. Should the population, production, and money supply increase to twenty over a period of, say, two generations, the farmers' return would still be one dollar per bushel. But should population and production double to twenty while the money supply was held at ten—currency contraction—the price of wheat would drop to fifty cents. The farmers of the nation would get no more for twenty bushels of wheat than they had previously received for ten.”)

¹⁴² See *id.* at 20 (arguing that the humiliating conditions of the crop lien “were so pervasive in their impact, shaping in demeaning detail daily options of millions of Southerners, that they constituted a system that ordered life itself”).

narrowed the possibilities of farmers.¹⁴³ Some farmers formed organizations for economic and political self-help, such as the Patrons of Husbandry (or Grange).¹⁴⁴ But by the 1880s, it was evident that things were worse than they had been in the previous decade and that self-help efforts of a new scale and breadth were needed.

In 1877, a group of farmers and landless tenants gathered at a farm in Lampsas County, Texas, and formed the Farmers' Alliance.¹⁴⁵ Its purpose was to allow farmers to self-educate about the causes of the problems they faced and to defend themselves from economic exploitation.¹⁴⁶ The Alliance was a system of agrarian self-help more ambitious and far-reaching than any before. The organizational effort of the Alliance was impressive. By the mid-1880s, the Alliance had grown into a diffuse network of county alliances. The members and leaders of the National Farmers' Alliance had no legal training; they were farmers schooled in the harsh system of the crop-lien.

The Alliance developed a system for members' education.¹⁴⁷ S.O. Daws, a thirty-six-year-old farmer from Mississippi who was a compelling speaker and had developed a sense of personal and political self-respect, was named the "Travelling Lecturer" and appointed sub-lecturers in each county.¹⁴⁸ Through self-education they developed their own understanding of how existing legal institutions had facilitated wealth inequality and brought farmers to heel. A statement from the Alliance in 1890 argued that, "a lapsed vigilance at the close of a terrible war allowed class legislators to frame the laws controlling the financial affairs of the country"¹⁴⁹ In a

¹⁴³ *Id.* at 71.

¹⁴⁴ See John G. Miles Jr., *The Impact of the Granger Movement Upon Social Legislation*, in LEGAL AND ECONOMIC INFLUENCE OF THE GRANGE 10, 12-13 (National Grange 1967) (discussing the Grange's conception and spread from 1873 to 1875); see also SOLON JUSTUS BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATIONS, 1870-1880* (1963) (examining the history of the Granger Movement).

¹⁴⁵ W.L. GARVIN & S.O. DAWS, *HISTORY OF THE NATIONAL FARMERS' ALLIANCE AND CO-OPERATIVE UNION OF AMERICA* viii (1887).

¹⁴⁶ See *id.* ("We aim to educate our members upon public questions affecting the welfare of the people in general, and especially of the laboring classes. Most of the public speakers in this country confine themselves to ideas gathered from the newspapers, which are too often paid to publish articles tending to mislead the people. It is our purpose as an organization to study and understand certain economic principles which underlie our structure of government, and upon which our prosperity as a people and our continued existence as a Republic depend.")

¹⁴⁷ GOODWYN, *supra* note 3, at XVIII (describing agrarian populism as a case study of how democratic mass protest happens). Goodwyn sees it as a sequential process involving four stages: the creation of an autonomous institution where new interpretations can materialize that run counter those of the prevailing authority ("the movement"), the creation of a tactical means to attract masses of people ("the movement recruiting"), the achievement of a heretofore unsanctioned level of social analysis ("the movement educating"), and the creation of an institutional means whereby the new ideas can be expressed in an autonomous political way ("the movement politicized"). *Id.*

¹⁴⁸ *Id.* at 27.

¹⁴⁹ Editorial, *Farmers' Alliance, Lincoln, Nebraska (Sept. 6, 1890)*, in *THE POPULIST MIND* 37 (Norman Pollack ed., 1967) [hereinafter *THE POPULIST MIND*].

similar vein, Nelson Dunning, associate editor of the Alliance weekly paper *The National Economist*, noted, “the American farmer in his present condition, is a living example of the folly and disaster which inevitably follow where one class of citizens permits another to formulate and administer all economic legislation.”¹⁵⁰ Specifically, the Alliance’s analysis focused on two legal issues: the legislation regarding public lands and the crop lien.

W. Scott Morgan of Arkansas, a farmer, journalist, and the Alliance’s “historian,” offered a lengthy critique of the public lands laws in his “official history” of the Alliance, published in 1889. Scott Morgan was writing at a time of sharp conflict between farmers and corporate land syndicates over competing claims to land. To the farmers, the syndicates, based in New York and London, represented alien land ownership, land monopoly, and lawlessness that hampered rural progress, capital improvements, and settlement.¹⁵¹ Scott Morgan reaffirmed the importance of the equitable distribution of land:

To encourage progress, induce invention and reward genius, it may be urged that inventors may for a time reap the benefits of their skill and industry. But such cannot be said of land, it is the gift of God. It is the source from whence the human family obtain their means of subsistence. From its fertile resources flows all wealth. Upon its proper and equitable distribution depends the happiness, comfort and prosperity of the people.¹⁵²

Scott Morgan went on to note,

[The] disposition of public lands is a question of vital importance. The existing public land laws . . . amount to class legislation that has helped establish a land aristocracy. The soul of American democracy and independence has been crushed out of our institutions, while the spirit of monarchical despotism is gestating.¹⁵³

By 1889, when Scott Morgan published his history of the Alliance, the contradictions and loopholes of the laws and policy concerning public lands were manifest. By 1890, the government had granted railroad

¹⁵⁰ Nelson A. Dunning, *The Farmers’ Alliance History and Agricultural Digest*, in A POPULIST READER: SELECTIONS FROM THE WORKS OF AMERICAN POPULIST LEADERS 98 (George B. Brown Tindall ed., 1966) [hereinafter A POPULIST READER].

¹⁵¹ See CHARLES POSTEL, *THE POPULIST VISION* 28 (2007) (describing the “land fever” in Texas in the 1880s, and the fence wars that took place “where farm settlement pushed into grazing lands claimed by corporate land syndicates”).

¹⁵² W. Scott Morgan, *History of the Wheel and the Alliance and the Impending Revolution*, in A POPULIST READER, *supra* note 150, at 24.

¹⁵³ *Id.* at 19.

companies an amount of land almost equal to the thirteen original colonies, and larger than the whole of England and France combined.¹⁵⁴ The amount of land in the hands of the twenty-seven largest foreign speculators was equal to a territory as large as Ireland.¹⁵⁵ Scott Morgan predicted that “[i]f we take the rate at which the public lands have been going for the last twenty-five years as a basis, there will not be at the end of fifteen years more, one acre of government land to be had.”¹⁵⁶

Land was also not the only resource held from farmers. Access to credit was equally important to farmers’ lives and the crop lien form effectively kept it from them.¹⁵⁷ Farmers in the South lacked the capital to buy supplies.¹⁵⁸ The crop lien allowed farmers to receive commodities such as food, supplies, and seeds on credit from a “furnishing merchant” and to pay this debt back after their crop was harvested and sold.¹⁵⁹ The amount of credit farmers received was based on the estimated value of the crop.¹⁶⁰ Farmers paid very high interest rates, often well in excess of 100% annually, and sometimes up to 200%.¹⁶¹ Caught between high interest rates and low commodity prices, farmers were hardly ever able to pay out.¹⁶² Once a farmer had signed his first crop lien, he was in bondage to his merchant as long as he had failed to pay out.¹⁶³

The Farmers’ Alliance decried the opacity and power asymmetry of the crop-lien contract.¹⁶⁴ However, neither the furnishing merchants nor the farmers alone deserve blame; as the Reverend Charles H. Otken, a Baptist minister of Mississippi associated with the Alliance, wrote, “the commercial contract under whose articles they formed a joint copartnership to do business, deserves full and signal justice.”¹⁶⁵ When a merchant agrees to furnish a farmer, all the farmer knows is that he must pay the prices determined by the merchant.¹⁶⁶ “The [farmer] is enveloped in mists. He travels in the dark twelve months in the year.”¹⁶⁷ “The size of the crop, the price of cotton, and the purchases made, determine the size

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *Id.* at 23.

¹⁵⁶ *Id.* at 24.

¹⁵⁷ See WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* 111 (1993) (discussing how access to credit was a central problem for farmers throughout the nineteenth century); GOODWYN, *supra* note 3, at 20–25 (discussing the crop lien system).

¹⁵⁸ GOODWYN, *supra* note 3, at 20–25.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ For a vivid description of the difficulties of the crop lien system, see *id.* at 21.

¹⁶⁴ *Id.* at 20–25.

¹⁶⁵ Charles H. Otken, *The Credit System*, in *A POPULIST READER*, *supra* note 150, at 42, 47.

¹⁶⁶ *Id.* at 43.

¹⁶⁷ *Id.*

and the number of balances. . . . A slight improvement one year is reversed by an unfavorable crop year the next.”¹⁶⁸ In other words, the crop lien is a covenant in which one party, the furnishing merchants, is “thoroughly organized, thoroughly systematic in keeping accounts, thoroughly acquainted with the cost and selling price of merchandise, and thoroughly informed as to their expenses,”¹⁶⁹ while the other is “thoroughly unorganized, thoroughly unsystematic, thoroughly uninformed as to prices and as to their ability to pay them, thoroughly in the dark as to what their product will be or its price, and thoroughly in the dark as to their expense account.”¹⁷⁰ This “indefinite plan of purchasing, and ignorance of the amount bought until the cotton has been sold is a source of disaster to the country,” Otken argued.¹⁷¹ Every year, because of the crop lien, more and more farmers who held a fee simple title to their farm lost it to their furnishing merchant and became his tenants.¹⁷²

B. *The National Farmers’ Alliance’s Vision of a “Democracy of Producers”*

To contrast with the oppressive power of land syndicates and furnishing merchants, the National Farmers’ Alliance offered its vision of an alternative capitalism based on a democracy of producers.¹⁷³ The admittedly controversial suggestion that the Agrarian Populists offered a constructive, normative vision requires an explanation. Historians have long offered an account of Agrarian Populism that casts it as a retrogressive movement rejecting progress and failing to comprehend the

¹⁶⁸ *Id.* at 44–45.

¹⁶⁹ *Id.* at 47–48.

¹⁷⁰ *Id.* at 48.

¹⁷¹ *Id.* at 45.

¹⁷² *See id.* at 47 (“Thus it is that not a few farmers in the South who held a fee-simple title to their property, lost all in ten years.”).

¹⁷³ For the emphasis on democratic market governance, see GOODWYN, *supra* note 3, at 66–67 (describing the Alliance cooperative vision as the means to build a democratic economy); *id.* at 294 (“Populism in America was not the sub-treasury plan, not the greenback heritage, not the Omaha Platform. It was not, at bottom, even the People’s Party. The meaning of the agrarian revolt was its cultural assertion as a people’s movement of mass democratic aspiration. Its animating essence pulsed at every level of the ambitious structure of cooperation: in the earnest probings of people bent on discovering a way to free themselves from the killing grip of the credit system (“The suballiance is a schoolroom”); in the joint-notes of the landed, given in the name of themselves and the landless (“The brotherhood stands united”) in the pride of discovery of their own legitimacy (“The merchants are listening when the County Trade Committee talks”) and in the massive and emotional effort to save the cooperative dream itself (“The Southern Exchange Shall Stand”).”). For an example of the Alliance’s emphasis on producers, see Lorenzo D. Lewelling, Governor, State of Kan., *A Dream of the Future* (Jan. 9, 1893), in *THE POPULIST MIND*, *supra* note 149, at 51–54 (discussing a dream for the future of producers, faith in human government, and emphasizing the need to protect producers); *see also* GARVIN & DAWS, *supra* note 145, at 86 (“A country is truly rich when its producers are prospering”).

realities of the 1880s and 1890s.¹⁷⁴ Even the historical accounts that present Agrarian Populism in a favorable light tend to focus on what the Populists were against, rather than on what they were for.¹⁷⁵ This Article, relying on recent scholarship, paints a different picture: one that focuses on what the Populists stood for, and their optimistic commitment to fashioning an alternative modernity suited to their own interests.¹⁷⁶

In his recent study of the Agrarian Populists, Charles Postel shows that they firmly believed in progress and in the logic of modernity.¹⁷⁷ The members of the National Farmers' Alliance were modern in two ways: their lives were shaped by modern economic relations, and "they expressed a modern sensibility."¹⁷⁸ While elements of traditional non-market farming persisted, the Agrarian Populists' world was a modern one, both commercially and intellectually. Cotton and wheat farmers operated in a commercial environment that was bound to global markets, as virtually every bale or bushel ventured into national and global trade.¹⁷⁹ Farmers recognized that the survival of their operations depended on commercial innovation and required more direct connections to national and international markets.¹⁸⁰ Intellectually, second-class postage brought inexpensive newspapers and pamphlets into the farming heartland, thereby bringing millions of men and women into the national discussion of progress and reform.¹⁸¹ Not only were the farmers embedded in modern

¹⁷⁴ For the most well known articulation of this view, see RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 61–62 (1955). Hofstadter emphasized the ambiguities of Agrarian Populism. *Id.* at 18 ("I believe it will be clear that what I am trying to establish is not that the Populist and Progressive movements were foolish and destructive but only that they had, like so many things in life, an ambiguous character."); *id.* at 63–65, 70 (arguing that a number of simplistic ideas, such as the beneficence of nature, the natural harmony of interests among the productive classes, and the simple social classification of the people versus the interests, followed the delusive assumption that, "the victory over injustice, the solution for all social ills, was concentrated in the crusade against a single, relatively small but immensely strong interest, the money power," and that "[t]here was something about the Populist imagination that loved the secret plot and the conspiratorial meeting"). For a contrasting view that emphasizes the energy of Agrarian Populism, see POLLACK, *THE POPULIST RESPONSE*, *supra* note 139, at 3–5 (arguing that evidence contradicts the retrogressive reading of populism on three notable grounds: first, far from opposing technology, the agrarians "were receptive to mechanization, scientific procedures, and the dissemination of technical information;" second, the political solutions they offered were "concrete remedies designed to meet *existing* conditions," rather than "utopian blueprints for the perfect society of independent yeomanry;" and third, the agrarians' relationship with industrial labor involved ideological interactions and attempts at collaboration between the two groups).

¹⁷⁵ See POSTEL, *supra* note 151, at 10 ("To understand the full significance of these strivings it is necessary to look further than what the Populists were against—abusive railroad pricing, inequitable banking policies, and corrupt government—and to examine what they were for.").

¹⁷⁶ *Id.* at 10–11.

¹⁷⁷ *Id.* at 9.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* ("The Populist country . . . was a commercial environment, bound to global markets.").

¹⁸⁰ *Id.* at 16.

¹⁸¹ *Id.*

economic relations, they also shared the modern desire for change. As Populist novelist Hamlin Garland put it, they were moved by “a splendid optimism” about the future, and believed that the imperfect and the unjust could be improved.¹⁸²

For the Alliance, as with the National Reformers in the 1840s, improvement required legal and institutional innovation rather than mere redistribution through tax and transfer. The Kansas Alliance newspaper, *The Advocate*, commenting on proposals to introduce the income tax to allow a modicum of redistribution, argued that the income tax was a good start but was insufficient.¹⁸³ The Alliance called for new institutions that would establish a democracy of producers, which they believed would bring equity to the market and commercial playing field.¹⁸⁴ The farmers envisioned a system where market power would be distributed more equitably from the get-go. As *The Advocate*'s editorial put it:

Monopoly of the resources of nature and of the means of production and distribution will have to come to an end. Robbery under sanction of law will have to stop. Equal rights and equal opportunities will have to become a reality. . . . Conditions that will permit the producer of wealth to retain and enjoy that which he produces, will have to be established and maintained.¹⁸⁵

Establishing a more equitable commercial playing field would require a broad range of innovative policies and institutions. First, a democracy of producers would depend on institutions to ease farmers' access to land, credit, technology, and transportation.¹⁸⁶ Second, a more democratic economy would entail fostering the development of farmers' skills.¹⁸⁷ In Postel's words, “[b]ecause [farmers] believed in the transforming power of science and technology, they sought to attain expertise and knowledge for their own improvement.”¹⁸⁸ Finally, leveling the playing field would

¹⁸² *Id.* at 11.

¹⁸³ Editorial, *ADVOCATE*, Apr. 3, 1895, reprinted in *THE POPULIST MIND*, *supra* note 149, at 57.

¹⁸⁴ See *POSTEL*, *supra* note 151, at 15 (“The Farmers’ Alliance brought a new quality to rural associational life. . . . It demanded equity in the commercial playing field.”).

¹⁸⁵ *Id.* at 57–58.

¹⁸⁶ These were the main areas covered in the Alliance literature. See *Morgan*, *supra* note 152, at 19–20 (discussing land monopoly); *Otken*, in *A POPULIST READER*, *supra* note 150, at 42–43 (describing the credit problem); *N.B. Ashby*, *The Railroad Problem*, in *A POPULIST READER*, *supra* note 150, at 26–27 (describing the railroad issue); see also *GARVIN & DAWS*, *supra* note 145, at 101–02 (discussing the railroad problem).

¹⁸⁷ See *GARVIN & DAWS*, *supra* note 145, at 84–85 (describing education as an important goal of the Alliance); *GOODWYN*, *supra* note 3, at 20–54 (describing the development of a movement culture and structure for self-education as an important achievement of the Alliance); *POSTEL*, *supra* note 151, at 15 (discussing the Alliance's aspiration to create “the most powerful and complete educator of modern times”).

¹⁸⁸ *POSTEL*, *supra* note 151, at 4.

require new models of business organization and self-governance. Growers of cotton and wheat sought to become a business interest like any other in modern society, interacting on an equal footing with capitalists and corporations.¹⁸⁹ This required adapting the model of large-scale enterprise to meet their own associative and marketing needs.¹⁹⁰ An institutional framework capable of realizing these goals, the Alliance believed, would encourage the growth of human potential by “realizing and incarnating in the lives of the common people the fullness of the divinity of humanity,” as Henry D. Lloyd put it in an 1894 campaign speech.¹⁹¹

This broad vision of economic democracy was not without its dark sides; historians have long highlighted the racist and exclusionary nature of Agrarian Populism,¹⁹² and the more nuanced picture offered by recent historical scholarship does not absolve it of these charges.¹⁹³ As Postel notes, in the cultural world of the Alliance, civilization was by nature white or “Anglo-Saxon.”¹⁹⁴ With few exceptions, the communities that did not fit this category, such as Indians and black farmers, had little room in the new democracy of producers.¹⁹⁵ White farmers pushed to open Indian lands to white settlement and the Alliance endorsed white farmers’ claims on Indian land.¹⁹⁶ Many members of the Alliance supported the Dawes Severalty Act of 1887, which divided up tribal lands into 160-acre tracts for Indians and parceled the rest for private purchase by white settlers.¹⁹⁷ William Peffer, Alliance leader, justified the Alliance’s position by explaining that Indians had to accept the dismantling of tribal property and give way to “the common good”¹⁹⁸ (however, not all farmers’ organizations supported the dismantling of tribal property; the Arkansas-based Agricultural Wheel expressed the concern that railroads and land syndicates would take advantage of the allotment policy to seize Indian lands and argued that the government should protect the inalienable rights of the Indians).¹⁹⁹

On race, the opinions of the Alliance were similar to those of the rest

¹⁸⁹ *Id.* at 15.

¹⁹⁰ *See id.* at 17.

¹⁹¹ CHI. TIMES, Nov. 4, 1894, reprinted in THE POPULIST MIND, *supra* note 149, at 69–70.

¹⁹² *See* POSTEL, *supra* note 151, at 8 (“The rise of industry, however, brought with it what contemporaries thought of as an immigrant invasion, a massive forty-year migration of Europeans, chiefly peasants, whose religions, traditions, languages, and sheer numbers made easy assimilation impossible. Populism and Progressivism were in considerable part colored by the reaction to this immigrant stream among the native elements of the population.”).

¹⁹³ *Id.* at 19, 174.

¹⁹⁴ *Id.* at 174.

¹⁹⁵ *Id.* at 174–75.

¹⁹⁶ *Id.* at 29.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

of Anglo-America in that they ranged from relative tolerance to lynch-mob-level oppression and forced exclusion.²⁰⁰ Alliance leaders' notion of "race progress" meant separation of the races.²⁰¹ Black farmers created their own Alliances,²⁰² called Colored Farmers Alliances, though while they attempted to reproduce the organizational might of the white Alliance, they were much less successful, as they relied solely on a loose network of supportive ministers.²⁰³

C. *The Alliance's Proposals: Homesteading, Cooperation, and the Subtreasury*

If class legislation (public lands laws that favored speculators and asymmetrical contract and property forms) had reduced the people to a state of vassalage, then radically new legal institutions were needed. "Corrupt[] legislation made us poor & only correct legislation can restore prosperity," wrote Fanny Leake, secretary of the Farmers' State Alliance of Texas, in 1895.²⁰⁴ The Alliance developed a folk legal wisdom inspired by knowledge acquired through self-education and first-hand experience. The Alliance realized that to be effective, legal innovation had to be informed by knowledge of economics and business organization. In his history of the movement, Scott Morgan noted:

[T]he only hope of reform is to . . . make a united effort. [Farmers] are adopting systems of trade and studying questions of political economy as they never did before. Mistakes may occur, as no doubt they will. Their track may be strewn with wrecks of failures; but they will move on.²⁰⁵

The Alliance drew on personal experience in their efforts at institutional design. Because farmers directly experienced the problem of limited access to the means of production, they drew their answers from that experience itself.²⁰⁶

To solve the problem of access to land and avoid land monopoly, the

²⁰⁰ *Id.* at 174.

²⁰¹ *Id.*

²⁰² *Id.* at 174 n.178 (describing the Colored Farmers' Alliance's attempts to make the most out of the separate but equal regime by insisting on equal).

²⁰³ *Id.* at 42.

²⁰⁴ Letters from Fanny Leake to Unidentified Persons (Aug. 5, 1895 & Oct. 23, 1895), in *THE POPULIST MIND*, *supra* note 149, at 454.

²⁰⁵ Morgan, *supra* note 152, at 31.

²⁰⁶ The term "folk legal wisdom" is inspired by Norman Pollack's idea of the Populist's folk wisdom. See POLLACK, *THE POPULIST RESPONSE*, *supra* note 139, at 9 ("The grass-roots world of Populism is thereby opened, revealing what for me was an exciting dimension. A kind of folk-wisdom emerges which grasps complex philosophical questions and pierces to their heart with deceptively simple solutions. The reason behind this, while perhaps mystifying to the intellectual, is not hard to seek. Populists lived these problems, drawing their answers from experience itself.").

Alliance reiterated the National Reformers' earlier calls for homesteading. At its annual meeting in Ocala, Florida, in 1890, the Alliance demanded:

[T]he passage of laws prohibiting alien ownership of land, and that Congress take prompt action to devise some plan to obtain all lands now owned by aliens and foreign syndicates; and that all lands now held by railroads and other corporations in excess of such as is actually used and needed by them be reclaimed by the government, and held for actual settlers only.²⁰⁷

These demands are repeated in similar wording across all Alliance platforms from 1886 to 1890.²⁰⁸

The folk legal wisdom of the Alliance produced new imaginative solutions in response to the farmers' problems of access to credit and supplies. The centerpiece of their plan was to improve and expand the cooperative form.²⁰⁹ By dramatically expanding the cooperative form, farmers sought to obtain the benefits of large-scale enterprise while also facilitating democratic self-governance.²¹⁰

In the 1890s, bigger seemed better. The business corporation was emerging as the dominant form of economic enterprise.²¹¹ Courts and jurists were struggling with developing a theory of corporate personality that would enhance the position of the business corporation in American law.²¹² The entity theory of the corporation, according to which the corporation is an entity no different from the individual in its constitutional entitlement to property rights protection, was gradually taking shape in the jurisprudence of the Supreme Court.²¹³

The Alliance's leaders shared the general belief that progress meant large, concentrated economic enterprises.²¹⁴ They believed in the efficiency of large organizations that derived from economies of scale.²¹⁵ To interact with corporate power on an equal footing, the Alliance reasoned, the

²⁰⁷ *The Ocala Platform*, in A POPULIST READER, *supra* note 150, at 89.

²⁰⁸ See, e.g., *The Omaha Platform of 1892*, in THE POPULIST MIND, *supra* note 149, at 59–66 (discussing the Omaha Platform in detail).

²⁰⁹ For a chapter on Cooperation and Exchange in the Alliance's own official history, see GARVIN & DAWES, *supra* note 145, at 84–93.

²¹⁰ GOODWYN, *supra* note 3, at 57 (discussing the horizontal nature of the Alliance cooperative vision); POSTEL, *supra* note 151, at 16–17 (emphasizing the Alliance's belief in the benefits of large scale enterprise).

²¹¹ HORWITZ, *supra* note 15, at 16–17.

²¹² See *id.* at 65–73 (discussing the development of the natural entity theory and the meaning of the Santa Clara decision, which is considered by historians to be a dramatic example of judicial personification of the corporation that radically enhanced the position of the business corporation in the U.S.).

²¹³ *Id.* at 69 (discussing the Supreme Court's struggle with the question of corporate personality).

²¹⁴ POSTEL, *supra* note 151, at 16–17.

²¹⁵ *Id.*

farmers needed to develop new methods of large-scale business organization.²¹⁶ As Nelson Dunning, a national publicist for the Alliance, put it, if the farmers of America would organize as intelligently and solidly as the Standard Oil Company, nothing could withstand their power.²¹⁷ The idea was that a large-scale cooperative would provide even the smallest producers with access to economies of scale, standardization, technology, and regulated markets.²¹⁸

Responding to objections that a plan for large-scale business organization was inconsistent with the Alliance's attacks on trusts and monopolies, the farmers replied that theirs was to be a monopoly that would use its power wisely—a philanthropic monopoly for redistributing wealth among the people.²¹⁹ The Alliance argued that the farmers' large-scale business organization was to be democratic. Large-scale consolidation seemed intuitively antidemocratic; after all, in the law of corporations, the rise of the entity theory of the corporation had facilitated the shift of power away from shareholders to directors and professional managers.²²⁰

What's more, the previous experiments with farmers' cooperatives had been far from democratic. The Grange, and later some of the local branches of the Alliance, had founded cooperatives based on joint-stock principles.²²¹ In these cooperatives, management was neither democratic nor participatory.²²² Generally, the members met once a year and in the interim a committee of a handful of managers ran the business.²²³ Any member could attend the annual meeting but only members who owned stock had the right to speak.²²⁴ The number of shares that members owned also determined the number of votes they had.²²⁵ The Alliance of the 1890s recognized that the joint-stock system would facilitate "neighborhood factions, individual or local jealousies, and family or political differences."²²⁶ Farmers themselves pointed to the shortcomings of the joint stock model in letters to Alliance newspapers and started experimenting with new forms.²²⁷ For example, a farmer from the Prairie Lea Alliance, in a letter to the *Southern Mercury*, described a cooperative

²¹⁶ See *id.* (emphasizing the rural reformers' belief that "the future lay with organizational consolidation and economies of scale").

²¹⁷ *Id.* at 16–17.

²¹⁸ *Id.* at 17.

²¹⁹ *Id.* at 103, 118.

²²⁰ HORWITZ, *supra* note 15, at 98–100.

²²¹ POSTEL, *supra* note 151, at 119.

²²² *Id.* at 120.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 120–21.

²²⁷ See *id.* at 121 (addressing stinging letters addressed to the *Southern Mercury* from farmers).

experiment that barred dividends to shareholders, eliminated profits, and sold at cost plus expenses.²²⁸ The idea behind the experiment was to place “the poorest [black man]” and the “meanest white man” on an equal footing with “the best farmer in the land.”²²⁹

The prototype for the new, large-scale democratic cooperative was the Texas Farmers’ Alliance Exchange, a giant cooperative in charge of marketing the crops of the members and buying the supplies needed.²³⁰ Charles Macune, a doctor and farm owner from central Texas, was the architect of the new cooperative form.²³¹ As a marketing cooperative, the Exchange was able to obtain prices closer to the prevailing prices on the world cotton market.²³² Its internal organizational structure was straightforward. An Alliance trade committee was created and a business agent appointed in each county.²³³ The business agent, who worked through the Alliance cotton yard established by the trade committee, would weigh, sample, and number the bales of cotton in his local yard.²³⁴ Samples from each bale were then sent to the Dallas Exchange, where they were placed on display in a sample room for cotton buyers to examine.²³⁵ The effort was successful²³⁶—export buyers came to the Exchange, and more than a thousand bales of cotton were sold for shipment to England, France, and Germany.²³⁷

To solve the problem of farmers’ access to credit, Macune devised the joint note cooperative. The joint note cooperative brought together more prosperous landowning farmers and landless tenants, allowing them to purchase needed supplies through the Exchange and collectively overcome

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See GARVIN & DAWS, *supra* note 145, at 86 (describing the Exchange as one of the greatest efforts ever put forth by any farmers’ organization).

To resist [the pernicious influences of the mortgage and credit system] and to serve as a protection against them and their exorbitant demands, the Exchange, national in character, with a central head, extending its branches and striking its roots into every nook and corner of the land and embracing as its members all who are interested in the success of agriculture, became an absolute necessity. And by co-operation we can overthrow the power and counteract the evil influences of the past. For with such an arbiter as the Farmers Alliance Cotton Exchange and Commission Business Agency, ‘the hawks will make their trades with the doves’ no more.

Id.

²³¹ For Macune’s biography, see *id.* at 146–47.

²³² GOODWYN, *supra* note 3, at 74 (implying that the cooperative was able to enter the international market).

²³³ See *id.* (suggesting that each country had a business agent who worked through the Alliance cotton yard).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

the need to make use of furnishing merchants.²³⁸ Each member who wanted supplies would provide a schedule of his needs, a showing of “full financial responsibility,” and a pledge of cotton worth at least three times as much as the amount of credit requested.²³⁹ Landowners and tenants alike would then collectively purchase their supplies for the year through the Texas Exchange on credit.²⁴⁰ The landowners would sign the joint note and use their land as collateral.²⁴¹ The Exchange would use the notes to borrow money from local banks to buy the supplies.²⁴² The Alliance farmers would market the cotton collectively through the Exchange and then pay off the joint notes at year’s end.²⁴³ The notes would draw 1% per month from the date the supplies were shipped until the farmer had repaid the debt.²⁴⁴ In addition to substantial savings in credit costs, farmers also used the Exchange’s bulk purchasing power to obtain cheaper prices on supplies.²⁴⁵

However, in the long run, access to credit proved to be a problem for the Exchange, too, since bankers and wholesale merchants turned against the Exchange and largely refused to accept the joint notes.²⁴⁶ In the late summer of 1889, unable to market its joint notes in banking circles, the Texas Exchange collapsed.²⁴⁷ The Exchange also failed in its ambition to facilitate democratic governance.²⁴⁸ The organizational structure of the cooperative stores brought back many of the features of the older cooperatives.²⁴⁹ The general management of the Exchange was vested in a board of five directors with broad powers and a Manager exercising general supervision.²⁵⁰ The Exchange denied full benefits to non-shareholders, who were the large majority of the Alliance members, and also charged them an extra 5% commission.²⁵¹ Such discrimination made some “lose [their] love and enthusiasm for the Exchange,” as one farmer put it.²⁵² More generally, “[t]he Exchange stood removed from those too poor to take advantage of its services.”²⁵³

²³⁸ *Id.* at 75.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 75–76.

²⁴² *Id.* at 76.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 77.

²⁴⁷ *Id.* at 89.

²⁴⁸ *See id.* at 90 (“Wherever a cooperative failed for lack of credit, greenbackism surged like a virus through the organizational structure of the agrarian movement.”).

²⁴⁹ *See id.* (“Slowly, the Omaha Platform of the People’s Party was germinating.”).

²⁵⁰ For the Plan for Cooperative Stores submitted to the President and Members of the Farmers’ Alliance of Texas, see GARVIN & DAWS, *supra* note 145, at 155.

²⁵¹ POSTEL, *supra* note 151, at 125.

²⁵² *Id.*

²⁵³ *Id.*

When the Exchange and the joint note plan failed, Macune came up with his boldest idea: the Subtreasury. The concept of the Subtreasury was outlined in the report of Alliance's Committee on the Monetary System, approved by the Alliance's 1889 St. Louis convention.²⁵⁴ The report proposed establishing federal warehouses in every county in each state that yielded over \$500,000 worth of agricultural produce annually.²⁵⁵ These warehouses would provide farmers with a place to store their crops to await higher prices before selling.²⁵⁶ Farmers who stored their crop would receive a certificate of deposit showing the amount and quality.²⁵⁷ They would be permitted to borrow up to 80% of the local market price upon storage and they could sell their subtreasury certificates of deposit at the prevailing market price at any time of year.²⁵⁸ Farmers were to pay interest at the rate of 1% per annum on the condition that they redeem the crop within twelve months from the date of the certificate, or the trustees would sell the crop at public auction to the highest bidder to satisfy the debt.²⁵⁹ Besides the 1% interest, farmers would pay small charges for grading, storage, and insurance.²⁶⁰

The report concluded:

[W]ith this method in vogue, the farmer, when his product was harvested, would place it in storage where it would be perfectly safe and he would secure four-fifths of its value to supply his pressing necessity for money at 1% per annum. He would negotiate and sell his warehouse or elevator receipt whenever the current price suited him, receiving from the person to whom he sold only the difference between the price agreed upon and the amount already paid to the subtreasurer . . . This is no new or untried scheme; it is safe and conservative.²⁶¹

The New York Times described the Subtreasury plan as "one of the wildest and most fantastic projects ever seriously proposed by a sober man."²⁶² It was, in fact, the ultimate expression of the Alliance's idea of a democratic economy. As Lawrence Goodwyn put it, Macune's experiences and exasperation as a farmer led him "to a conception of the uses of

²⁵⁴ Report of The Committee on the Monetary System, *reprinted in* A POPULIST READER, *supra* note 150, at 84.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 84-85.

²⁶² GOODWYN, *supra* note 3, at 173.

democratic government that was beyond the reach of orthodox political theorists of the Gilded Age.²⁶³ The Alliance went beyond contemporary orthodoxy in proposing to mobilize the monetary authority of the nation to help some of its poorest citizens through the creation of a currency system designed to benefit the “producing classes.”²⁶⁴

Efforts to get a Subtreasury bill through Congress repeatedly failed.²⁶⁵ Historians explain this failure by pointing to a variety of factors, including factionalism within the Alliance, as well as the power of traditional political culture and the corporate state.²⁶⁶ The contest between the twin powers of traditional politics and the corporate state of the Agrarians’ experimentalism was not an even one. The traditionalist forces were narrow in outlook and primitive in economic theory but supported by an enormous passive constituency and by the nation’s press, universities, banks, and churches.²⁶⁷ The Farmers Alliance, by contrast, had only its self-education apparatus, sympathetic local newspapers, the partial successes of the cooperative experiment, and hope.²⁶⁸

Despite their nineteenth-century failures, some of the Alliance’s concepts lingered in agrarian reformers’ circles and were partially incorporated in later legislation. In 1913, President Wilson appointed a governmental commission to study the problem of agricultural credit and cooperation.²⁶⁹ The commission’s reports led to the Farm Loan Act of 1916, which established a system of long term agricultural credit based on a cooperative system of twelve federal land banks.²⁷⁰ The federal government provided part of the capital required for the cooperative land banks to begin operation and regulated the interest rates that could be charged borrowers.²⁷¹ Later, the Farm Credit Act of 1933 established production credit associations to make short term and intermediate term loans to farmers and a system of district banks and a central bank to extend credit to farmers’ cooperative associations.²⁷²

²⁶³ *Id.* at 91.

²⁶⁴ *Id.*

²⁶⁵ Report of the Committee on the Monetary System, *supra* note 254, at 80.

²⁶⁶ *Id.* at 212.

²⁶⁷ *Id.*

²⁶⁸ *See id.* (“The forces of reform . . . deployed several regiments of stump speakers, a thousand weekly newspaper editors, and a sizable constituency that carried strong but receding memories of the Alliance cooperative crusade. Collectively, they had hope.”).

²⁶⁹ COCHRANE, *supra* note 157, at 112.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 113.

III. THE IMPLICATIONS OF POPULIST PROPERTY LAW

A. *Property Law from Below*

The story of the National Reformers' and the Farmers' Alliance's efforts to influence property law builds on a body of legal and historical scholarship that seeks to examine the law "from below."²⁷³ Most legal history privileges the "official" lawmakers and interpreters of the law by focusing on the decisions and writings of judges, legislators, lawyers, and treatise writers. This prevailing mode of writing legal history assumes an input-output model of how law is produced. In this model, non-legal (e.g., social, cultural, political, and economic) inputs are processed by the official, privileged makers and interpreters of the law, then turned into authoritative legal texts, such as statutes, cases, or treatises.²⁷⁴ By contrast, "legal history from below" focuses on the contributions to the meaning of law made by people with no official roles in the hierarchy of legal authority.²⁷⁵ It shows that these people, such as workers, women, or farmers, often contested official versions of the law and put forward their own distinctive legal interpretations.²⁷⁶ The story told in this Article seeks to expand the insights of "legal history from below" in several ways.

First, in these two episodes, citizens with no official legal role or training went beyond ignoring, overriding, or re-interpreting the official meaning of the law: they actively sought to *change* it by crafting new property forms.²⁷⁷ In other words, workers and farmers contributed their

²⁷³ See William E. Forbath, Hendrik Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 759 [hereinafter *Legal Histories from Below*] (explaining that legal histories from below "share an unwillingness to regard official legal texts and interpretations as the sole—or, often, even the most significant—registers of what the law [is], in the eras and for the people studied here"). As examples of "legal history from below," see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 785, 809, 812, 817 (examining how, during the decades following the Civil War, organized labor repudiated "liberty of contract" as "wage slavery" and forged an alternative republican constitutionalism and an alternative vision of industrial cooperation); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 934 (exploring the practice of pig-keeping in nineteenth century New York City as a starting point for developing a larger and more general study of the legal significance of American customs); Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 838–39 (proposing a new view of family law history that "looks underneath" traditional family law to see family social roles mediating between law and social experience by reinforcing legal norms, while simultaneously providing independent bases for social practices and rationales for social change).

²⁷⁴ *Legal Histories from Below*, *supra* note 273, at 759, 761.

²⁷⁵ *Id.* at 760.

²⁷⁶ *Id.* at 759.

²⁷⁷ See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1602 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (arguing that "we need to pin down the . . . cloudy claims" of "popular constitutionalism" and distinguish between interpreting a constitution, changing a constitution and simply ignoring or overriding one).

creative *legal* input to property law. Most legal history characterizes their input as exclusively *non-legal*, explaining that any such input was later processed by professional lawmakers and translated into official property law.²⁷⁸ By contrast, the story of the Reformers and the Farmers' Alliance suggests that the folk *legal* craftsmanship of ordinary citizens (i.e., their legal knowledge and imagination) is an important factor in the production of the law. Farmers and workers believed that property law needed to be reformed, and they mastered the building blocks of property law to directly participate in the reform process. They were able to process their personal experiences with the problems of access to land or credit via their understanding of technical property concepts and to craft new property forms.

The story of populist property law expands the theory of "legal history from below" in a second important way: it broadens its focus to include property law, implicating property law theory in a new and interesting way. In recent years, "legal history from below" has focused predominantly on constitutional law, retrieving a lost strand of "popular constitutionalism."²⁷⁹ Its proponents note that today we are inclined to view law and politics as two distinct domains.²⁸⁰ In politics, the people rule, while law is reserved for a trained elite of judges and lawyers. However, "popular constitutionalism" theorists argue, the founding generations celebrated the central role of the people in the legal realm.²⁸¹ They were relied upon to supply the government with energy and direction by improvising solutions to preserve popular control over the course of constitutional law.²⁸²

This Article shows a similar idea at work in property law. The National Reformers and the Farmers' Alliance saw property law as a sort of economic constitution, like a body of law that determines the distribution of resources and the rules of the game. They believed that, because of its importance, property law should not be the exclusive domain of courts and trained lawyers, and so they reclaimed control of its development.

Recognizing the existence of popular lawmaking in property law has important implications for contemporary property theory. Descriptively, it challenges the prevailing view of how property law is structured and produced. Interestingly, with few exceptions, property theorists have largely overlooked the insights that "law and society" and "history from

²⁷⁸ *Legal Histories from Below*, *supra* note 273, at 759, 761 ("Usually modern legal history has characterized the inputs as non-legal When the inputs are legal, they are seen as drawn from the internal needs of the legal profession and the relatively autonomous values that are identified with lawyering and legal institutions." (internal quotation marks omitted)).

²⁷⁹ For the literature on "popular constitutionalism," see *supra* note 9.

²⁸⁰ KRAMER, *supra* note 9, at 7.

²⁸¹ *Id.*

²⁸² *Id.*

below” scholars offer regarding popular lawmaking. In most accounts, property law consists of a limited number of available property forms (the fee simple, future interests, covenants, easements, leaseholds) that have remained relatively fixed in time (the so called “numerus clausus” principle).²⁸³ In this prevailing view, legislatures are the main institutional actors responsible for managing the list of available property forms, pruning old ones or accepting new ones, and judges do most of the day-to-day work of tweaking existing forms.²⁸⁴ The story of the Reformers and the Farmers’ Alliance, however, suggests the presence of a greater degree of innovation in development of property law and magnifies the role of actors other than legislatures and courts. This story suggests that the friction between legislatures, courts, and ordinary citizens led to the continuous development of new property forms.

The story of Populist property law also has important normative significance, because it enhances the democratic legitimacy of property law. In recent years, democratic property theory has emerged as a powerful alternative to long-dominant normative accounts focusing on efficiency and information costs.²⁸⁵ Democratic property theory argues that, because property law defines the relations among individuals regarding access to resources, property forms should reflect the values and aspirations “of a free and democratic society that treats each person with equal concern and

²⁸³ See Dorfman, *supra* note 1, at 467 (“[The numerus clausus] is a restriction that means that it cannot be up to . . . private persons . . . to create new forms of property right, but only to trade rights that take existing forms.”); Merrill & Smith, *supra* note 1 at 10–11 (“[C]ommon-law courts *behave* toward property rights [and the numerus clausus principle] very much like civil-law courts do: [t]hey treat previously-recognized forms of property as a closed list that can be modified only by the legislature.”).

²⁸⁴ See Merrill & Smith, *supra* note 1, at 61 (discussing the reasons for and consequences of making legislatures the agents of change in property law and pointing at the features of legislative decision making that make it relatively more attractive as a basis for modifying property law: clarity, universality, comprehensiveness, stability and prospectivity); Dorfman, *supra* note 1, at 468–69 (noting that *numerus clausus* and the related idea that legislatures are the agent responsible for change in property law “reflect[] a concern about legitimate political authority” It signals that “private persons lack the legitimate political authority to create new [forms of property rights].” By contrast, the concept of political legitimation that underlies the creation of new property forms is that of democratic self-governance).

²⁸⁵ For examples of theories of property law that focus on efficiency and the reduction of information costs, see Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV 1691, 1691 (2012) (“Property is a platform for the rest of private law. The New Private Law takes seriously the need for baselines in general and the traditional ones furnished by the law in particular. And nowhere is this issue of baselines more salient than in property. I argue that the baselines that property furnishes, as well as refinements and equitable safety valves, are shaped by information costs. For information-cost reasons, property is, after all, a law of things.”); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005) (proposing a “unified theory of property predicated on the insight that property law is organized around creating and defending the value inherent in stable ownership”). On democratic property theory, see *supra* note 13.

respect.”²⁸⁶ Democratic property theorists also argue that, procedurally, property forms must be ratified through the “democratically elected legislature[.]”²⁸⁷ However, today, representative democracy is in crisis. A growing body of political science and legal scholarship discusses the new anxieties that threaten our liberal, representative democracy.²⁸⁸ These anxieties involve both democracy’s legitimacy as well as its effectiveness. Its legitimacy is threatened by the problem of unequal access. For Claus Offe, the bedrock of democracy was “the principle of non-convertibility”²⁸⁹—i.e., the notion that unequal social and economic assets should not convert into unequal political influence. But today’s liberal representative democracy demonstrates both that wealth readily converts into political influence and the consequential inequitable distribution of citizen power that results. Democracy’s ability to deliver good policy is also brought into question by the troubling dysfunction of national legislatures. As Ira Katznelson puts it, the ideal of a legislature where the representatives of the community come together to make policies and laws in a way that acknowledges and respects differences is out of reach with the reality of “a cacophony of partisan argument, obsessive protection of intensely interested minorities, poor legislative craftsmanship, and delegation to courts and executive agencies.”²⁹⁰

These new anxieties about the legitimacy and capacity of representative democracy have ushered in a new conversation among political scientists and activists about the need to imagine new institutions that would restore democracy’s promises of equal access and effective policymaking. Central to this conversation is the theme of more authentic and efficacious forms of political participation. Political scientist Nadia Urbinati proposes three alternative models for bringing democracy closer to the people.²⁹¹ One is a model of deliberative democracy where citizens reason together on the assumption of shared interests and information.²⁹²

²⁸⁶ Singer, *supra* note 13, at 1301.

²⁸⁷ di Robilant, *supra* note 1, at 370; Dorfman, *supra* note 1, at 510.

²⁸⁸ See Ira Katznelson, *Anxieties of Democracy*, BOS. REV. (Sept. 8, 2015), [bostonreview.net/forum/ira-katznelson-anxieties-democracy](https://perma.cc/MJC7-SDRL) [https://perma.cc/MJC7-SDRL] (“[T]here is a sense that constitutional democratic forms, procedures, and practices are softening in the face of allegedly more authentic and more efficacious types of political participation—those that take place outside representative institutions and seem closer to the people. There is also widespread anxiety that national borders no longer define a zone of security, a place more or less safe from violent threats and insulated from rules and conditions established by transnational institutions and seemingly inexorable global processes.”).

²⁸⁹ Claus Offe, *Democracy in Crisis: Two and a Half Theories about the Operation of Democratic Capitalism*, OPENDEMOCRACY (July 9, 2012), <https://www.opendemocracy.net/clauss-offe/democracy-in-crisis-two-and-half-theories-about-operation-of-democratic-capitalism> [https://perma.cc/KJ29-JEZ5].

²⁹⁰ Katznelson, *supra* note 288.

²⁹¹ NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH AND THE PEOPLE 2* (2014).

²⁹² *Id.*

Another is a robustly populist democracy where mobilized people reach conclusions superior to those achieved by the elites.²⁹³ And the third is a plebiscitary democracy where policy choices are offered directly for the people's approval.²⁹⁴

Property law making has been an important laboratory for all three of those scenarios. This "closer to the people" property law has received little attention so far in democratic property theory, but it is visible and vital. In recent decades, in the U.S. and in Europe, new property forms have been introduced or revamped that seek to establish mechanisms of democratic deliberative governance for resources as diverse as natural resources, scarce urban land, historic landmarks, and cultural institutions. These forms—which include the community land trust, the public trust doctrine, common interest communities, emphyteusis, and the commons—are crafted on the belief that, for some critical resources that involve public interests, use and management decisions should be made not by a single owner, whether private or public, but through a democratic, deliberative process.

Starting in the 1990s, forms of plebiscitary property law making have also become common. Ballot-box land use planning has sought to replace the representative structures of traditional zoning with direct popular participation. The idea is to give local citizens a means of directly addressing the growth and development problems they feel their local planning officials are unable or unwilling to remedy. And the story of populist property law suggests that the goal of a populist democracy has long inspired property law making. In the stories told in this Article, the role of citizens in property law is not limited to tacit approval through their representatives in the legislative process; it shows how they have had direct input in the process. The stimulus for innovation came from groups of ordinary citizens who were motivated by their own needs, narratives and public values and developed informed views about property law reform.

The story of the Reformers and the Farmers' Alliance also enriches our understanding of how a populist democracy would work and what institutional reforms are needed for it to successfully achieve its goals. For the people to be involved more directly in law making, we need to rethink our current institutions and design new, more appropriate ones. Critics of "popular constitutionalism" complain that the theory has been pitched at too abstract of a level and as a consequence, it is difficult to know how it would actually work.²⁹⁵ Other critics emphasize the lack of realism implicit in the notion of "popular constitutionalism."²⁹⁶ These critics paint a bleak

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 166.

²⁹⁶ *Id.* at 184.

picture of the average citizen as politically inactive and civically ignorant.²⁹⁷ They insist that the average citizen lacks knowledge about issues on the public agenda and about the fundamentals of our legal system that would allow her to directly participate in interpreting existing law or crafting new legal forms.²⁹⁸

The episodes of populist property law examined in this Article show that civic renewal through organization and education is essential for popular lawmaking to work. The National Reformers and the Farmers' Alliance failed in some respects, but they were extremely successful in their ability to recruit, organize, and educate their constituencies about law. The Farmers' Alliance created their own autonomous institutions from scratch to promote the acquisition and dissemination of knowledge. The leaders of the Alliance taught themselves the fundamentals of political economy and law, developing analytical abilities and the capacity to express their proposals in technical language previously unattained by those outside the traditional lawmaking process. They disseminated their knowledge to the Alliance's members through their "travelling lecturers" series. As Lawrence Goodwyn has argued, the educational institutions of the Alliance allowed its leaders to acquire individual self-respect and enabled the movement to gain collective self-confidence.²⁹⁹

In the case of the National Reformers, the belief in the need for institutions for self-education and self-organization was nurtured by the specific culture of the world of printing and printing unions. Evans was apprenticed to a printer in Ithaca where he became immersed in the ethos of free thinking. The printing office called itself "a chapel devoted to the faith of reason and free discourse."³⁰⁰ The Reformers promoted self-education and free thinking through a network of an estimated six hundred local newspapers.³⁰¹

The efforts at self-education and self-organization of the Reformers and the Alliance show that one does not have to hold unrealistic expectations about the capacities of ordinary citizens to accept that the American people should play a more direct role in lawmaking.³⁰² Practically speaking, the story of the Reformers and the Alliance provides

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ GOODWYN, *supra* note 3, at XX.

³⁰⁰ LAUSE, *supra* note 2, at 10–12.

³⁰¹ See *Amateur Journalism*, 8 ILLUSTRATED AM. 261, 263 (1891) ("By 1877 amateur journalism, with some six hundred newspapers in the field, had reached a commanding position.").

³⁰² See Donnelly, *supra* note 9, at 162, 164 (discussing the idea of the "People's veto," a mechanism for challenging five-to-four decisions of the Supreme Court on constitutional issues); see also Tom Donnelly, Essay, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 966–68 (2009) (putting forth a proposal that suggests political scientists are devoting greater attention to the role that civic education and the narratives presented in high school history textbooks play in shaping people's beliefs about the American constitutional system).

support for contemporary proposals of institutional reforms meant to combat citizens' apathy and foster civic renewal.

B. *Contestations and Reversals in Modern Property Law: Retrieving Feudal Doctrines in Service of Distributive Equity.*

The story of Populist Property Law also invites a revision of the prevailing account of the history of property law in America. Most property law historians describe its modern development as the steady march away from feudal restraints on the use and alienability of land towards the free alienability and the maximally productive use of land.³⁰³ The story of Populist Property Law presents us with a different scenario. The Reformers and the Farmers' Alliance actually reversed, at least temporarily, this modern trend towards market alienability and efficiency.³⁰⁴ This reversal has been largely overlooked by existing historiographical accounts of property law.

The literature supporting the dominant view of the development of modern property law is vast.³⁰⁵ It explains both the development of property doctrine and its normative underpinnings. As I described in Section I, throughout the course of the nineteenth century, virtually every doctrine of property law was revised to promote free alienability and efficient use. Normatively, this trend was driven by two ideas: the commitment to a republican form of government³⁰⁶ and the belief that the market is the dominant mechanism for structuring the social order.³⁰⁷ As Greg Alexander has shown, these two ideological traditions, republicanism and market commodification, were not incompatible but rather intertwined.³⁰⁸

Republicanism signified a rejection of aristocratic government in favor of a form of government based on the consent and participation of the governed.³⁰⁹ It also entailed a rejection of feudal relations of economic subordination in favor of individual autonomy.³¹⁰ These republican ideas,

³⁰³ See *supra* notes 15 (supporting the dominant account).

³⁰⁴ William M. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1338–39 (1992) (framing the Reformers and Farmer's Alliance movements in America as focused on "a commitment to participation and equality in the economic sphere, and a sympathetic focus on small-scale, locally rooted enterprise," which were generally against alienation).

³⁰⁵ See *supra* notes 15 (citing sources to this effect).

³⁰⁶ Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 274 (1991) (interpreting the "legal meanings of property" as defined by "American recrudescence of the classical republican tradition of political thought").

³⁰⁷ See *id.* at 293 (finding the modern debate in property theory remains focused on the "market . . . [as] the central device for allocating economic resources").

³⁰⁸ ALEXANDER, *supra* note 15, at 3.

³⁰⁹ Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 681–83 (2006).

³¹⁰ *Id.* at 683.

historians argue, translated into sweeping reforms of the law of inheritance that abolished primogeniture and the entail, and led to a more restrictive approach towards restraints on alienation.³¹¹ The rejection of feudalism was the dominant republican theme in the contemporary commentary on these reforms. Thomas Jefferson saw the abolition of the fee tail and primogeniture as necessary for “every fibre [to be] . . . eradicated of antient [sic] or future aristocracy and a foundation laid for a government truly republican.”³¹² St. George Tucker, the most prominent legal scholar in Virginia in 1803,³¹³ called the entail “the offspring of feudal barbarism and prejudice.”³¹⁴ Another commentator counted inheritance reforms, along with the universal inoculation for smallpox and the absence of the plague, as among the blessings enjoyed by the new nation.³¹⁵ The poet and diplomat Joel Barlow predicted that “the simple destruction of these two laws, of entailment and primogeniture, if you add to it the freedom of press, will ensure the continuance of liberty in any country.”³¹⁶

The other ideological driver of the development of property law, market consciousness, grew in importance with the social and economic changes of the nineteenth century.³¹⁷ It soon became dominant and partially obscured the republican theme.³¹⁸ Market consciousness was culturally rooted in the one of the fundamental ideas of modernity, the belief in the possibility of endless material progress.³¹⁹ Market consciousness viewed the market as the privileged mechanism for promoting progress by allowing individuals to realize their will and preferences.³²⁰

This new market ideology translated into sweeping reforms in the law of property designed to encourage the maximally productive use of land. The two most important historiographical interpretations of modern American property law both emphasize the role played by market consciousness. Willard Hurst’s famous “release of energy” interpretation

³¹¹ See *supra* text accompanying notes 99 (describing the Reformation as beginning with the abandonment of feudal features of the English common law).

³¹² Hart, *supra* note 99, at 168 (citing Thomas Jefferson, *Autobiography*, in 1 THE WRITINGS OF THOMAS JEFFERSON 68–69 (Paul Leicester Ford ed., 1892)).

³¹³ Brewer, *supra* note 99, at 307.

³¹⁴ *Id.* (citing Tucker, 2 Blackstone’s Commentaries 119 n.14).

³¹⁵ STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 14 (2011) (citation omitted).

³¹⁶ *Id.* (emphasis omitted) (citing Brewer, *supra* note 99, at 307–08).

³¹⁷ Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248, 248–49 (1972).

³¹⁸ See ALEXANDER, *supra* note 15, at 7 (arguing “[t]here is no single American traditional meaning of property” and that people wrongfully assume that “the market idea of property has monopolized American legal thought”).

³¹⁹ *Id.* at 10.

³²⁰ See *id.* at 3 (addressing the “important normative commitment[] . . . [of] the market as the primary mechanism for mediating individual preferences within society”).

of American legal history³²¹ has inspired a vast literature that describes nineteenth-century law as promoting enterprise and the release of individual creative energy.³²² The conceptual alternative to the “release of energy” account, Morton Horwitz’s “transformation” thesis, differs radically in methodology but has a similar focus on the rise of market consciousness.³²³ Horwitz documented in detail how, over the course of the nineteenth century, judges, mobilized in part by a self-conscious alignment of interests with the leaders of a rapidly expanding mercantile capitalist class, reformed property law to permit the destruction of its older forms by new agents of economic development.³²⁴ The courts viewed land almost exclusively as a productive asset and justified all changes to the concept of property ownership by claiming they promoted a net increase in national wealth.³²⁵ In areas such as water law, the law of waste, or the law of prescription, doctrines encouraging high-risk investment and “reasonable user” balancing tests replaced anti-developmental property doctrines that limited owners to the natural use of their land.³²⁶

Some historians have questioned these accounts of the development of property law by pointing to the apparently contradictory assumptions underlying modern American property law.³²⁷ According to these theorists, modern property doctrine has been premised on fundamentally irreconcilable postulates of liberal ideology;³²⁸ it has sprung from ideas of autonomy and self-determination as much as it has from ideas of community and paternalism.³²⁹ Other historians have examined the

³²¹ See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3–32 (1956) (“Because it most valued property for its productive potential, the nineteenth century was prepared to make strong, positive use law to maintain such conditions as it thought essential to the main flow of private activity.”).

³²² See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 157 (1973) (“[D]uring much of the [nineteenth] century, there was a great deal of public sympathy for business, productivity, growth.”); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 192 (1989) (“[E]very state legislature [in the nineteenth century] devised legal means to compete with the equally ambitious efforts of other states anxious to attract new enterprise.”); John V. Orth, *The Release of Energy: Reflections on a Legal History Trope*, 34 *ADEL. L. REV.* 159, 160 (2013) (examining the release of energy trope and comparing it to the periodization of English legal history).

³²³ See Horwitz, *supra* note 317, at 290 (describing how legal doctrines of were transformed by the concept that ownership of property contributed to increased national wealth). For a summary of the debate over Horwitz’s “transformation” thesis and its methodology, see Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 *TULSA L. REV.* 915, 915–20 (2002).

³²⁴ Horwitz, *supra* note 317, at 248, 250.

³²⁵ *Id.* at 290.

³²⁶ See *id.* at 251–61 (discussing water law); *id.* at 264–70 (discussing prescription); *id.* at 279–84 (discussing waste).

³²⁷ See, e.g., KENNEDY, *supra* note 106, at 113 (noting the contradiction between morality and policy which underlies modern property law).

³²⁸ *Id.* at 102.

³²⁹ *Id.* at 99–105 (identifying and discussing several contradictions: facilitation vs. regulation, autonomy vs. community, self determination vs. paternalism, formality vs. informality).

survival of customary property forms that contradicted the faith in the market.³³⁰ Use rights in commons, such as grazing, wood-gathering, hunting, and fishing, are the clearest example of how obsolete remnants of a “moral economy” of pre-market custom survived in modern property law.³³¹ The story of Populist Property Law dramatically expands these “revisionist” insights. The movement toward market alienability and efficient use of the land was not as steady and linear as usually assumed—it was marked by ideological contradictions,³³² the survival of local “communitarian” customs,³³³ and significant contestations and temporary reversals.³³⁴

As argued in Section I of this Article, the Reformers and the Alliance sought to reverse the course of modern property law, and for some time, they succeeded. The Homestead Act stands as the most important example of this temporary success.³³⁵ The Reformers and the Alliance were committed to the modern idea of progress, but they rejected both strands of the modern property discourse (i.e., market consciousness and the anti-feudalism rhetoric).³³⁶ The Reformers sought to improve the prospects of workers in modern industrial society,³³⁷ and the Farmers’ Alliance was firmly committed to promoting agrarian progress.³³⁸

However, while they shared in that modern sensibility, these two groups were also convinced that the market was not the privileged mechanism for promoting modern progress. Progress for the Reformers and the Alliance did not mean realizing individual preferences through market transactions. Progress meant endowing everyone with the means to effectively realize their life plans.³³⁹ This could only be done by expanding and securing long-term access to resources such as land and agricultural credit.³⁴⁰ Up to that point, this idea of distributive equity had remained marginal to the discourse of modern property law. The Reformers and the Alliance made it the central focus of their reflections on property. In this respect, the property discourse of these two groups was new. It rejected the dominant market consciousness, and it also went beyond the old language

³³⁰ See, e.g., Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 96 (John Brewer & Susan Staves eds., 1995) (observing how English and colonial social norms and practices contradicted absolute dominion discourse).

³³¹ See *id.* at 96–97 (detailing the customs which countered the model of absolute dominion).

³³² KENNEDY, *supra* note 106, at 98–99, 102.

³³³ Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 97–98 (John Brewer & Susan Staves eds., 2014).

³³⁴ Priest, *supra* note 15, at 392–94.

³³⁵ See *supra* Section I.C.

³³⁶ See *supra* Section I.B.

³³⁷ See *supra* Section I.A.

³³⁸ See *supra* Section I.

³³⁹ See *supra* Section I.B.

³⁴⁰ See *supra* Section II.A.

of republican virtue.³⁴¹

Even more striking was the Reformers' and the Alliance's rejection of the anti-feudal rhetoric of modern property law. They retrieved doctrinal tools that had been discarded as *feudal* not because they envisaged a return to an older social order but because of their potential to effectively realize their *modern* ideas about progress as distributive equity. They were motivated by a pragmatic concern with what would "work."³⁴² This pragmatism made them look beyond the pervasive rhetoric of the critique of feudalism. The Reformers realized that anti-feudal rhetoric had distracted the "official" property lawyers, who had failed to see that "feudal" restraints on alienation, such as positive duties to cultivate and exemptions from creditors, could be put to work in service of the modern goals of making access to land and credit more equitable and secure in the long term.

C. *Making Sense of the New Populist Property Law*

The story of Populist Property Law is also important because it illuminates current developments in property law. Populist Property Law is not merely a phenomenon of the past. It bears a striking resemblance to the present.

To begin with, the circumstances that led to the rise of the Reformers and the Alliance are very much like those of today. The Reformers and the Alliance rose up against levels of wealth inequality that parallel those of today.³⁴³ Over the last thirty years, wealth inequality in the United States has grown to the point that it is now "fully back to Gilded Age levels."³⁴⁴ A recent study suggests that the wealthiest quintile holds about 84% of the nation's wealth.³⁴⁵ As modern America faces increasing middle-class insecurity and rising inequality, progressives are looking to a new economic populist agenda to expand access to resources such as housing, credit, healthcare, and education.³⁴⁶ The heirs of the Reformers and the

³⁴¹ On republican virtue in the modern property discourse, see ALEXANDER, *supra* note 15, at 26–43.

³⁴² See *supra* Section I.B.

³⁴³ Paul Krugman has been particularly vocal about the New Gilded Age. Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014), <http://www.nybooks.com/articles/2014/05/08/thomas-piketty-new-gilded-age/> [https://perma.cc/GA7F-L8T2] (reviewing Thomas Piketty's *CAPITAL IN THE TWENTY-FIRST CENTURY*).

³⁴⁴ Paul Krugman, *Gilded Once More*, N.Y. TIMES (Apr. 27, 2007), http://www.nytimes.com/2007/04/27/opinion/27krugman.html?_r=0 [https://perma.cc/4EPU-43NN]; see also TIMOTHY NOAH, *THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* 146–47 (2013) (providing data on income distribution in the United States up to 2008).

³⁴⁵ Michael I. Norton & Dan Ariely, *Building a Better America—One Wealth Quintile at a Time*, 6 PERSP. ON PSYCHOL. SCI. 9, 10 (2011).

³⁴⁶ See Paul Krugman, *The Populist Imperative*, N.Y. TIMES (Jan. 24, 2014),

Alliance are organizations such as Americans for Financial Reform (AFR) and Strike Debt.³⁴⁷ These organizations have revived many of the arguments about property, equality, and freedom once advanced by the National Reformers and the Alliance, and they are proposing similar property law innovations. The story of nineteenth-century populist property law helps make sense of these contemporary ideas and proposals.

One of those proposals, known as “pre-distribution,” has spread rapidly from academic circles to politicians and advocacy groups.³⁴⁸ Coined by Yale political scientist Jacob Hacker, pre-distribution is the idea that “[i]nstead of equalizing unfair market outcomes through tax-and-spend or tax-and-transfer, we instead engineer markets to create fairer outcomes from the beginning.”³⁴⁹ Pre-distribution presents important similarities to the concerns and the vision of the Reformers and the Alliance.

Like their nineteenth-century predecessors, many modern-day progressives are concerned with the limited effectiveness and unpopularity of redistribution.³⁵⁰ The Farmers’ Alliance believed that support for the income tax was a hopeful sign but insufficient for real change.³⁵¹ For their part, the National Reformers were concerned with the unfairness of ex post redistribution.³⁵² Contemporary advocates of pre-distribution warn about the limits of redistribution.³⁵³ They argue that regulation that intervenes

<http://www.nytimes.com/2014/01/24/opinion/krugman-the-populist-imperative.html> [<https://perma.cc/3W8Q-PRPK>] (noting the connection between economic inequality and lack of access to employment); see also Michael Tomasky, *A New Populism?*, N.Y. REV. BOOKS (Mar. 6, 2014), <http://www.nybooks.com/articles/2014/03/06/new-populism/> [<https://perma.cc/QR4Z-XFVS>] (reviewing LANE KENWORTHY, *SOCIAL DEMOCRATIC AMERICA* (2014) and noting that progress is inevitable).

³⁴⁷ See LARRY KIRSCH & ROBERT N. MAYER, *FINANCIAL JUSTICE: THE PEOPLE’S CAMPAIGN TO STOP LENDER ABUSE* xiii (2013) (describing AFR and noting that “consumer, labor, civil rights, fair lending, and community groups in Washington and across the country did come together in a way rarely, if ever, seen before in modern-day citizen politics . . . [in] a pitched battle between newly cemented and sometimes unusual alliances advocating for the ‘people’—2000s’ style—and the traditional leviathans of Wall Street and Big Business”); STRIKE DEBT, <http://strikedebt.org> [<https://perma.cc/SCZA-9GUE>] (last visited Dec. 1, 2016) (Strike Debt describes itself as “a nationwide movement of debt resisters fighting for economic justice and democratic freedom.”).

³⁴⁸ See, e.g., Martin O’Neill & Thad Williamson, *The Promise of Pre-Distribution*, POL’Y NETWORK (Sept. 28, 2012), http://www.policy-network.net/pno_detail.aspx?ID=4262&title=The+promise+of+pre-distribution [<https://perma.cc/8Q65-KWZ8>] (describing a conference where a British politician announced that pre-distribution would be the Labour Party’s new agenda).

³⁴⁹ *Id.*

³⁵⁰ See, e.g., Jacob S. Hacker, *The Institutional Foundations of Middle-Class Democracy*, in *PRIORITIES FOR A NEW POLITICAL ECONOMY: MEMOS TO THE LEFT* 33, 35 (Michael McTernan ed., 2011) [hereinafter Hacker, *Institutional Foundations*] (“[E]xcessive reliance on redistribution fosters backlash, making taxes more salient and feeding into the conservative critique that government simply meddles with ‘natural’ market rewards.”).

³⁵¹ *Supra* Section II.B.

³⁵² *Supra* Section I.B.

³⁵³ Hacker, *Institutional Foundations*, *supra* note 350, at 35–36.

before the distribution of entitlements is both more popular and more effective than redistribution.³⁵⁴ It is more popular because it does not feed into the conservative critique that government taxation “meddles with ‘natural’ market rewards.”³⁵⁵ It is more effective because equalizing the preconditions for individual economic agency has a greater potential to change the very structure of power.³⁵⁶

There is another more fundamental affinity between the Reformers’ and the Farmers’ proposals and the contemporary focus on pre-distribution. These visions all aspire to create a democratic economy and recognize that economic democracy requires a fair distribution of effective control over economic resources. The Reformers envisioned a democracy of property owners, where the government would give each citizen a capital stake, such as a parcel of land and, in some cases, cash.³⁵⁷ The Farmers Alliance called for a “democracy of producers,” where access to credit and agricultural services would be expanded through farmers’ cooperatives and the Subtreasury.³⁵⁸ Today, advocates of pre-distribution seek to democratize the economy through a sweeping set of reforms in housing, education, welfare, and financial policy that would secure widespread ownership of productive assets and human capital.³⁵⁹

This vision of economic democracy that informs the contemporary pre-distribution approach seeks to offer a fresh alternative to existing theories of distributive justice, particularly the “equality of opportunity” approach, which has so far dominated discussions of distributive justice. In its narrowest formulation, formal equality of opportunity forbids the allocation of resources and advantages based on race, sex, or sexual orientation, but takes pre-existing inequalities, such as disadvantages

³⁵⁴ See, e.g., *id.* (“The moral of this story is that progressive reformers need to focus on market reforms that encourage a more equal distribution of economic power and rewards even before government collects taxes or pays out benefits.”).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ See *supra* Section I.C.

³⁵⁸ See *supra* Section II.B.

³⁵⁹ See Jacob Hacker, *The Free Market Fantasy*, POL’Y NETWORK (Apr. 23, 2014), http://www.policy-network.net/pno_detail.aspx?ID=4628&title=The-free-market-fantasy [https://perma.cc/G73N-G9NH] (“Four themes should define a new redistributive agenda: a true commitment to equality of opportunity, embodied in universal access to affordable pre-K education and college; the encouragement of faster, more broadly shared, and more stable growth through public investment and stronger discipline of finance; a concerted campaign to expand and improve public services so that all citizens have access to a basic set of goods essential to human flourishing, regardless of income or wealth; and the fostering of countervailing power and participation through the empowerment of communities, civic organisations, and economic watchdogs, including, of course, trade unions but also collective investors (such as pension funds) and public-interest organisations (such as anti-poverty advocates).”); O’Neill & Williamson, *supra* note 348 (“The power and promise of pre-distribution is that governments can find ways to influence the structure of the economy, to make it unrecognizably more egalitarian and more democratic.”).

arising from social-class origin, as given.³⁶⁰ A broader version of equality of opportunity, known as “compensatory” or “substantive” equality of opportunity, views pre-existing inequalities as obstacles for which there must be some compensation in order that all individuals have an opportunity to compete based solely on their talents and abilities.³⁶¹

Even in its broadest formulation, the theory of equality of opportunity has two critical shortcomings that pre-distribution seeks to overcome. First, equality of opportunity does not have anything to say about the inequality of end outcomes. Equality of opportunity assumes that once individuals have equal opportunities to fairly compete in the market, the way the market distributes its rewards is not something we should worry about. Second, equality of opportunity assumes a narrow-minded conception of self-reliance and self-improvement that magnifies the relevance of individual talents, effort, and abilities, but denies interdependence and vulnerability.

Pre-distribution seeks to overcome these problems by placing the question of inequality of end-outcomes front and center. It recognizes that a society where wealth is concentrated in the hands of few is not a healthy or just society³⁶² and that inequality corrodes the very fabric of democracy. Economic oligarchies breed political oligarchies that dominate and control the polity. The Reformers and the Farmers Alliance saw the dangers of “European-style” political despotism in America in the form of a “moneyed aristocracy” with undue political influence.³⁶³

After recent Supreme Court decisions such as *Citizens United*,³⁶⁴ *Arizona Free Enterprise*,³⁶⁵ and *McCutcheon*,³⁶⁶ the issue of unequal

³⁶⁰ See JOHN ROEMER, EQUALITY OF OPPORTUNITY I (1998) (defining formal equality of opportunity or the anti-discrimination principle as the idea that “in the competition for positions in society, all individuals who possess the attributes relevant for the performance of the duties of the position in question be included in the pool of eligible candidates, and that an individual’s possible occupancy of the position be judged only with respect to those relevant attributes.”).

³⁶¹ See *id.* (defining the substantive or compensatory notion of equality of opportunity as the idea that “society should do what it can to ‘level the playing field’ among individuals who compete for positions, or, more generally, that it level the playing field among individuals during their periods of formation, so that all those with relevant potential will eventually be admissible to pools of candidates competing for positions.”).

³⁶² See, e.g., Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 670 (2014) (“As structures of opportunity have grown increasingly narrow and brittle, and class differences have widened, the nation is becoming what reformers throughout the nineteenth and early-twentieth century meant when they talked about a society with a ‘moneyed aristocracy’ or a ‘ruling class’ – an oligarchy, not a republic.”). Fishkin and Forbath argue that “we cannot keep our constitutional democracy – our republican form of government – without constitutional restraints against oligarchy and a political economy that maintains a broad middle class, accessible to everyone.” *Id.* at 669.

³⁶³ See *supra* Sections I.A & II.A.

³⁶⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 312 (2010) (extending First Amendment protection to corporate political speech).

³⁶⁵ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 754–55 (2011) (striking down a program that aimed to mitigate inequalities by awarding a campaign matching funds in

political influence is real and urgent.³⁶⁷ Markets are never self-governing; rather, they are the product of political decisions.³⁶⁸ In recent years, the rules in key areas have been distorted by powerful economic interests, which have reshaped markets to their advantage.³⁶⁹ Pre-distribution seeks to empower the middle class and produce more equitable end outcomes.³⁷⁰

Pre-distribution goes beyond the narrow conceptions of self-reliance and self-improvement of the equality of opportunity approach. It recognizes that individuals are inherently vulnerable and that there are structural and personal limits to their ability to lift themselves up for which they are only indirectly responsible. Pre-distribution seeks to give individuals not only fairly equal chances to compete in the market, but also the ability to respond confidently to the uncertainties of the economy.³⁷¹ This requires not only endowing every individual with a capital stake so that they could be an active and participating economic agent, but also making sure that they can hold onto their assets, regardless of the randomness of life.³⁷² In other words, to be confident, individuals need a

response to its opponents' spending).

³⁶⁶ *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1462 (2014) (plurality opinion) (striking down aggregate contribution limits that aimed to limit the political dominance of the largest donors by prohibiting any donor from contributing more than a set amount to federal candidates and parties each cycle).

³⁶⁷ See Fishkin & Forbath, *supra* note 362, at 694 ("The thrust of recent Supreme Court decisions in cases such as *Citizens United*, *Arizona Free Enterprise*, and *McCutcheon v. FEC* has been the wholesale rejection of statutory efforts to in any way equalize political influence – among donors, among candidates, among citizens. In a variety of contexts, the Court has analyzed these efforts similarly. The Court reasons that the government has a legitimate policy interest in preventing corruption – while defining corruption in an exceedingly narrow way. The Court holds, however, that this effort to prevent corruption must come to terms with a powerful force: the Constitution. The sole constitutional value in play in this story is First Amendment protections for free speech.").

³⁶⁸ See Hacker, *supra* note 359 ("Markets can be enormously effective, but they aren't always and they are never self-governing. They rest on rules of the game that inevitably advantage some players and not others. The increasingly lax rules governing the financial sector, to take the most salient recent example, advantaged market players willing to take on more leverage and risk without regard to the grave systemic threats their actions posed. In the language of economics, these threats were an 'externality'—privatised gains, socialised losses, predictable crises.").

³⁶⁹ See *id.* ("More and more research suggests that the powerful economic interests in finance and the corporate world that have shot ahead over the last generation have in turn used their economic power to reshape markets to their advantage, or at least to fend off measures that would limit the externalities – from carbon emissions to toxic financial assets – they impose on the rest of us.").

³⁷⁰ See *id.* ("The core point of redistribution is that progressives need to think more seriously about how the rules of the market, and the measures taken to augment and support it, encourage the kinds of social outcomes that citizens value. The distortion of these rules in key areas from finance to corporate governance to energy to industrial relations hinders not just growth, but also the translation of growth into broad-based economic and social gains.").

³⁷¹ See Kitty Ussher, *What is Pre-Distribution?*, POL'Y NETWORK (Oct. 22, 2012), http://www.policy-network.net/pno_detail.aspx?ID=4272&title=What-is-pre-distribution [<https://perma.cc/6TG8-QYGE>] (discussing the "empowerment" approach to pre-distribution, "which focuses on what is needed to ensure that an individual can respond to the uncertainties of a global economy in a positive and confident way").

³⁷² *Id.*

stake in the economy and a chance to keep it. The National Reformers saw this in the 1860s.³⁷³ Their proposals for a homestead law, including duties to reside and restraints on alienation, were designed to limit the risk that grantees would lose their parcels to speculators.³⁷⁴

D. *Cautionary Tales: Is Populist Property Law Doomed to Fail?*

Just as the Reformers and the Alliance did before them, organizations such as AFR and Strike Debt have proposed their own populist property forms.

One proposal that has attracted attention is the idea of a “sticky opt out plain vanilla mortgage” articulated by Professor Michael Barr, a reform for which AFR has expressed its support.³⁷⁵ The idea behind this proposal is to make home mortgage finance safer for consumers.³⁷⁶ The mortgage crisis revealed that brokers and lenders had been able to lure homebuyers into mortgages that they did not understand and could not afford.³⁷⁷ Lenders, at least in the short term, benefit from selling borrowers mortgages they cannot afford,³⁷⁸ and borrowers are not “rational agents with perfect information and foresight.”³⁷⁹ Improved disclosure may help avoid some catastrophic outcomes, but it may not be sufficient in the face of market pressure and consumer confusion.³⁸⁰

In the proposed “sticky opt-out plain-vanilla mortgage,” lenders would be required to offer eligible borrowers a standard “plain-vanilla” mortgage (or set of mortgages) such as a fixed-rate, self-amortizing, thirty-year mortgage loan, according to reasonable underwriting standards.³⁸¹ Borrowers would receive one of these standard mortgages unless they choose to opt out in favor of a non-standard option offered by the lender.³⁸² Given the strong market pressure to deviate from default options, to make the default “sticky,” deviation would require heightened disclosure and

³⁷³ See *supra* Section I.C.

³⁷⁴ *Id.*

³⁷⁵ Barr et al., *supra* note 22, at 41–46; *Press Coverage of AFR’s Launch*, AMS. FOR FIN. REFORM, <http://ourfinancialsecurity.org/2009/06/press-coverage-of-afrs-launch/> [<https://perma.cc/Z39N-859K>] (last visited Dec. 9, 2016).

³⁷⁶ See Barr et al., *supra* note 22, at 42 (“We thus deploy an opt-out strategy to make it easier for borrowers to choose a standard product, and harder for borrowers to choose a product that they are less likely to understand.”).

³⁷⁷ See *id.* at 41 (“[A] central problem [leading to the mortgage crisis] was that many borrowers took out loans that they did not understand and could not afford.”).

³⁷⁸ See *id.* at 42 (“[I]n the short term, lenders and brokers may benefit from selling borrowers loans they cannot afford.”).

³⁷⁹ *Id.* at 25.

³⁸⁰ See *id.* at 41–42 (“Improved disclosures might help. . . . However, if market pressures and consumer confusion are sufficiently strong, such disclosure may not be enough.”).

³⁸¹ *Id.* at 42.

³⁸² *Id.* at 42–43.

additional legal exposure for lenders.³⁸³ The “sticky opt out plain vanilla” mortgage system, advocates argue, would improve consumers’ decision making because more uniform “plain vanilla” terms better allow homebuyers to compare mortgage offers and to understand the key features of the standard products.³⁸⁴

Another populist property law innovation proposed by activists is a novel use of eminent domain where municipalities would use their eminent domain power to condemn underwater mortgages and then refinance them at market value.³⁸⁵ Robert Hockett, the plan’s originator, claims that the plan will effectively solve the collective action problems that make principal write downs of securitized mortgage loans difficult.³⁸⁶ First, there is a last-mover advantage where write downs are concerned: absent orchestration by a collective agent, individual mortgagees benefit by waiting for others to revalue first.³⁸⁷ “Everyone else’s revaluing eliminates debt overhang, thereby lowers aggregate default risk, and so raises property prices. That in turn lessens the degree to which any last mortgage remains underwater”³⁸⁸ In this situation, then, the last one to revalue has the least need to revalue.³⁸⁹ Second, many of the pooling and servicing agreements, drafted in the bubble years, vest authority to collect loan payments in a single collective agent, the servicer, but require supermajority voting among mortgage-backed securities holders before loans can be modified.³⁹⁰ These bondholders, geographically dispersed and unknown to one another, cannot collectively bargain with borrowers or buyers on workouts or prices.³⁹¹ According to Hockett, the municipal

³⁸³ *Id.* at 43. The authors discuss two approaches to making the default “sticky.” The first approach uses an objective reasonableness standard akin to that used for warranty analysis under the Uniform Commercial Code. *Id.* Under that approach, if the court determined that the disclosure did not sufficiently communicate the key terms and risks of the mortgage, the court could modify or rescind the loan. *Id.* Under the second approach, banking agencies would be responsible for supervising the nature of disclosures according to a reasonableness standard and would impose a fine on the lender or order other corrective actions if disclosures were found to be unreasonable. *Id.*

³⁸⁴ *Id.* at 43–44.

³⁸⁵ Hockett, *Village*, *supra* note 23, at 150–52. According to Hockett’s plan, private investors would convey funds to trusts organized and maintained by municipalities. Municipalities would use these funds to condemn underwater mortgages from private-label securitization trusts, paying fair market value. *Id.* at 150–51. The municipalities would then work with homeowners to restructure the underwater loans, on which they owe and which municipalities now hold, in an amount corresponding to the level at which the mortgagor can obtain new financing in the current mortgage loan market. *Id.* at 151. Once that is done, the new restructured loans are conveyed to the municipalities-organized trust, which conveys resultant funds to investors. *Id.*

³⁸⁶ *See id.* at 149 (“The Municipal Plan is designed specifically to sidestep all of the unnecessary impediments that presently block meaningful debt revaluation and attendant value maximization.”).

³⁸⁷ *See id.* at 138 (“Every mortgagee . . . has reason to wish to be last . . .”).

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 139–40.

³⁹¹ *Id.* at 139 (“The fragmentation of ownership interests both in pools of mortgage loans and,

government exercising its traditional eminent domain authority is the optimally situated agent to solve these collective action problems.³⁹² Since cities decline when their residents are evicted, properties deteriorate, and crime levels rise, protecting residents and preventing blight epitomize the types of public purpose that justify the exercise of eminent domain authority.³⁹³

The fate of these proposals resembles that of the earlier forms of populist property law. The plain-vanilla proposal was incorporated into the bill creating the Consumer Financial Protection Agency (later known as the “Dodd-Frank Act”) in 2009,³⁹⁴ but it was dead on arrival. Industry advocates claimed that it would “go too far” and “would be too intrusive in the marketplace.”³⁹⁵ The plain-vanilla idea turned into a “political lightning rod,” and before the Consumer Financial Protection Agency Act could become law, the “plain-vanilla” feature had to be removed.³⁹⁶

The eminent domain plan did not go anywhere either. The opposition from the Securities Industry, Financial Markets Association, and the Federal Housing Finance Agency induced caution.³⁹⁷ Cities in California’s San Bernardino County explored the idea but ultimately passed on the eminent domain plan.³⁹⁸

thereby, even the individual mortgage loans themselves, renders it impossible for creditors to act in concert to modify underlying loans. There is no way for these hundreds of thousands of people even to find one another, let alone act together.”).

³⁹² *Id.* at 150.

³⁹³ *Id.*

³⁹⁴ See Joe Adler, *How Bank-Defeated ‘Plain Vanilla’ Requirements Live On*, NAT’L MORTG. NEWS (Nov. 4, 2013), <http://www.nationalmortgagenews.com/features/How-Bank-Defeated-Plain-Vanilla-Mortgage-Requirements-Live-On-1039717-1.html> [<https://perma.cc/7GVQ-8ZVD>] (noting how the plain-vanilla idea was included in the initial Dodd-Frank bill proposal); *Triumph of the Regulators: The Dodd-Frank Financial Reform Bill Doubles Down on the Same System That Failed*, WALL ST. J. (June 28, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703615104575328993006115992> [<https://perma.cc/KC52-24S4>] (“Congressman Paul Kanjorski . . . offered a motion to memorialize [the bill] as the Dodd-Frank Act.”).

³⁹⁵ Adler, *supra* note 394 (quoting Michael Barr, former senior Treasury Department official).

³⁹⁶ KIRSCH & MAYER, *supra* note 347, at 84.

³⁹⁷ See Statement, Fed. Hous. Fin. Agency, FHFA Statement on Eminent Domain (Aug. 8, 2013), <http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Statement-on-Eminent-Domain.aspx> [<https://perma.cc/C58E-THBS>] (stating that the Federal Housing Finance Administration has “serious concerns” about the use of eminent domain and reserving the right to exercise its statutory authorities in response to eminent domain action); Alexis Goldstein, *Wall Street Group Aggressively Lobbied a Federal Agency to Thwart Eminent Domain Plans*, NATION (Jan. 17, 2014), <http://www.thenation.com/article/wall-street-group-aggressively-lobbied-federal-agency-thwart-eminent-domain-plans/> [<https://perma.cc/9W9V-ZW9V>] (discussing how the Securities Industry and Financial Markets Association, one of Wall Street’s trade groups, lobbied forcefully against eminent domain to the FHFA).

³⁹⁸ See Alejandro Lazo, *San Bernardino County Abandons Mortgage Plan*, L.A. TIMES (Jan. 25, 2013), <http://articles.latimes.com/2013/jan/25/business/la-fi-eminent-domain-20130125> [<https://perma.cc/4MCU-EK69>] (“San Bernardino County and two of its cities abandoned a plan that would use eminent domain to seize troubled mortgages and write down debt for homeowners. . . . [The

This raises the question of whether populist property law is doomed to fail. Is popular lawmaking inevitably going to deliver reforms that are too radical and unworkable? The story of Nineteenth century populist property law suggests that we should not be too pessimistic. Despite their apparent failure, the Homestead Act and the Subtreasury plan had a lasting impact. First, populist property law plays an important *constitutive* role because it shapes people's consciousness about what entitlements they deserve.³⁹⁹ By generating expectations about the political and economic structure we live in, it suggests new avenues by which people can make claims. For example, the Homestead Act made nineteenth-century Americans internalize the expectation of an essentially universal entitlement. It consolidated the expectation that the public domain, "held in trust by the government, would be delivered to its rightful owners: all of 'the People.'"⁴⁰⁰ This new entitlement consciousness helped create a broader welfare rights mentality that was critical to the development of an American welfare state later in the early twentieth century.⁴⁰¹

The new Populist property forms may have a similar constitutive effect. Both the plain-vanilla mortgage and the eminent domain plan have generated a great deal of attention among consumers and homeowners, shaping expectations and generating new demands. For example, the plain-vanilla mortgage proposal has helped embed new expectations about safety in home mortgage finance. Discussions of the plain-vanilla option have helped dispel the narrative that blames the mortgage crisis on homebuyers who "knowingly signed mortgage contracts they cannot now afford to honor."⁴⁰² Debates over the plain-vanilla option have also consolidated the public's awareness of the combined effects of market pressure and the cognitive and behavioral failures in home mortgage finance. Whatever the

County] said it gave up on the eminent domain plan because of its lack of public support.").

³⁹⁹ On law's "constitutive effect," see Robin Stryker, *Mechanisms of Legal Effect: Perspectives on the Law & Society Tradition*, in PUBLIC HEALTH LAW RESEARCH METHODS MONOGRAPH SERIES 2 (2012) (explaining that "law and society scholars refer to law's 'constitutive' effects — that is, law's power to make, and make sense of, the social world"); JENSEN, *supra* note 119, at 11 (discussing how land grants and pensions for veterans of the Revolutionary war had important constitutive effects, creating formal categories of citizens' deservingness, suggesting new avenues to make claims and demands, and generating new expectations about the Federal role).

⁴⁰⁰ JENSEN, *supra* note 119, at 191 (internal citations omitted).

⁴⁰¹ See *id.* at 5–6, 8–10, 33 (arguing that the land grants and pensions for veterans of the Revolutionary War helped embed a notion of "entitlements" that later paved the way for the New Deal welfare state and later for the welfare rights revolution of the 1960s and early 1970s).

⁴⁰² Eli Lehrer, *Subprime Borrowers: Not Innocents*, COMPETITIVE ENTER. INST., <https://cei.org/op-eds-and-articles/subprime-borrowers-not-innocents> [<https://perma.cc/P3NH-CYMA>] (Dec. 11, 2007) (originally posted on BusinessWeek); cf. Daniel Gross, *Subprime Suspects*, SLATE (OCT. 7, 2008, 2:08 PM), http://www.slate.com/articles/business/moneybox/2008/10/subprime_suspects.html [<https://perma.cc/2WL3-LVLE>] (arguing that the financial credit crisis was caused by investment banks recklessly giving out and trading large loans, not by banks lending money to poor minority homeowners).

fate of the plain-vanilla proposal, Americans now expect and demand better product regulation, informed by the realities of market pressure and the insights of behavioral science about consumers' choices. Additionally, the eminent domain plan may have constitutive effects by helping to embed a broader understanding of what counts as a "public purpose" in takings' jurisprudence. In other words, citizens familiar with the eminent domain plan may become more receptive to the idea that preserving neighborhood integrity, property values, the revenue bases from which municipalities fund services, and enabling residents to remain in their own homes are "public purposes."⁴⁰³

In addition to this constitutive effect, populist property law has another important effect. While populist property law may deliver solutions that appear radical and unrealistic when they are first proposed, those solutions may prove useful under different conditions. In other words, while popular lawmaking may not be of immediate application, it expands the repertory of solutions available in the future. For example, as suggested in Section I, the expansive homestead proposal of the National Reformers helped fuel a debate on how to improve the narrower Homestead Act of 1862 after a new "panic" made its failures apparent.⁴⁰⁴ Similarly, the Subtreasury system informed both the establishment of the Federal Reserve System in 1913 and the New Deal's farm programs two decades later.⁴⁰⁵ Today, the idea behind the plain-vanilla proposal has not died. The concept of anchoring the home mortgage market to a safer and fairer product lived on in Dodd Frank's "Qualified Mortgage,"⁴⁰⁶ a type of mortgage privileged by the Act in order to incentivize lenders to offer them instead of other types of mortgages.⁴⁰⁷ As to the eminent domain plan, as noted in a *Huffington Post* article:

Perhaps the mere threat that local and state governments might get serious about using eminent domain to seize underwater mortgages might be enough to get banks to do

⁴⁰³ See Hockett, *Village*, *supra* note 23, at 156, 169 (arguing that in light of *Midkiff*, the plan to condemn underwater mortgages satisfies the public purpose requirement. It would allow municipalities to "preserve neighborhood integrity, property values, and the revenue base from which [they] fund services." In addition, the plan would enable residents to remain in their own homes and eliminate "debt overhang." Even the "landlords" in this case "overwhelmingly wish to write down principal but are prevented from doing so by the collective action challenges . . ." Furthermore, they hold property rights that are "much more attenuated than those of literal landlords, owning as they do only repayment rights and security interests").

⁴⁰⁴ See generally *supra* Section I.C.

⁴⁰⁵ See *supra* Section II.C.

⁴⁰⁶ David Reiss, *Message In a Mortgage. What Dodd-Frank's "Qualified Mortgage" Tells Us About Ourselves*, 31 REV. BANKING & FIN. L. 717, 721 (2012).

⁴⁰⁷ *Id.* at 721, 721 n.12 (citing Dodd-Frank Act, Pub. L. No. 111-203, §§ 941(b), 1411(a)(2) (2010) (codified at 15 U.S.C. §§ 78o-11(c)(1)(G)(ii), 1639c(a) (2012)) (explaining the requirements for a "Qualified Mortgage").

something they have been loathe to do from the beginning: write down principal and right-size mortgages to align them with current property values. Such actions would bring much-needed relief to hundreds of thousands of borrowers and make up somewhat for the trillions in homeowner losses that resulted from the shoddy bank practices of the last decade.⁴⁰⁸

CONCLUSION

The story of populist property law poses new challenges for property scholars beyond the scope of this Article.

The first is to think creatively about how to tackle inequality through property law. At a time when wealth and income inequality is on the rise, scholars and policymakers are debating the possibility of addressing inequality through property law. At first glance, American property law appears to have historically been more ideologically committed and technically better equipped to protect those who already own property and to facilitate their efficient use of that property than to promote a more equitable distribution of property. The Framers were concerned with the vulnerability of property in a republic and believed the protection of private property was central to the American constitutional government. As Jennifer Nedelsky wrote, “With property as the paradigmatic instance of the vulnerability of rights in a democracy, inequality became both a presumption and an object of protection”⁴⁰⁹ In other words, there appears to be a tension between progressives’ ambitions to use property law to target inequality and restrictive assumptions about what can be done within American property law. The story of how the National Reformers and the Farmers’ Alliance translated their ideas about equality into new creative property forms should inspire contemporary property lawyers. It encourages us to shift the focus of property law back to the need to expand access to key economic resources, and invites us to think outside the box when it comes to working with existing property forms.

The second challenge posed by the story of populist property law is to enhance the democratic legitimacy of property law by fostering citizens’ participation and building on their input. The National Reformers and the Farmers’ Alliance exemplify successful grassroots organization and the prospects of progressive change through citizen participation. However, discussions of their visions and proposals have so far occurred largely

⁴⁰⁸ Ray Brescia, *Returning to Eminent Domain for Underwater Mortgages: Speak Quietly and Swing a Big Stick*, HUFFINGTON POST (last updated Nov. 23, 2014), http://www.huffingtonpost.com/ray-brescia/returning-to-eminent-doma_b_5865338.html [<https://perma.cc/2L9W-2KSE>].

⁴⁰⁹ JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 1 (1990).

outside of expert property circles. In other words, “official” property lawyers and “folk” property lawyers have not been speaking with each other. Today, property theory needs to be in closer touch with the suggestions that come from the new wave of citizens’ activism that was spurred by the financial crisis.

