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THEORIZING AMERICAN FREEDOM

Anthony O'Rourke*

THE TWO FACES OF AMERICAN FREEDOM. By Aziz Rana. Cambridge and London: Harvard University Press. 2010. Pp. 415. \$29.95.

INTRODUCTION

Some intellectual concepts once central to America's constitutional discourse are, for better and worse, no longer part of our political language.¹ These concepts may be so alien to us that they would remain invisible without carefully reexamining the past to challenge the received narratives of America's constitutional development.² Should constitutional theorists undertake this kind of historical reexamination? If so, to what extent should they be willing to stray from the disciplinary norms that govern intellectual history? And what normative aims can they reasonably expect to achieve by exploring ideas in our past that are no longer reflected in the Constitution's text, structure, or interpretive doctrine? Aziz Rana's *The Two Faces of American Freedom*³ provides an occasion not only for reflecting on these questions, but also for exploring how deeply they are interrelated.

Rana's project is a "large-scale . . . historical reconstruction" of the relationship between ideas of freedom and exercises of foreign power in American constitutional history (p. 2). This reconstruction draws upon settler colonial studies, a burgeoning interdisciplinary field that previously received little attention from constitutional theorists, to examine the extent to which the early American idea of freedom was predicated on a policy of territorial expansion and elimination of indigenous populations.⁴ "[M]ost of the American experience," Rana provocatively contends, "is best understood as constitutional and political experiment in . . . *settler empire*" (p. 3). More specifically, Rana argues that a robust but racially exclusionary idea of freedom predicated on whiteness—a concept he calls "settler freedom"—gave rise to a constitutional structure that allowed for aggressive territorial expansion and domination of "outsider" groups, while offering a guarantee of self-rule and political participation to Anglo-American "insiders." This

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1. See *infra* notes 49–51 and accompanying text.

2. See *infra* note 63 and accompanying text.

3. Aziz Rana is an Assistant Professor of Law, Cornell Law School.

4. See *infra* notes 14–19 and accompanying text; see also Lorenzo Veracini, *Introducing Settler Colonial Studies*, 1 SETTLER COLONIAL STUD. 1 (2011) (characterizing settler colonial studies as a new scholarly field).

concept of freedom, Rana contends, was ultimately eradicated from our constitutional structure in the twentieth century, replaced by an understanding of liberty that was more inclusive, but in some ways far less substantive, than its predecessor.⁵

If the scope of this historical argument is ambitious, so too are Rana's normative aims. As Part I of this Review explains, the purpose of Rana's historical narrative is not to present an exhaustive account of the multifarious ideas and ideologies that shaped America's constitutional development. Instead, by recasting America's constitutional past through the lens of a single ideology, Rana hopes to uncover "normative tools for grappling with the current moment and for imagining emancipatory alternatives" (p. 17). Unlike many historically informed works of constitutional theory, the success of Rana's project does not necessarily turn on whether the narrative he presents is one historians would find persuasive.⁶

As Part II explains, however, it is unlikely that Rana's normative aims can be fully achieved through the method of historical analysis he employs. Skeptical of what he calls the "abstract form of utopianism" that characterizes work such as John Rawls's theory of justice,⁷ Rana contends that the "American experience" can itself provide tools for imagining a more economically protective, politically participatory vision of citizenship (pp. 17–19). This position, to my mind, reflects Rana's overconfidence that ideas that are no longer part of our constitutional language may still constitute a substantial part of our shared cultural experience, and suggests a misunderstanding of what Rana characterizes as "utopian" political theory.

Notwithstanding these concerns, Rana's methodology serves as a valuable complement to more analytical forms of political theorizing, and his project is a significant contribution to constitutional scholarship. One of the virtues of *The Two Faces of American Freedom* is Rana's willingness to take intellectual risks, including the adoption of an unconventional historical methodology, in order to present a socially relevant analysis than can inform other theoretical projects. Indeed, as Part III suggests, Rana's project is most normatively successful when it strays from the norms of intellectual history.

I. SETTLER FREEDOM AS A HISTORICAL NARRATIVE

According to Rana's account, the experience of Anglo-American colonists under British rule spawned a unique vision of freedom, predicated on both territorial expansion and the subordination of outsiders (p. 12). This vision, Rana argues, emerged from a tension between how "Anglo settlers" conceived of their legal position within the British Empire and their status in the eyes of the British Crown (pp. 21–22). As recent scholarship has emphasized, the concept of empire was hotly contested in pre-Revolutionary

5. See *infra* Part I.

6. See *infra* notes 38–39 and accompanying text.

7. Pp. 17–18. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

America.⁸ While agents of the British Crown thought of the legal structure of their empire as “imperial and integrative,” the Anglo-American elite espoused a “provincial and disintegrating” view. In this latter view, the provinces that Anglo colonists inhabited were in some sense autonomous, and those colonists were deserving of the same rights and liberties as Englishmen.⁹

As Rana describes it, the concept of freedom underpinning the Anglo-American view was a populist incarnation of the civic republican idea of freedom that historians have long held to be a formative principle of early American constitutional thought.¹⁰ A concept notorious for eluding precise definition,¹¹ republican freedom has both political and economic dimensions. The core of republican freedom, as Rana characterizes it, is freedom from any possibility of being subjected to decisions in which one has not participated on an equal basis with one’s fellow citizens.¹² This freedom requires that members of a political community enjoy a guarantee of self-rule and control over economic, political, and religious life (p. 54). Together, these ideals entail a vision of citizenship in which members of a political community are not only free as a formal matter to participate in politics but also have the wealth necessary to avoid social control by more powerful citizens. As originally envisioned by Anglo settlers, the only legitimate means of obtaining this wealth was property ownership, since other forms of resource accumulation either were corrupting (as with commerce) or degraded one’s status as a member of the political community by subjecting the person to another’s will (as with wage earning) (pp. 53–55).

The political and economic dimensions of republican freedom, Rana argues, each generated a competing set of demands that together shaped America’s constitutional framework (p. 12). The principle of self-rule committed Americans to forming legal institutions that facilitated political

8. See John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 *HARV. L. REV.* 754, 765–69 (2007) (book review).

9. DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 10, 84–86, 90–96 (2005); see also ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 7–10, 64–66 (2010) (arguing that the American idea of federalism emerged out of the colonial elite’s understanding of how power was allocated under the British imperial constitution).

10. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (4th prtg. 1969); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 83 (2d ed. 2003); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (W.W. Norton & Co. 1972) (1969).

11. See Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. AM. HIST.* 11, 34 (1992) (describing the contested nature of “republicanism” as a concept in American historiography).

12. P. 51. This characterization is drawn from Quentin Skinner’s account of “neo-roman” liberty as the freedom from being subjected to “the will of anyone other than the representatives of the body politic as a whole.” See QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 49 (1998).

participation on the part of citizens and protected them against arbitrary applications of state power (pp. 53–54). This imperative called for a political structure rooted in “local, decentralized legislative supremacy” and for firm limits on government power over the citizenry (p. 124). To guarantee the economic security necessary to make political participation meaningful, however, institutions had to be structured to enable each citizen to acquire the resources necessary to stand on an equal footing with his peers.¹³ Because land acquisition was the only morally salutary basis of acquiring wealth, and was thus a precondition for republican freedom, the government had to be organized around the principle of territorial conquest for the benefit of a privileged group of Anglo citizens. The result of these competing institutional demands of decentralized government and territorial acquisition was a “structural dualism” in America’s constitutional order, characterized by an executive with robust power over noncitizens in the realm of foreign affairs, and rigid constraints on state authority over insiders (p. 167).

While Rana is not the first legal scholar to examine the link between republican freedom and imperial expansion in American constitutional history,¹⁴ he is the first to do so through the lens of settler colonial theory. According to the scholars Rana draws upon from this field, “settler colonialism” differs from colonialism undertaken for military advantage or economic trade.¹⁵ Under the latter forms of colonialism, imperial administrators have little intrinsic interest in land seizure and have an incentive to “find and work through reliable indigenous partners or chartered companies.”¹⁶ Settler societies, by contrast, are characterized by a permanent “settler population” that is “intent on making a territory their permanent home” while enjoying the living standards and political privileges of citizens in the metropole.¹⁷ They are typically “bound[] by ties of ethnicity and faith in what they persistently define[] as virgin or empty land,” and tend to develop relatively nonhierarchical modes of internal political authority.¹⁸ However, the settler project is organized around wresting land from indigenous groups and eliminating them, “push[ing] them beyond an ever-expanding frontier of settlement.”¹⁹

By applying this theoretical framework, Rana offers a provocative and original narrative of how early American ideas of freedom and imperialism were interdependent, and together animated what was once a formative ide-

13. I use the masculine pronoun advisedly, since republican citizenship was a status available only to men. See pp. 259–61; see also Linda K. Kerber, *Making Republicanism Useful*, 97 *YALE L.J.* 1663, 1669 (1988) (arguing that “patriarchy was embedded in classical republicanism”).

14. See, e.g., POCOCK, *supra* note 10, at 534–35.

15. Caroline Elkins & Susan Pedersen, *Settler Colonialism: A Concept and Its Uses*, in *SETTLER COLONIALISM IN THE TWENTIETH CENTURY: PROJECTS, PRACTICES, LEGACIES* 1, 2 (Caroline Elkins & Susan Pederson eds., 2005).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

ology underpinning American constitutional governance. According to Rana, this “settler ideology” had four basic components.²⁰ First, inspired by a radical idea of republican freedom, settlers sought to create an “internally egalitarian and participatory political community” predicated on land ownership and individual proprietorship (p. 12). Second, the “basic engine” of this internally egalitarian ideal was territorial conquest, such that republican freedom was “constitutively bound to empire and expansion” (p. 12). Third, the economic preconditions of republican freedom meant that it was not universally inclusive, because it required Americans to expropriate native land and consign certain classes of individuals to degraded forms of labor (p. 12). Americans thus drew a distinction between “free citizens”—men for whom republican freedom could be fully realized—and subordinated, external groups.²¹ Fourth, the promise of free citizenship, while completely foreclosed for nonwhites and women, was remarkably open for European immigrants who could be assimilated into the ethnic identity of American settlers. European newcomers benefited not only from a remarkably open immigration regime but also from policies such as grants of voting rights to noncitizens and access to federal land in the territories (pp. 115–20). This openness ensured that America’s population of “free citizens” grew at a rate that made it possible to preserve the structure of settler society (pp. 15, 120).

The Two Faces of American Freedom recasts a considerable amount of republican historiography through this theoretical lens and, by doing so, reveals a little-explored link between American external power and domestic freedom. Rana argues, for example, that a constitution that facilitated territorial conquest served to sustain what other scholars have characterized as a “free labor” ideology, according to which the ownership of economically productive property could enable independent laborers (including artisans and petty entrepreneurs) to participate on an equal basis as citizens in a political community.²² This ideology conceptually severed the promise of republican freedom from the requirement of land ownership,

20. Rana does not define what he means by “ideology.” His use of the term, however, is consistent with Clifford Geertz’s influential definition of it as a set of concepts that have the structural purpose of motivating political action. See CLIFFORD GEERTZ, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 193, 218 (1973) (“The function of ideology is to make an autonomous politics possible by providing the authoritative concepts that render it meaningful, the suasive images by means of which it can be sensibly grasped.”).

21. P. 115. Here, Rana is treating citizenship as “an ahistorical or theoretical category that can serve as a baseline for cross-temporal comparison.” Sam Erman, Book Note, *An “Unintended Consequence”*: *Dred Scott Reinterpreted*, 106 MICH. L. REV. 1157, 1161 n.25 (2008) (reviewing AUSTIN ALLEN, *ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857* (2006)). This category is entirely distinct from “citizenship” as a legal status, which Rana refers to as “formal citizenship.” As Erman explains, this methodological decision can allow scholars to “recover less-studied historical concepts of citizenship that resemble concepts that exist today,” albeit at the cost of understating “the extent to which citizenship was a slippery term, varying across locales, occasioning disputes, and shifting shape over time.” *Id.*

22. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995).

thus broadening the class of individuals for whom full and free citizenship was possible. Thus, Rana argues, the settler ideology continued to undergird America's constitutional structure through the nineteenth century.

By the 1890s, however, America's political and economic development placed "profound pressure" on the material conditions that made settler freedom possible.²³ The most serious threat to the settler ideal, as Rana envisions it, was the closing of the frontier, which threatened the promise of widespread economic independence through land ownership and eliminated the need for a massive influx of immigrants who could be assimilated into settler society.²⁴ In conjunction with the end of America's territorial expansion on the continent, the rise of railroad transportation consolidated national manufacturing markets and ensured that corporations played a heavy role in the politics of frontier communities, further diminishing the hope that settlers could rely on land acquisition and control of subordinated populations to create an internally egalitarian society (p. 185). Although the United States continued its project of territorial expansion, it did so through the occupation of island territories that were not constructed as "uninhabited" land primed for white settlement.²⁵

Rana argues that these developments gave rise to a constitutional jurisprudence that undermined the "great premise" of settler colonialism—that "U.S. expansion went hand in hand with decentralized and autonomous self-rule of free citizens" (p. 280). In the area of foreign affairs, the Supreme Court created a new framework for addressing the legal status of the island territories (Guam, Hawaii, the Philippines, and Puerto Rico). Specifically, in the *Insular Cases*,²⁶ the Court demarcated these overseas possessions as "unincorporated territories" that were not integral to the United States and could be "held indefinitely as colonial dependencies" or relinquished as Congress saw fit.²⁷ In the domestic realm, the Court increased the president's power to respond to incidents of domestic unrest, including the labor

23. Pp. 174–75. While Rana's book contains a detailed and compelling discussion of how the events that led to the American Civil War reflected a settler vision of American power, it offers little analysis of how the Civil War itself affected America's commitment to a settler ideology. Cf. ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 97–108 (1980). "During the Reconstruction the coalition which had fought the Civil War dissolved into its components, and strands of free labor ideology were adopted by contending social classes, each for its own purposes." *Id.* at 126.

24. See p. 174.

25. Cf. Elkins & Pedersen, *supra* note 15, at 2 (describing "settler colonialism" as having occurred when settlers "sought to construct communities bounded by ties of ethnicity and faith in what they persistently defined as virgin or empty land").

26. The *Insular Cases* refer to a group of cases from 1901 to 1922, including *Downes v. Bidwell*, 182 U.S. 244 (1901), which is the focus of much of Rana's analysis, and *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

27. Pp. 275–81; cf. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005) (arguing that the constitutional innovation of the *Insular Cases* was that they "installed a doctrine of territorial deannexation in American constitutional jurisprudence").

disruptions that grew in tandem with corporate expansion.²⁸ Thus the “structural dualism” between the Executive’s strength in foreign affairs and its weakness in domestic affairs began to unravel (pp. 225–26).

But, Rana argues, this unraveling was slow at first, and the settler ideal continued to inspire political actors who otherwise had vastly divergent ideologies. On one side, there was the Supreme Court, which had not yet completely come to grips with the economic transformations that threatened the settler concept of freedom. For example, in Rana’s account, a free labor ideology can explain the Court’s approach to economic regulation in both *Lochner v. New York*,²⁹ where it struck down a statute limiting the workday of bakers, and *Muller v. Oregon*,³⁰ where it upheld a statute limiting the workday of women. In *Lochner*, Justice Peckham characterized the bakers whom the statute regulated (who were, in reality, wage laborers subjected to dangerous and degrading working conditions) as artisans and individual proprietors—free citizens whose right to self-rule entitled them to “care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action.”³¹ Women, by contrast, were a subordinate class of citizens within the settler-republican framework, and could be consigned to labor that was degrading and unmeaningful for free citizens. Because work could not provide women with the autonomy necessary to participate as full members of the political community, the Court in *Muller* saw it appropriate to regulate women’s labor through legislation that was “not necessary for men.”³²

On the opposite side of the ideological contest, some radical political figures constructed new visions of republican freedom by drawing on settler concepts while rejecting the racial and gender hierarchies of the settler structure. The Knights of Labor’s Thomas Powderly, for example, forged alliances with radical Populists in the Farmer’s Alliance and advocated for a producer-centered society in which all laborers, regardless of race or color, had the capacity for self-rule. Subsequently, John Dewey invoked a republican idea of civic and political participation to argue for a restructuring of the economic relations and divisions of labor in society.³³ In the “Great Community” that Dewey envisioned, each individual would have “a responsible share according to capacity in forming and directing the activities of the groups to which [the person] belongs,” including industrial organizations, and would “participat[e] according to the need in the values which the

28. Pp. 222–26; see *In re Neagle*, 135 U.S. 1, 58–59 (1890) (upholding the attorney general’s authority to assign U.S. marshals to protect federal judges); *In re Debs*, 158 U.S. 564 (1895) (upholding the president’s decision to enjoin the 1894 American Railway Union strike and to enforce the injunction by deploying federal troops).

29. 198 U.S. 45, 57 (1905).

30. 208 U.S. 412, 422–23 (1908).

31. *Lochner*, 198 U.S. at 57; see pp. 231–32.

32. *Muller*, 208 U.S. at 422–23; see pp. 322–23.

33. See p. 248; JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 147–48 (1927).

groups sustain.”³⁴ This vision reflected a keen awareness of America’s political and economic structure, but took seriously the idea that, through a “practical re-formation of social conditions,” individuals could structure their working and political relationships based on the principles of self-rule and community engagement.³⁵

But, Rana argues, these efforts to craft a more capacious, post-settler understanding of freedom failed to gain traction in political discourse. By the 1930s, the expansion of executive power in both domestic and foreign affairs had given rise to a “new mode of politics” that completely supplanted the earlier settler ideal. A conception of rights developed that was far more inclusive than the settler understanding, extending (as Dewey and other radical thinkers had hoped it would) “to outsiders long subordinated under the settler narrative” (p. 295). However, with this expansion of membership in the American political community came a decline in the value of that membership. Where citizenship had been predicated on “economic independence,” it now involved only a guarantee of “security from economic want” through federal programs that failed to offer individuals any meaningful control over their livelihoods (pp. 262, 296). Where citizenship once involved a robust idea of political self-rule, it was now reduced to an emphasis on electoral choice—in which voters were free to decide upon their leaders but conditioned to leave the complicated work of governance and political decisionmaking to a professional elite.³⁶ Finally, where the settler idea of free citizenship required a foreign policy of territorial expansion for the sake of colonization, the principal goal of foreign policy was now “global primacy” and “pacification” (p. 296). Thus, Rana argues, the settler concept of freedom had, for better *and* for worse, been eradicated from our governing constitutional framework.

* * *

The broad sweep of this narrative tempts a question often asked of historically grounded constitutional theory: Is the methodology one that

34. P. 248; DEWEY, *supra* note 33, at 147.

35. Pp. 248–49; DEWEY, *supra* note 33, at 211.

36. Pp. 296, 306–08. Rana arguably overstates the extent to which the New Deal vision of electoral politics differs from the republican idea of self-rule. According to Quentin Skinner’s account of eighteenth-century republican freedom (an account that Rana borrows), “the will of the people” meant nothing more mysterious than “the sum of the wills of each individual citizen,” as mediated by “an assembly chosen by the people to legislate on their behalf.” SKINNER, *supra* note 12, at 28–29, 32. Moreover, not every citizen had the moral capacity to serve as a representative. Rather, the legislators needed to be “the more virtuous and considering” of the citizenry. *Id.* at 32. For those citizens who lacked the special virtue required of a legislator, it was sufficient from the standpoint of republican freedom that they had the opportunity to choose who represented them. This concept of political participation plainly does not require, and indeed seems to be at odds with, “participatory control over all the relevant sites of decision making.” P. 288.

historians would accept?³⁷ No, Rana refreshingly concedes. While *The Two Faces of American Freedom* offers a historical account of the relationship between national power and domestic freedom, Rana cautions that it is “not a work of traditional historical scholarship” (p. 17). It is, instead, a self-consciously normative and presentist project “in which history is presented in the service of today’s problems as well as tomorrow’s latent possibilities” (p. 17). This presentation is largely univocal: rather than attempt to chart the diversity of ideologies and of political languages that influenced American constitutionalism, as an intellectual historian might, Rana reexamines America’s constitutional development exclusively through the lens of one of these ideologies. By offering this new and stylized narrative of America’s constitutional history, Rana aims to provide a “means for critiquing the institutions and concepts that have dominated contemporary thinking” (pp. 18–19).

For many constitutional theorists, acknowledging that historians would not accept their historical account would be tantamount to admitting failure. Rana’s project differs, however, from most historically oriented legal scholarship. In keeping with this scholarship, Rana strives to present a credible account of the past to influence how we think about present-day constitutional problems. But while the success of Rana’s normative project is to some extent related to the credibility of his historical narrative, this relation is less direct, and more complex, than is typical for historically grounded legal theorizing. Though Rana’s narrative is undoubtedly incomplete and ideologically selective, he—unlike many theorists—does not employ it in order to legitimize a particular constitutional vision.³⁸ Nor is Rana an unequivocal booster for the settler ideology that he excavates, which is at its core a racial ideology that nobody would care to revive. Instead, he uses history to draw out ideas and concepts that could help shed light on contemporary constitutional questions, but which do not dictate definitive answers to those questions. Such a project does not necessarily suffer—or, at least, suffers far less than most historically grounded legal theory—from the fact that it departs from historians’ methodological standards. (Indeed, as Part III of this Review suggests, Rana’s normative goals would have been better served by departing even more dramatically from those standards.)

Therefore, the success or failure of Rana’s project should, in my view, be judged primarily on whether it advances its broad normative aims, rather than on whether it strictly conforms to the disciplinary conventions of historians.³⁹ By this standard, *The Two Faces of American Freedom* is a

37. Cf. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1749 (1996) (“Legal arguments relying on economics, philosophy, or sociology are more convincing when they comport with the standards set by those disciplines. Nothing prevents the same point from applying to arguments based upon history.”).

38. Cf. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 567–80 (2006) (criticizing Antonin Scalia’s characterization of the common law as a coherent and unified field at the time of the Constitution’s framing).

39. See Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 114–19 (1997) (offering a partial defense of “lawyers’

significant theoretical accomplishment. It successfully taps the insights of a discipline unfamiliar to many legal scholars, and by doing so offers a novel interpretation of America's constitutional past. This interpretation suggests new and challenging ways of thinking about the relationship between national power and domestic freedom—a theoretical achievement that a more nuanced, but less provocative, historical account could not necessarily obtain.

II. THEORIZING FREEDOM: HISTORICAL VALUES AND “ABSTRACT UTOPIANISM”

This is not to say, however, that Rana's normative aims do not themselves merit scrutiny, or that his methodological choices are ideal for achieving those aims. Indeed, the scope of Rana's normative ambitions raises significant questions about the value, and limits, of examining political ideals that were once, but no longer are, integral to a constitutional culture.

Rana presents his method of historical inquiry as a full-service alternative to abstract and “utopian” philosophical “ruminations” about justice (p. 18). Using John Rawls's theory of justice⁴⁰ as a stalking horse, Rana asserts that such “highly analytical forms of theorizing . . . only reinforce the seeming gulf between governing institutions and utopian ideals” (pp. 17–18). Granted, “this form of utopian thinking embodies one avenue of social creativity,” but it is not the sort of “creativity” that can do much to change things, for it “never attaches the promise of improvement to a vision of practical agency” (p. 18). Moreover, such “utopian” theorizing “fails to suggest the cultural tools within the American experience that make these accounts of justice not just universal aspirations but rather constitutive elements of our local and contested debates over social possibility.”⁴¹ By contrast, the settler concepts of freedom and social membership, for all their warts, are things we can accept as “foundational aspects of *our* identity” and as part of “*our own* practices and ideas” (p. 18; first emphasis added). Therefore, Rana contends, identifying these concepts provides us with a “means for critiquing the institutions and concepts that have dominated contemporary thinking” that “utopian” theory is unable to offer (p. 19).

legal history” written to generate “interpretations that are of use in resolving modern legal controversies” (internal quotation marks omitted); Cass R. Sunstein, *The Idea of a Usable Past*, 95 COLUM. L. REV. 601, 605 (1995) (defending the use in constitutional law of “arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future”).

40. See RAWLS, *supra* note 7.

41. P. 18. With this statement, Rana dismisses not only “utopian” political theory but also scholarship exploring the application of such theory to our actual governing institutions. See generally Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (discussing the implications of Rawls's theory for creating a welfare-oriented constitutionalism); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001) (analyzing how Rawls's concept of a “veil of ignorance” is instantiated in constitutional law).

There is an interesting irony in Rana's dismissal of "utopian" theory's practical possibilities. *The Two Faces of American Freedom* is, ultimately, about an American populist ideology that emerged out of republican political theory. At the time of the American Revolution, republican theorists were attacked for the same sort of utopianism that Rana condemns.⁴² For example, in what became a leading nineteenth-century textbook on political theory, William Paley urged that republican definitions of liberty "ought to be rejected" because they were "unattainable in experience" and served only to "inflame expectations that can never be gratified."⁴³ Thus, Rana's project not only takes part in a long tradition of dismissing political theories for being utopian, but also undermines that tradition by showing its potential to motivate political action.⁴⁴

Irony aside, one can question whether Rana's methodology is markedly superior to "utopian" theorizing in terms of offering a vision of freedom rooted in our cultural experience. First, it is unclear how recovering antiquated concepts of freedom and citizenship—concepts predicated on racial subordination and the elimination of native populations—enables us to accept those concepts as "foundational aspects of *our* identity," and as a part of "*our own* practices and ideas" (p. 18; first emphasis added). If Rana is correct that these concepts are no longer part of our constitutional language, how are they any more a part of *our* practices and identity than other concepts that our forebearers had but that are now alien to us?

One obvious answer is that rediscovering how the Constitution was originally understood is relevant to how judges, lawyers, and scholars resolve current constitutional questions.⁴⁵ But this does not get us far with respect to concepts as abstract and legally indeterminate as "freedom." Nor does the historical understanding of a concept have legal weight when aspects of that understanding (such as the principle of racial subordination intrinsic to the settler concept of freedom) are both morally odious and intolerable as a matter of present-day constitutional text, structure, and precedent.⁴⁶ Moreover, if Rana were arguing for the legitimacy of a particular constitutional interpretation based on the original understanding of the Constitution, his argument

42. These theorists included James Harrington, whose *Commonwealth of Oceana* lays out the constitutional structure of a utopian version of England, and whom Rana identifies as one of the core influences on the settler ideology. See JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656) (describing the constitutional structure of an idealized England).

43. WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 341 (7th ed. 1785); see also SKINNER, *supra* note 12, at 78 (discussing Paley's attack on neo-roman utopianism).

44. See Martha Nussbaum, Response, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1780 (1998) (offering examples of philosophical ideas that have influenced public life).

45. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 9–24 (1982) (analyzing a variety of arguments referencing the Framers' understanding of the Constitution and categorizing them as historical, doctrinal, structural, and ethical types of constitutional advocacy).

46. See *id.*; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (arguing that most judges and lawyers recognize the legitimacy of constitutional arguments based on text, historical understanding, structure, precedent, and contemporary values).

would require a much more traditional work of historical scholarship than he purports to offer.⁴⁷

What Rana seems to suggest is that some sort of affective identification with our past allows us to recognize as foundational to our identity those concepts our forebearers possessed. These concepts, the argument goes, are meaningful to us simply because they are part of our history. It is unclear, however, how we can identify with a concept that is alien to our constitutional language, or with the people who espoused that concept. As illustrated by Rana's account of how the concept of freedom evolved, significant discontinuities exist between our political language and that of our predecessors.⁴⁸ Even when we are using the same word as earlier political writers and thinkers, we may be using it in different ways, to address entirely different problems, under entirely different economic and social circumstances.⁴⁹ If one can identify continuities between our constitutional language and that of our predecessors, or between the problems and circumstances that have shaped our respective constitutional understandings, it may indeed be possible to show how a concept they used is reflected in "our own practices and ideas."⁵⁰ Absent any such continuity, however, it is difficult to understand what might create a link across the "vast abyss of cultural estrangement,"⁵¹ to borrow a phrase from literary theory, that time creates between our constitutional values and those of preceding generations.

Moreover, in rejecting the "highly analytical forms of theorizing evident in political philosophy" (p. 17), Rana fails to appreciate how deeply socially rooted—perhaps problematically so—much of this literature is. There are few better examples of this than Rawls's work. In broad summary, Rawls proposes a process of "reflective equilibrium" for identifying the principles of justice that would be accepted by a "well-ordered society," one whose members are committed to acting justly and upholding just institutions.⁵² The first step is to identify which principles of justice a member of the soci-

47. See *supra* notes 37–39 and accompanying text.

48. Cf. ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS 2* (Univ. of Notre Dame Press 1998) (1966) ("There are continuities as well as breaks in the histories of moral concepts. Just here lies the complexity of the history.").

49. 1 QUENTIN SKINNER, *VISIONS OF POLITICS* 86 (2002) (arguing that political thinkers from different historical periods use common terms, "if at all, only in such divergent ways that it seems an obvious confusion to suppose that any stable concepts are being picked out"); see also J.G.A. Pocock, *Political Ideas as Historical Events: Political Philosophers as Historical Actors*, in *POLITICAL THEORY AND POLITICAL EDUCATION* 139 (Melvin Richter ed., 1980), reprinted in J.G.A. POCOCK, *POLITICAL THOUGHT AND HISTORY* 51, 59 (2009) ("[A]ny linguistic relation between two persons can be thought of as a historical relation, and the fact that the historical distance between them may be as great as two and a half millenia only serves to highlight the problems of historicity which the relationship involves.").

50. P. 18; see also H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS* 7 (2002) (arguing that "constitutional law is thoroughly historical, dependent throughout on the contingencies of time and political circumstance, and that it is a coherent tradition of argument").

51. Cf. Stephen Greenblatt, *The Eating of the Soul*, 48 *REPRESENTATIONS* 97, 99 (1994).

52. RAWLS, *supra* note 7, at 8, 453–54.

ety would agree upon in the “original position,” a situation in which each member is behind a “veil of ignorance,” without information that might distort decisionmaking processes such as his or her particular natural abilities, social status, intelligence, and psychological propensities.⁵³ By design, this framework is, as Rana charges, “severely disconnected” from the reality of everyday political life.⁵⁴ The second step in the process, however, involves stepping back to evaluate whether the principles arrived at in the original position match our considered convictions about justice—convictions like our belief that racial discrimination is unjust.⁵⁵ If the principles conflict with our considered convictions, then we must either modify our account of the original position and derive a new set of principles, or reevaluate our considered judgments to determine whether they reflect distortions or biases of which we had been unaware.⁵⁶

Thus, Rawls’s framework both incorporates a society’s prevailing moral sentiments and provides a means for critiquing those sentiments. This method of theorizing places Rawls (and other “highly analytical” political philosophers) within a long tradition of so-called “utopian” political theory⁵⁷—a tradition that Rana draws upon in fleshing out the settler concept of freedom. These theories take seriously the principles that a society purports to value and construct a political ideal that reflects those principles, thereby highlighting the ways in which our actual social practices are out of step with how we conceive of ourselves.⁵⁸ Rana, then, appears to underestimate the extent to which “utopian” theory strives to articulate principles that we can accept as “foundational aspects of our identity,” and as a part of “our own practices and ideas” (p. 18).

Unlike these theorists, Rana offers a complicated historical idea of freedom, many aspects of which are incompatible with our considered convictions about justice. It is unclear why this concept is more foundational to our identity than one obtained through the process of reflective equilibrium. If an analytically minded philosopher were to construct a “theory of freedom,” it might be one that we would accept in theory and aspire to accept in practice. By contrast, the historical concept that Rana offers, in which the privileges of freedom are tied to whiteness, is one we would reject in theory and aspire to reject in practice. Moreover, while the philosopher would work within our present-day constitutional language, Rana presents a

53. *Id.* at 11.

54. P. 18. However, it is at the very least an open question whether Rawls’s vision of a well-ordered society is properly characterized as “utopian.” See, e.g., Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1622 (2010) (“Rawls’s [well-ordered] society is not utopian in that fantasy sense; it is steadfastly located in the circumstances of justice, which include among other things the subjective circumstances of anxiety and limited strength of will among its citizens.”).

55. RAWLS, *supra* note 7, at 48.

56. *Id.*

57. See SKINNER, *supra* note 12, at 79 n.47 (identifying *A Theory of Justice* as “a utopian treatise . . . and none the worse for that”).

58. See *id.* at 79.

historical concept alien to that language. Such a concept seems far more “severely disconnected” from our everyday lives than one that a “utopian” philosopher could derive (p. 18).

This is not to suggest, however, that Rana’s methodology lacks normative promise. In my view, Rana’s methodology is not an adequate substitute for more systematic philosophical theorizing, but it is a necessary complement. Analytical political philosophy, at least under a reflective equilibrium model, is predicated on an author’s assessment of what a society believes to be its considered convictions. If these convictions are not interrogated, they can distort the process of developing a more analytically refined understanding of value-laden concepts like freedom and justice. Indeed, some have argued that such distortions infect Rawls’s analysis, and that his theory is too parasitic on unexamined moral intuitions to count as more than an apology for our existing social arrangements.⁵⁹ Insofar as it is possible to rehabilitate Rawls’s framework in the face of these powerful criticisms, it requires complementary methods of critiquing our considered convictions *before* using them as the building blocks of a systematic theory. Responsible political philosophy thus requires engagement with the social sciences and whatever other disciplines might enable us to, as Bernard Williams puts it, “reflexively rais[e] questions” about a theory’s “relations to social reality.”⁶⁰

As Rana’s project illustrates, historically grounded theory can help us call our convictions into question. It makes clear that the way we currently think about ideas such as freedom is not the *only* way of thinking about them.⁶¹ Even intellectual historians who stress the impossibility of understanding texts outside their historical contexts recognize that examining the past can allow us to “stand back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.”⁶² While it may be unwise to rely on the past for political ideas that

59. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. (forthcoming Mar. 2012) (discussing the reflective equilibrium model’s “inherent conservatism”); see also RAYMOND GEUSS, *Liberalism and Its Discontents*, in *OUTSIDE ETHICS* 11, 22 (2005) (“It is . . . extremely striking, not to say astounding, to the lay reader that the complex theoretical apparatus of *Theory of Justice*, operating through over 500 pages of densely argued text, eventuates in a constitutional structure that is a virtual replica (with some extremely minor deviations) of the arrangements that exist in the United States.”); R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD AND POINT* 12 (1981) (arguing that the “equilibrium” reached under Rawls’s method “is one between forces which might have been generated by prejudice”).

60. BERNARD WILLIAMS, *Political Philosophy and the Analytical Tradition* (1980), reprinted in *PHILOSOPHY AS A HUMANISTIC DISCIPLINE* 155, 159 (A. W. Moore ed., 2006).

61. SKINNER, *supra* note 12, at 116 (“As we analyse and reflect on our normative concepts, it is easy to become bewitched into believing that the ways of thinking about them bequeathed to us by the mainstream of our intellectual traditions must be *the* ways of thinking about them.”).

62. 1 SKINNER, *supra* note 49, at 6; see also JOHN DUNN, *THE HISTORY OF POLITICAL THEORY AND OTHER ESSAYS* 1 (1996) (arguing that even “quite archaic intellectual resources can help us to improve our judgment of the significance of recent political experience, and perhaps even (thereby) our prospects for securing a better rather than a worse political future for ourselves and our descendants”).

are fundamental to *our* social identity—we'll need to work out those ideas for ourselves—we can use the past to challenge our current ideas in ways that more abstract theorizing may not allow. Rana is thus correct that his theoretical approach can offer a “means for critiquing the institutions and concepts that have dominated contemporary thinking” (p. 19). In this respect, Rana's project is a success.

III. SETTLER FREEDOM AS NORMATIVE THEORY

It is worth exploring, however, whether Rana's methodological choices enable him to fully realize the normative promise of his account of settler freedom. The historical and normative aspects of Rana's project—orienting American constitutional history around a concept of settler freedom and creating a narrative that sheds light on current constitutional problems—give rise to two competing methodological pressures. On one hand, in order to present a responsible intellectual history of how a concept has influenced American constitutional discourse, it is necessary to define the concept with enough specificity to make it possible to evaluate the concept's importance in the political climate of a given period.⁶³ The concept must, in other words, be treated as stable, or rigid, in order to accurately identify when it is deployed in specific texts and to determine whether the concept has fallen into disuse.⁶⁴ On the other hand, for the sake of constructing a historical narrative that can be used “in the service of today's problems” (p. 17), it might be tempting to discard this methodological requirement and treat the concept as fluid. That is, it may be worth treating the concept's meaning as something that evolves over time in ways that make it relevant to contemporary constitutional or political questions.

Rana appears to tacitly alternate between these two incompatible methodologies in tracing how the concept of settler freedom has shaped American constitutionalism. Specifically, Rana treats the concept as fluid and adaptive for much of the book, but as too rigid and static to adapt to the pressures of the New Deal. This tension in his analysis provides an interesting case study on the relative merits of two methods of using historical concepts to shed light on contemporary problems. Perhaps surprisingly, this Review suggests, the less acceptable one from an intellectual history standpoint is, in this case, the more successful one from a normative standpoint—an irony that raises interesting questions about the role of historical argument in normative theory.

63. See 1 SKINNER, *supra* note 49, at 62–63, 85–86 (criticizing the “unit-idea” approach to intellectual history, in which the “morphology” of a given doctrine is traced through all the historical periods through which it appears); see also Anthony Grafton, *History of Ideas: Precepts and Practice, 1950–2000 and Beyond*, 67 J. HIST. IDEAS 1, 6 (2006) (observing that contemporary “[s]cholars who mention the name of A.O. Lovejoy,” the creator of the “unit-idea” approach, “do so in order to in order to lampoon his methods”).

64. See POCOCK, *supra* note 49, at 13 (explaining that historians of thought are interested in examining how “relatively stable concepts” are “employed in the political thought of relatively stable societies”).

The settler freedom that Rana traces through the nineteenth century appears to be a fluid concept, one that evolved in response to cultural and economic changes following the United States' founding. In the book's early chapters, Rana's characterization of settler freedom is, for the most part, in keeping with other theorists' definitions of republican freedom.⁶⁵ Under each of these definitions, the freedom requires *actual* independence from the very possibility of being arbitrarily subjected to another's will; in other words, you are deprived of your liberty if you are actually coerced by the state (or another citizen), but also if your material conditions leave you at the mercy of the state (or another citizen) to avoid coercing you out of grace or benevolence.⁶⁶ This form of freedom requires that each citizen have *actual* economic independence from his fellow citizens.

Given this economic imperative, it would be difficult for a republican freedom to sustain a popular ideology—as in a set of concepts and ideas that motivates political action⁶⁷—in a democracy where a large majority of the electorate did not own real property. This more or less described the United States by the 1870s. By this period in the country's history, the property and taxpaying qualifications for voting that were common in antebellum America had largely been abolished for white males,⁶⁸ and most working people were wage laborers who owned no productive property.⁶⁹ Indeed, the republican historians whom Rana relies upon largely acknowledge that civic republicanism had ceased to exist by this period as a meaningful ideology in American politics.⁷⁰ For Rana, however, the settler ideology survived as an influence in politics and jurisprudence.⁷¹

How, then, did the settler ideology continue to underpin America's constitutional structure? The answer implicit in Rana's analysis is that the concept of settler freedom evolved to accommodate changes in America's political economy and social order. By the mid-nineteenth century, Rana contends, the free market “appeared to exacerbate economic and bargaining inequalities between employers and laborers rather than promote broad-based self rule,” and the language of Jacksonian populism did not offer a means of critiquing these structural inequalities (p. 152). In such a society, those who were reduced to working as wage laborers could not participate

65. Specifically, Rana's characterization is adapted from Quentin Skinner's definition of neo-roman liberty. See *supra* note 12 and accompanying text. It also draws from Philip Pettit's definition of liberty as nondomination. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 52 (1997).

66. SKINNER, *supra* note 12, at 68–70.

67. See *supra* note 20.

68. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 24–26 (rev. ed. 2009).

69. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *Wis. L. Rev.* 767, 779.

70. Rodgers, *supra* note 11, at 29–30 (noting general scholarly consensus among nineteenth century historians that republicanism had been “killed dead by the Civil War”).

71. See, e.g., pp. 227–28 (discussing how the settler ideology animated Justice Field's dissent in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 93 (1872) (Field, J., dissenting)).

in the settler ideal as it existed in the nineteenth century. The settler ideology was sustained, however, by the continued existence of the frontier, which provided wage laborers with the *promise* of land ownership. If confronted with conditions of economic dependence, poor settlers could escape to the frontier, where land (and hence the promise of economic and political independence) was widely available (p. 152). This promise gave poor settlers an investment in a constitutional order that supported territorial expansion, regardless of whether the settlers were themselves property owners.

Thus, the settler concept of freedom diverged, subtly but importantly, from the republican concept of freedom from which it emerged. Where settler freedom initially meant *actual* independence from the threat of arbitrary coercion, it grew to demand only the *promise* of independence in the event that a citizen starts to bridle under his condition of servitude. This reconceived idea of freedom is incompatible with the republican theories that Rana earlier relies upon.⁷² However, unlike the concept of freedom Rana initially describes, this new ideal is one that appealed to settlers whose ethnicity qualified them for free citizenship, but who did not satisfy the republican criteria for free citizenship.

This fluid treatment of the concept of settler freedom is, in my view, a valuable methodological move. The central aim of *The Two Faces of American Freedom* is not to challenge or keep faith with a specific republican historiography, but to demonstrate the ways in which American freedom—in whatever form it may have taken—has been predicated on territorial expansion and racial subordination.⁷³ By relying on a protean definition of settler freedom when analyzing the nineteenth century, Rana is able to identify these phenomena as part of America's constitutional structure long after a static definition of republican freedom might otherwise allow. This flexibility allows him to provide an illustration of how intellectual concepts might not only give rise to a particular constitutional structure but also evolve to keep that structure in place. If tracing a settler ideology into the twentieth century helps Rana identify a concept of freedom that was unfamiliar to republican discourse, so much the better.

Moreover, treating the concept of settler freedom as fluid places Rana's project in the mainstream of current theoretical work in settler colonial studies, allowing Rana to obtain as many insights as possible from a discipline that he is introducing to legal scholarship. The theorists Rana draws upon argue that settler colonization does not typically mark a discrete stage in a nation's history. Settler colonization is "a structure rather than an event,"

72. A key psychological assumption of early modern republican political theory, according to Quentin Skinner, is that it is impossible for a citizen to think or act as his conscience dictates if he is living in a condition of dependence. The very recognition that you are in such a condition, according to eighteenth-century republican theorists, would "serve in itself to constrain you from exercising a number of your civil rights" out of fear of provoking your superior. SKINNER, *supra* note 12, at 84; *see also id.* at 85–93.

73. *See supra* notes 20–22 and accompanying text.

and its history does not stop with the closing of a nation's frontier.⁷⁴ A settler colonial state is, as described above, one that is organized around a project of eliminating native societies.⁷⁵ At different historical junctures, however, the state may adopt different and more sophisticated strategies of elimination, such as assimilating the native group.⁷⁶ Accordingly, "[s]ettler colonialism . . . is not the past—a violent but thankfully brief period of conquest and domination—but rather the foundational governing ethic of [a] 'new world' state."⁷⁷ Therefore, according to these theorists, narrating the history of a settler state "involves charting the continuities, discontinuities, adjustments, and departures whereby a logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations."⁷⁸ This view is not only consistent with treating the concepts underlying a settler ideology as fluid; it seems to require it.

* * *

Notwithstanding these merits, Rana appears to revert to a static, non-evolving concept of settler freedom in arguing that the settler ideology was unequipped to survive the political and economic changes wrought by the 1930s. Specifically, Rana argues that the New Deal's constitutional framework ensured that "the distinction between free citizen and stratified subject—between republican self-rule and centralized despotism—that had so galvanized early American settlers dissolved into thin air" (p. 324). Even if Rana had consistently traced a fixed concept of settler freedom from the eighteenth century through the beginning of the twentieth, this claim would warrant caution. Although it is possible for a particular style of political rhetoric to completely "drive out" others at some historical moment, "political discourse is typically polyglot," and political languages "do not typically succeed in excluding one another."⁷⁹ It is true that, if Rana were treating settler freedom as static, and more or less coextensive with the republican concept of freedom, he would have considerable historiographical support

74. See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 390 (2006) [hereinafter Wolfe, *Elimination*].

75. See *supra* notes 14–19 and accompanying text.

76. See Wolfe, *Elimination*, *supra* note 74, at 401; see also Patrick Wolfe, *After the Frontier: Separation and Absorption in US Indian Policy*, 1 SETTLER COLONIAL STUD. 13 (2011) (analyzing the evolving strategies the United States adopted for eliminating American Indian populations, including geographic removal prior to the closing of the frontier and assimilation afterwards).

77. Elkins & Pedersen, *supra* note 15, at 3.

78. Wolfe, *Elimination*, *supra* note 74, at 402.

79. J.G.A. POCOCK, *The Concept of a Language and the Métier d'Historien: Some Considerations on Practice*, in THE LANGUAGES OF POLITICAL THEORY IN EARLY MODERN EUROPE 19 (Anthony Pagden ed., 1987), reprinted in J.G.A. POCOCK, POLITICAL THOUGHT AND HISTORY 87, 89 (2009).

for his claim that the concept had essentially been extinguished from constitutional structure by the 1930s.⁸⁰

However, while it may be a more responsible approach to intellectual history to focus on the discontinuities between our contemporary idea of freedom and the settler concept, it might have been better normative theory to focus on how the settler concept evolved in ways that influence our current constitutional understanding. By treating settler freedom as an adaptive concept, as Rana did in his analysis of the nineteenth century, one could likely find some traces of the settler ideology in the constitutional politics of the New Deal and beyond. For example, in Rana's account, the New Deal's emphasis on "economic security" rather than true "economic independence" was a paradigmatic shift away from a republican ideology. Other scholars, however, have identified continuities between the egalitarianism of the republican tradition and the constitutional structure of the New Deal. William Forbath, for example, argues that the New Deal ratified a vision of "social citizenship" in which "the guarantee of equal citizenship entailed decent work, a measure of economic autonomy and democracy, and social provision for 'all Americans.'" ⁸¹ While this social citizenship concept differs in significant ways from classical republican freedom—it is compatible, for example, with an economy based on wage labor⁸²—any exploration of how it might intersect with Rana's framework is precluded by his static definition of settler freedom.

In addition to allowing for such an inquiry, a fluid treatment of settler freedom would have allowed exploration of how a settler framework might explain New Deal political rhetoric that cannot easily be squared with a mere commitment to economic security. For instance, what could the framework tell us about Frances Perkins's claim that Roosevelt detested "the dole" and wanted temporary unemployment relief programs designed so that they would be "curtailed and cancelled as soon as there was a revival of business and employment opportunities?"⁸³ Or what might it say about initiatives such as the Civilian Conservation Corps, which its administrators characterized as a "civic melting pot" in which young men "from varying backgrounds . . . are taught the old-fashioned virtues of hard work[?]"⁸⁴

With regard to the principle of self-rule, a more flexible concept of settler freedom might shed light on the ways in which the New Deal was arguably an outgrowth of participatory constitutional politics and accommodated some

80. See *supra* note 70 and accompanying text; FONER, *supra* note 23, at 97–108 (describing the collapse of free labor ideology after the Civil War).

81. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 4 (1999).

82. See *id.* at 70–71 (describing union leaders' and ordinary workers' roles in shaping the New Deal conception of citizenship).

83. FRANCES PERKINS, *THE ROOSEVELT I KNEW* 284 (1946); see *id.* at 285–301.

84. NEIL M. MAHER, *NATURE'S NEW DEAL: THE CIVILIAN CONSERVATION CORPS AND THE ROOTS OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 108 (2009) (quoting U.S. CIVILIAN CONSERVATION CORPS, *ANNUAL REPORT OF THE DIRECTOR OF THE CIVILIAN CONSERVATION CORPS* 8 (1939)).

level of local decisionmaking. As William Forbath has argued, New Deal officials, in talking in a language of economic and social rights, “tapped a protest language millions of industrial workers encountered in the groundswell of [Congress of Industrial Organizations (“CIO”)] organizing.”⁸⁵ Moreover, many New Deal accomplishments, including the establishment of the right to collective bargaining and the creation of social insurance programs, reflected the demands of activists and leaders of the CIO, which “had become the organizational and financial mainstay of the Democratic Party.”⁸⁶ These successes, according to Forbath, reflect not simply the influence of union leaders but the mobilization of millions of working-class families into the base of the New Deal Democratic Party.⁸⁷ Finally, while the New Deal established an administrative bureaucracy under the control of the president, many New Deal programs were locally administered and, notwithstanding their formal mandates, modified at the ground level to reflect regional political structures.⁸⁸

I am not contending that these observations reflect a historically legitimate account of the New Deal, nor do I wish to enter the debate about whether the New Deal was the product of a participatory constitutional politics or a commitment to economic autonomy. I want to suggest, however, that there is at least a plausible interpretation of the New Deal Constitution that is compatible with Rana’s settler framework. Constructing such a narrative, even if it were a highly stylized one, might have better served Rana’s goal of presenting history “in the service of today’s problems as well as tomorrow’s latent possibilities” than insisting that his settler ideology plays no role in modern constitutional politics (p. 17).

Consider, for example, the role of home ownership in American politics. One of the values that Rana attributes to the settler ideology is a commitment to land ownership as a means of economic independence. It would be interesting to explore how this value evolved through the twentieth century, and whether our current political culture bears traces of this element of the settler colonial framework. Scholars have documented, for example, how corporate interests in the early twentieth century encouraged workers to purchase mortgaged homes on the theory that debt-ridden homeowners would be reluctant to go on strike.⁸⁹ This rise in corporate enthusiasm for

85. Forbath, *supra* note 81, at 70.

86. *Id.*

87. *Id.*

88. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 109 (2004).

89. See, e.g., MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 28 (Verso 2006) (1992) (describing a Los Angeles Merchants and Manufacturing Association member’s boast that in 1914 “working class home ownership was the keystone of the Open Shop and a ‘contented’ labor force,” and union leaders’ characterization of mortgage payments as “‘new serfdom’ that made Los Angeles workers timid in the face of their bosses”); Anne E. Mosher, “*Something Better than the Best*”: Industrial Restructuring, George McMurtry and the Creation of the Model Industrial Town of Vandergrift, Pennsylvania, 1883–1901, 85 ANNALS ASS’N AM. GEOGRAPHERS 84, 103–04 (1995) (describing how homeownership

mortgages coincided with one of the first federal subsidies for home ownership: deductions for interest on mortgage payments (along with all other “interest paid on . . . indebtedness”) that were incorporated into the modern federal income tax in 1913.⁹⁰ Federal incentives toward individualized home ownership deepened during the New Deal, when Congress set up the Federal Housing Administration to insure long-term mortgages and created the Federal National Mortgage Association for the purpose of providing liquidity for those mortgages.⁹¹

Taken together, these political choices have sustained a tremendous effective demand for (tax-subsidized and mortgage-financed) home ownership. As geographer David Harvey has argued, this economic framework has transformed both the political and physical landscape of the country, giving rise to suburbs where home ownership is widespread and “the defence of individual housing value is a collective norm, upheld by homeownership associations, even in the midst of plenty of isolated individualism.”⁹² Indeed, the American cultural norms that support home ownership are now so strong that, according to Harvey, “[p]reliminary studies of those caught up in the foreclosure wave now indicate . . . that many of them blame themselves rather than systemic conditions for not being able, for whatever reason, to live up to the personal responsibility.”⁹³ To the extent that Rana’s framework could help explain the origins and contours of these norms, it could be relevant to some difficult and pressing constitutional puzzles. It could, for example, shed light on the cultural dimensions of descriptive questions like how best to understand the nature of the political backlash to *Kelo v. City of New London*,⁹⁴ as well as normative ones like how to determine which rights should (or should not) be guaranteed under a new, welfare-oriented constitutionalism.⁹⁵

workers in a model town “expressed little interest in striking or organizing so long as they held property or a mortgage on it”).

90. See Revenue Act of 1913, ch. 16, § 2(B), 38 Stat. 114, 167 (1913); Nadav Shoked, *The Reimvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91, 93–94 & n.8 (2011).

91. Julie Andersen Hill, *Bailouts and Credit Cycles: Fannie, Freddie, and the Farm Credit System*, 2010 WIS. L. REV. 1, 17, 19; see also Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 193 (2005).

92. DAVID HARVEY, *THE ENIGMA OF CAPITAL* 150 (2010).

93. *Id.* at 132.

94. 545 U.S. 469 (2005) (holding that a city did not violate the “public use” requirement of the Fifth Amendment’s Takings Clause in exercising eminent domain for the purpose of developing a distressed area); cf. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2101–02 (2009) (“The *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history.”).

95. Cf. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 87–88 (2009) (suggesting that the 2008 financial crisis could revitalize a welfare-oriented constitutionalism, and recommending that “home ownership” as one of the guarantees in President Roosevelt’s Second Bill of Rights be resurrected).

These are, of course, speculations. Perhaps settler colonial theory and contemporary constitutional law are too separate, and the connections between them too tenuous, for anything to be gained from this kind of inquiry. But Rana's compelling account of the settler ideology's evolution through the nineteenth century, and the theoretical potential of his decision to depart from the norms of traditional historical scholarship, suggest it might have been worth trying.