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BOOK REVIEW ESSAY

IDEAL THEORY AND THE LIMITS OF HISTORICAL NARRATIVE

THE TWO FACES OF AMERICAN FREEDOM, by Aziz Rana. Harvard University Press, 2010. Pp. 415. \$29.95.

Anthony O'Rourke*

INTRODUCTION

Some intellectual concepts that once played a central role in America's constitutional history are, for both better and worse, no longer part of our political language. These concepts may be so alien to us that they would remain invisible without carefully reexamining the past in order to challenge the received narratives of America's constitutional development. 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 or structure, or in constitutional doctrine? Aziz Rana's *The Two Faces of American Freedom* provides not only an occasion for reflecting on these questions, but 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.³ This reconstruction draws upon settler colonial studies, a burgeoning interdisciplinary field that had 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 . .

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¹ See infra notes 84-86 and accompanying text.

² See infra notes 99-100 and accompanying text.

³ AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 2 (2010).

⁴ See infra notes 26-32 and accompanying text; see also Lorenzo Veracini, Introducing Settler Colonial Studies, 1 SETTLER COLONIAL STUDIES 1 (2011) (characterizing settler colonial studies as a new scholarly field).

. settler empire."⁵ 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 concept of freedom, Rana contends, was ultimately eradicated from our constitutional structure in the 20th century, replaced by an understanding of liberty that was more inclusive, but in some ways far less substantive than its predecessor.⁶

If the scope of this historical argument is ambitious, so too are Rana's normative aims. As Part I of this essay 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 imagining emancipatory alternatives." 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 entirely historically accurate.

As Part II explains, however, it is unlikely that Rana's normative aims can be fully achieved through his method of historical analysis. Rana claims that the "American experience" can itself provide the tools necessary to develop a more economically protective, politically participatory vision of citizenship.⁸ He combines this claim with an attack on what he calls the "abstract form of utopianism" that characterizes work such as John Rawls's theory of justice.⁹ These positions, to my mind, reflect Rana's overconfidence in the extent to which ideas that are no longer part of our constitutional language still constitute part of our shared cultural experience, and a misunderstanding of what Rana characterizes as "utopian" political theory.

Notwithstanding these concerns, Rana's methodology serves as an invaluable 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

⁵ See RANA, supra note 3, at 2 (emphasis in original).

 $^{^6}$ See infra Part I.

⁷ RANA, *supra* note 3, at 17.

⁸ *Id.* at 17.

 $^{^9}$ Id. at 18; see John Rawls, A Theory of Justice (1971) [hereinafter Rawls, Theory of Justice].

Part III suggests, Rana's project is at its most normatively successful when he strays from the disciplinary norms that intellectual historians would accept.

I.

In Rana's account, the experience of Anglo-American colonists under British rule "spawned" a unique vision of freedom, one predicated on both territorial expansion and the subordination of outsiders. ¹⁰ 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. ¹¹ As recent scholarship has shown, the concept of empire was hotly contested in pre-Revolutionary America. ¹² 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, according to which the provinces they inhabited were in some sense autonomous and Anglo colonists were deserving of the same rights and liberties as Englishmen. ¹³

As Rana describes it, the concept of freedom underpinning the Anglo-American view is a variant of the civic republican idea of freedom that historians have long held to be a formative idea of early American constitutional thought.¹⁴ A concept notorious for eluding precise definition,¹⁵ republican freedom has both political and economic dimensions. The core of republican freedom, as Rana characterizes it, is freedom from "the very possibility" of being subjected to decisions in which one has not participated on an equal basis with one's fellow citizens.¹⁶ This freedom requires a guarantee of "self-rule" to members of a political

11 Id. at 22; see id. at 12.

¹² 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, 794 (2007) (book review).

¹³ DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD 10 (2005); *see id.* at 84-86, 90-96.

¹⁰ RANA, supra note 3, at 12.

¹⁴ See, e.g., J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 83 (1975) [hereinafter POCOCK, MACHIA-VELLIAN MOMENT]; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).
¹⁵ See Daniel T. Rodgers, Republicanism: The Career of a Concept, 79 J. Am. Hist. 11, 34

¹⁵ See Daniel T. Rodgers, Republicanism: The Career of a Concept, 79 J. Am. HIST. 11, 34 (1992) ("The problem of the republicanism [historiographical] paradigm as it entered its last phase... was not simply that of a word passed through too many hands and made to do too many things—though that was manifest in republicanism's career in the late 1980s. The deeper, unnoticed problem was the unraveling sense of what kind of entity republicanism actually was.").

¹⁶ RANA, *supra* note 3, at 51; This characterization is drawn from Quentin Skinner's account of "neo-roman" personal liberty as the freedom from being subjected to "the will of anyone other than representatives of the body politic as a whole." *See* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 49 (1998) [hereinafter SKINNER, LIBERTY BEFORE LIBERALISM].

community, and entails "the active assertion" by those members "of control over economic, political, and religious life." 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 source for obtaining this wealth was property ownership, since other forms of resource accumulation were either corrupting (as with commerce) or degraded one's status as a member of a political community by subjecting the person to another's will (as with wage earning).¹⁸

The political and economic dimensions of republican freedom, Rana argues, each generated a competing set of constitutional demands that together shaped an American "settler ideology." ¹⁹ The principle of self-rule committed Americans to forming legal institutions that facilitated political participation on the part of citizens and "rejected any application of arbitrary power" over them.²⁰ This imperative called for a political structure rooted in "local, decentralized legislative supremacy," and for firm limits on government power over the citizenry.²¹ The economic security that makes political participation meaningful for citizens, however, required that institutions be structured to enable each citizen to acquire the resources necessary to stand on an equal footing with his peers.²² Because land acquisition was the only morally salutary basis of acquiring wealth, and was thus a precondition for republican freedom, this demand entailed a government organized around the principle of territorial conquest for the benefit of a privileged group of Anglo citizens. The result of these competing institutional demands was a "structural dualism" in America's constitutional order, characterized by an executive with robust power over non-citizens in the realm of foreign affairs, and rigid constraints on state authority over insiders.²³

¹⁷ RANA, supra note 3, at 54.

¹⁸ *Id.* at 53-55.

¹⁹ *Id.* at 12. 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, reprinted in* THE INTERPRETATION OF CULTURES 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.").

²⁰ RANA, *supra* note 3, at 53-54.

²¹ *Id.* at 124, 97.

²² I use the masculine pronoun advisedly, since republican citizenship was a status available only to men. *See* RANA, *supra* note 3, at 259-61; *See also* Linda R. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1669 (1988) (arguing that "patriarchy was embedded in classical republicanism").

²³ RANA, supra note 3, at 163.

Rana is not the first scholar to argue that concepts of republican freedom and imperialism were intertwined in American constitutional thought. John Pocock, for example, has shown that even Federalists like Noah Webster maintained that "equality of property," by virtue of reducing power disparities between citizens, was "the very soul of a republic."24 For such thinkers, Pocock argued, the frontier served as the principal safeguard of civic virtue by providing a seemingly infinite supply of land for occupation.25

However, Rana is the first legal scholar to recast this concept through the lens of settler colonial theory. According scholars whom Rana draws upon from this field, "settler colonialism" differs from colonialism undertaken for military advantage or economic trade.²⁶ Under the latter form 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."27 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 their metropole.²⁸ 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 non-hierarchical modes of internal political authority.²⁹ However, the settler project is organized around wresting land from indigenous groups and eliminating them from the land, "push[ing] them beyond an everexpanding frontier settlement."30 This imperative requires settler societies to develop increasingly intricate strategies of elimination to maintain dominance.31

By applying this theoretical framework, Rana offers a provocative and original narrative of how early American ideas of freedom and imperialism were not only mutually constitutive, but inspired an ideology that shaped American constitutional politics. According to Rana, this settler ideology had four basic components. First, inspired by a radical idea of republican freedom, settlers sought to create an "internally egali-

²⁴ POCOCK, MACHIAVELLIAN MOMENT, supra note 14, at 534 (quoting Webster). See also id. at 535.

25 Id. at 535.

 $^{^{26}}$ See Caroline Elkins & Susan Pedersen, Settler Colonialism: A Concept and Its Uses, in SETTLER COLONIALISM IN THE TWENTIETH CENTURY: PROJECTS, PRACTICES, LEGACIES 2 (2005). ²⁷ Id.

²⁸ *Id*.

²⁹ *Id*.

³⁰ *Id*.

³¹ Id.; see also Patrick Wolfe, Settler Colonialism and the Elimination of the Native, 8 J. Genocide Research 387, 401 (2006) [hereinafter Wolfe, Elimination] (defining "strategies of elimination").

tarian and participatory political community," predicated on land ownership and individual proprietorship.³² Second, the "basic engine" of this internally egalitarian ideal was territorial conquest, such that republican freedom was "constitutively bound to empire and expansion."33 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.³⁴ Americans thus drew a distinction between "free citizens" – men for whom republican freedom could be fully realized – and subordinated, external groups.³⁵ 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 not only benefited from a remarkably open immigration regime, but also from policies such as noncitizen voting rights and access to federal land in the territories. This openness ensured that America's population of "free citizens" grew at a rate that made it possible to preserve the structure settler society.

The Two Faces of American Freedom recasts a considerable amount of republican historiography through the lens of this settler framework. By doing so, it reveals a possible link between American external power and domestic freedom that has not been extensively explored in legal scholarship. Rana argues, for example, that a constitution which facilitated territorial conquest sustained 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.³⁶ This ideology concep-

³² RANA, supra note 3, at 12.

³³ *Id.* at 12.

³⁴ See id.

³⁵ Id. at 115. Here, Rana is treating citizenship as "an ahistorical or theoretical category that can serve as a baseline for cross-temporal comparison." See Sam Erman, An "Unintended Consequence": Dred Scott Reinterpreted, 106 MICH. L. REV. 1157, 1161 n.25 (2008) (book review). This category is entirely distinct from "citizenship" as a legal status – which Rana refers to as "formal citizenship." Women, for example, have been formal citizens of the United States since its founding, but for much of its history did not fit within the theoretical category of free citizens. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES xx-xxi (1998). 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." Erman, supra at 1161 n.25.

³⁶ See, e.g., ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970). Rana traces this ideology from Shay's Rebellion and the Whiskey Rebellion – two revolts of the white, rural poor against the mercantile and agrarian elites in the decades following the War of Independence – through Justice Field's dissent in *The Slaughterhouse Cases*, in which he proclaimed that the "equality of right in the lawful pursuits of life throughout the whole country is the distinguishing privilege of all citizens of the United States." (continued next page)

tually severed the promise of republican freedom from the requirement of land ownership, and thus broadened the class of citizens for whom this promise was possible. Thus, Rana argues, the settler ideology continued to undergird America's constitutional structure through the 19th century.

By the 1890s, however, America's political and economic development placed "profound pressure" on the material conditions that made settler freedom possible.³⁷ 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.³⁸ 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.³⁹ 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.40

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."⁴¹ In the area of foreign affairs, the Court

⁸³ U.S. (16 Wall.) 36, 93 (Field, J., dissenting). For the seminal analysis of how Justice Field's dissent embodied a free labor ideology, *see* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 773-79 [hereinafter Forbath, *Ambiguities*]

³⁷ RANA, *supra* note 3, at 175. Rana's book contains a detailed and compelling discussion of how the events that led to the American Civil War, including Justice Taney's opinion in *Dredd Scott*, were a reflection of a settler vision of American power – including an unchecked executive in external affairs and constitutional limits on federal power that threatened white independence. Disappointingly, however, Rana's book 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) [hereinafter FONER, POLITICS AND IDEOLOGY] ("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.").

³⁸ RANA, *supra* note 3, at 174. This argument appears to place Rana in disagreement with scholars who question the usefulness of "frontier" as a concept for understanding settler societies, since "frontiers can be porous and largely imaginary." ELKINS & PEDERSEN, *supra* note 26, at 2. Another prevailing, and related, view in settler colonial studies that appears to conflict with Rana's account is that settler colonialism is not a historical stage that ends with the closure of the frontier, but rather a societal structure that continues to persist through alternative strategies of eliminating indigenous cultures (such as assimilation) even after the stage of territorial expansion. *See infra* notes 113-17 and accompanying text..

³⁹ RANA, *supra* note 3, at 185.

⁴⁰ ELKINS & PEDERSEN, *supra* note 26, at 2.

⁴¹ RANA, *supra* note 3, at 280.

created a new framework for addressing the legal status of the island territories. Specifically, in the Insular Cases, the Court demarcated these overseas possessions as "unincorporated territories" that were not integral to the United States, and which could be held indefinitely as colonial dependencies or relinquished as Congress saw fit.42 In the domestic realm, the Court increased the President's power to respond to incidents of domestic unrest, including the labor disruptions that grew in tandem with corporate expansion. First, the Court expanded its interpretation of the President's power under the Constitution's Take Care Clause⁴³ to include "all the protection implied by the nature of the government under the Constitution."44 Next, it upheld President Cleveland's decision to enjoin the 1894 American Railway Union strike, and to enforce the injunction by deploying federal troops, on the remarkable ground that "[t]he strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails."45 These decisions, Rana argues, "suggested a reordering of governmental institutions to pacify unrest and to crush labor protest more effectively."46 Thus began to unravel the "structural dualism" between the Executive's strength in foreign affairs and its weakness in domestic affairs, which had been the constitutional underpinning of America's settler society.⁴⁷

But this unraveling was slow at first, Rana argues, 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*,⁴⁸ in which it struck down a New York statute limiting the workday of bakers, and *Muller v. Oregon*,⁴⁹ 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

⁴² *Id.* at 275-81; 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").

⁴³ U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.

^{...&}quot;)

44 In re Neagle, 135 U.S. 1 (1890) (upholding Attorney General's authority to assign U.S. marshals to protect federal judges).

⁴⁵ In re Debs, 158 U.S. 564 (1895).

⁴⁶ RANA, *supra* note 3, at 225.

⁴⁷ Id.

⁴⁸ 198 U.S. 45, 57 (1905).

⁴⁹ 208 U.S. 412 (1908).

degrading working conditions) as artisans and individual proprietors free citizens whose right to self-rule would entitle them to "care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action."50 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."51

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 producerist 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. In the "Great Community" 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 groups sustain."52 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 a principles of self-rule and community engagement.⁵³

But these efforts to craft a capacious, post-settler understanding of freedom failed gain traction in political discourse, Rana argues. 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. 54 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."55 However, with this expansion of membership in the American political community came a decline in

⁵⁰ Lochner v. New York, 198 U.S. 45, 57 (1905); see RANA, supra note 3, at 231.

⁵¹ Muller v. Oregon, 208 U.S. 412, 422 (1908)); RANA, *supra* note 3, at 322-23.

⁵² Id. at 248 (quoting John Dewy, The Public and Its Problems (1927)).

⁵³ Id. (quoting John Dewy, The Public and Its Problems (1927)).

⁵⁵ *Id*.

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.⁵⁶ Where citizenship once involved a robust idea of political self-rule, it was 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 decision-making to a professional elite.⁵⁷ 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 had became "global primacy" and "pacification."⁵⁸ Thus, Rana argues, the settler concept of freedom had, for better *and* for worse, been completely eradicated from our constitutional framework.

* * *

The broad sweep of this narrative tempts a question often asked of historically-grounded constitutional theory: is the methodology one that historians would accept?⁵⁹ 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."⁶⁰ 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."⁶¹ Rather than attempt to chart the diversity of

⁵⁶ RANA, *supra* note 3, at 296, 262.

⁵⁷ *Id.* at 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. Rana contends that republican freedom "carrie[s] the strong . . . implication" of "participatory control over all the relevant sites of [political] decision-making," and that the New Deal represents a rejection of this principle. RANA, *supra* note 3, at 288. However, according to Quentin Skinner's account of early modern 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, LIBERTY BEFORE LIBERALISM, *supra* note 16, at 29, 32. Moreover, not every citizen has the moral capacity to serve as a representative. Rather, the legislators must be "the more virtuous and considering" of the citizenry. *Id.* at 32. For those citizens who lack the special virtue required of a legislator, it is sufficient from the standpoint of republican freedom that they have the opportunity to choose who represents them. This concept of political participation plainly does not require, and indeed seems to be at odds with, "participatory control over all the relevant cites of decision-making."

 $^{^{58}}$ RANA, *supra* note 3, at 296.

⁵⁹ 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.").

RANA, supra note 3, at 17.

⁶¹ *Id*

ideologies and of political languages that shaped American constitutionalism, as an intellectual historian might, Rana reexamines America's constitutional development through a lens of a particular historical ideology. By offering a new and stylized narrative of America's constitutional history, Rana aims to provide a "means of critiquing the institutions and concepts that have dominated contemporary thinking." 62

For many constitutional theorists, a disavowal of historical fidelity would be an admission of failure. But Rana's project differs from most historically oriented legal scholarship. Unlike many theorists, he does not deploy an incomplete and ideologically selective narrative of the past - though his narrative is undoubtedly incomplete and ideologically selective – for the purpose of legitimizing a particular constitutional vision.⁶³ 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; Rana is not, in other words, simply "'roaming around history looking for [his] friends."64 Instead, Rana uses history to draw out ideas and concepts that could help shed light on contemporary constitutional questions, but which do not necessarily dictate answers to those questions. Such a project does not necessarily suffer from the fact that it departs from historians' methodological standards. (Indeed, as Part III of this essay will suggest, Rana's normative goals would have been better served by departing even more dramatically from those standards.)⁶⁵

Therefore, the success or failure of Rana's project should, in my view, primarily be judged on whether it advances its broad normative aims, rather than on whether it strictly conforms to the disciplinary conventions of historians.⁶⁶ By this standard, *The Two Faces of American*

⁶³ See Bernadette Meyler, Towards a Common Law Originalism, 59 STANFORD 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).

⁶² Id. at 17-18.

⁶⁴ Nomi Maya Stolzenberg, A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism, 111 HARV. L. REV. 1025, 1025 (1998) (book review) (quoting G. Edward White, Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy, 6 YALE J.L. & HUMAN. 1, 4 (1994)

⁶⁵ The large and persuasive literature attacking John Yoo's historical methodology comes to mind. *See, e.g.*, Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); *see also* Witt, *supra* note 12, at 763 (observing that Yoo "spuriously converts Wilson's and Madison's statements that treaties 'may' or 'sometimes' require congressional implementation into claims that treaties are not self-enforcing.").

⁶⁶ 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' 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").

Freedom is a significant theoretical accomplishment. It successfully taps the insights of a discipline unfamiliar to most 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.

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. Part II of this essay questions the scope of Rana's normative aims, particularly his ambition to lay the groundwork for a new constitutional vision of freedom that can be developed without resorting to other "highly analytical forms of theorizing." Part III then evaluates the extent to which Rana's methodological choices enable, or inhibit, him from advancing the normative goals that his project is well suited to achieve.

II.

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 their constitutional culture. Rana presents his method of historical inquiry as a full-service alternative to abstract and "utopian" philosophical "ruminations" about justice. ⁶⁸ Using John Rawls's theory of justice as a stalking horse, ⁶⁹ Rana asserts that such "highly analytical forms of theorizing . . . only reinforce the seeming gulf between governing institutions and utopian ideals." 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." 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." By contrast,

⁶⁷ RANA, supra note 3, at 17.

⁶⁸ *Id.* at 18.

⁶⁹ See RAWLS, THEORY OF JUSTICE, supra note 9.

⁷⁰ RANA, *supra* note 3, 17.

⁷¹ *Id*.

⁷² *Id.* at 17. With this statement, Rana dismisses not only "utopian" political theory, but scholarship exploring the application of such theory to our actual governing institutions. *See*, *e.g.*, 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 (continued next page)

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."⁷³ Therefore, Rana contends, identifying these concepts provides us with a "means of critiquing the institutions and concepts that have dominated contemporary thinking" that "utopian" theory is unable to offer.⁷⁴

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 as it was developed by theorists including James Harrington, whose *Commonwealth of Oceana* is about the constitutional structure of a utopian version of England. At the time of the American Revolution, these theorists were attacked for the same sort of utopianism that Rana condemns. For example, in what became a leading 19th century political theory textbook, 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." Thus, Rana's project not only takes part in a long tradition of dismissing political theory for being utopian, but also undermines that tradition by showing the potential of "utopian" theory to motivate political action.

Irony aside, it is doubtful that 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, ones predicated on racial subordination and native elimination, enables us to accept those concepts as "foundational aspects of *our* identity," and as a part of "*our own* prac-

YALE L. J. 399 (2001) (analyzing how Rawls's concept of a "veil of ignorance" is instantiated in constitutional law).

⁷³ RANA, *supra* note 3, at 18 (first emphasis added).

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* at 52-53 (discussing Machiavelli and Harrington); James Harrington, *The Commonwealth of Oceana* (1656); POCOCK, MACHIAVELLIAN MOMENT, *supra* note 14, at 388 (describing Harrington's Oceana as a "lightly idealized England").

⁷⁶ WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 341 (7th ed. 1785); *see also* SKINNER, LIBERTY BEFORE LIBERALISM, *supra* note 16, at 78 (discussing Paley's attack on neo-roman utopianism).

⁷⁷ See also Martha Nussbaum, Still Worthy of Praise, 111 HARV. L. REV. 1776, 1780 (1998) (book review) ("Here are a few of the examples that would usually be used to show that philosophers have had some influence on public life: Rousseau's influence on the French Revolution; the influence of Cicero, Grotius, and Kant on the development of the international law of war and the modern human rights movement; the influence of Cicero on the thought of countless statesmen the world over; the influence of Locke and Montesquieu on the American founding; the influence of Marx on many modern governments; the influence of Burke on conservative politics; the influence of Mill on modern liberal and libertarian thought; the influence of John Dewey on American education.")

tices and ideas."⁷⁸ 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 forbearers had, but which are 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.⁷⁹ But this does not get us far with respect to concepts as abstract and legally indeterminate as "freedom." Nor will 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.⁸⁰ Moreover, if Rana were arguing for the legitimacy of a particular constitutional interpretation based on the original understanding of the Constitution, his argument would require a much more traditional work of historical scholarship than he purports to offer.⁸¹

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 forbearers 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 it.⁸² 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.⁸³ 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

⁷⁸ RANA, *supra* note 3, at 18 (second emphasis added).

⁷⁹ See PHILIP BOBBITT, CONSTITUTIONAL FATE 9-24 (1982) (offering a typology of constitutional arguments, including historical, textual, doctrinal, structural, and ethical).

⁸⁰ See BOBBITT, supra note 79; 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).

⁸¹ See supra notes 63-64 and accompanying text.

⁸² For the argument that we cannot assume that our affective desires and feelings resemble those of subjects from different historical periods, see MICHEL FOUCAULT, LANGUAGE, COUNTER MEMORY, PRACTICE 253 (1980) ("We believe that feelings are immutable, but every sentiment, particularly the noblest and most disinterested, has a history. We believe in the dull constancy of instinctual life and imagine that it continues to exert its force indiscriminately in the present as it did in the past. But a knowledge of history easily disintegrates this unity, depicts its wavering course, locates its moments of strength and weakness, and defines its oscillating reign.").

⁸³ *Cf.* ALISDAIR MACINTYRE, A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSO-PHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY 1-2 (1998) ("There are continuities as well as breaks in the histories of moral concepts. Just here lies the complexity of history.").

and social circumstances.⁸⁴ 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."⁸⁵ Absent any such continuity, however, it is difficult to understand what might create a link across the "vast abyss of cultural estrangement," to borrow a phrase from literary theory, that time creates between our understanding of the Constitution's values, and that of preceding generations.⁸⁶

Moreover, in rejecting the "highly analytical forms of theorizing evident in political philosophy," Rana fails to appreciate how deeply socially rooted (and self-consciously 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.⁸⁷ The first step is to identify which principles of justice a member of the society would agree upon in the "original position," a situation in which each member is behind a "veil of ignorance," without information that might distort decision-making processes such as his or her particular natural abilities, social status, intelligence, and psychological propensities.88 By design, this framework is, as Rana charges, "severely disconnected" from the reality of everyday political life.89 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

⁸⁴ QUENTIN SKINNER, 1 VISIONS OF POLITICS: REGARDING METHOD 86 (2002) [hereinafter SKINNER, VISIONS OF POLITICS] (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 stable concepts are being picked out"); see also J.G.A. POCOCK, Political Ideas as Historical Events: Political Philosophers as Historical Actors, reprinted in POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD 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 millienia only serves to highlight the problems of historicity which the relationship involves.").

⁸⁵ RANA, *supra* note 3, at 18; *see, e.g.*, H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 8 (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").

⁸⁶ Stephen Greenblatt, *The Eating of the Soul*, 48 REPRESENTATIONS 97, 100. (1994).

⁸⁷ RAWLS, THEORY OF JUSTICE, supra note 9, at 8.

⁸⁸ *Id.* at 11.

⁸⁹ RANA, *supra* note 3, at 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.")

discrimination is unjust.⁹⁰ 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.⁹¹

Thus, Rawls's framework both incorporates our society's moral sentiments and provides a means for critiquing those sentiments. As Bernard Williams (himself a critic of the systematic nature of Rawls's work) observed, Rawls's theory was pathbreaking because it demonstrated that "analytical" political philosophy could make sense of "complex value concepts" - concepts such as "justice" that interweave both facts about the world and the values that we, as a society, apply to those facts.92 This places Rawls (and other "highly analytical" political philosophers) within a long tradition of so-called "utopian" political theory - a tradition that Rana draws upon in fleshing out the settler concept of freedom.⁹³ 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 ourselves. 94 Rana thus 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."95

Unlike these theorists, Rana offers a complicated historical idea of freedom, many aspects of which are incompatible with our considered convictions of 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 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.⁹⁶

⁹⁰ RAWLS, THEORY OF JUSTICE, supra note 9, at 16-17; 42-43.

⁹¹ *Id.* at 18-19; 42-43.

⁹² BERNARD WILLIAMS, *Political Philosophy and the Analytical Tradition*, reprinted in Philosophy as a Humanistic Discipline 155, 157-58 (2006).

 $^{^{93}}$ See SKINNER, LIBERTY BEFORE LIBERALISM, supra note 16, at 79 n.3 (identifying A Theory of Justice "as a utopian treatise . . . , and none the worse for that").

⁹⁴ *See Id*. at 79

⁹⁵ RAWLS, THEORY OF JUSTICE, supra note 9, at 16.

⁹⁶ RANA, supra note 3, at 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 considers to be its considered convictions – or, more plainly, its values. If these considered convictions are not interrogated, they could distort the process of developing a more refined analytical understanding of complex-value concepts like freedom and justice. 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 philosophy's "relations to social reality."

As Rana's project illustrates, historically grounded theory can help us call our convictions into question. It mkaes clear that the way we currently think about ideas such as freedom are not the *only* ways of thinking about them. Beven intellectual historians who stress the impossibility of understanding historical texts outside their intellectual 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." While it may be unwise to rely on the past for political ideas that 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 of critiquing the institutions and concepts that have dominated contemporary thinking." In this respect, Rana's project is a success.

III.

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 pro-

⁹⁷ WILLIAMS, supra note 92, at 160.

⁹⁸ SKINNER, LIBERTY BEFORE LIBERALISM, *supra* note 16, at 116 ("As we analyze and reflect on 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.").

⁹⁹ SKINNER, VISIONS OF POLITICS, *supra* note 84, at 6; *see also* JOHN DUNN, THE HISTORY OF POLITICAL THEORY AND OTHER ESSAYS 1 (1996) (stating that essay collection attempts to "show how 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").

ject - 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.¹⁰⁰ 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.¹⁰¹ On the other hand, for the sake of constructing a historical narrative that can be used "in the service of today's problems," 102 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 has shaped American constitutionalism. Specifically, Rana treats the concept of settler freedom 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 essay suggests, the less acceptable one from an intellectual history standpoint is, in this case, the more successful one

102 RANA, supra note 3, at 17.

¹⁰⁰ See SKINNER, VISIONS OF POLITICS, supra note 84, at 62-63 (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, 67 J. HISTORY OF 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").

¹⁰¹ J.G.A. POCOCK, The History of Political Thought: A Methodological Inquiry, reprinted in POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD, supra note 84, at 13 (explaining that historians of thought are interested in examinging how "relatively stable concepts" are "employed in the political thought of relatively stable societies"); see also SKINNER, VISIONS OF POLITICS, supra note 84, at 85-86 ("Once we see that there is always a question to be answered about what writers are doing in saying what they say . . . we shall no longer want to organize our histories around tracing 'unit ideas' or focusing on what individual writers say about 'perennial issues.' To say this is not to deny there have been long continuities in Western moral, social and political philosophy, and that these have been reflected in the stable employment of a number of key concepts and modes of argument. It is only to say there are good reasons for not continuing to organise our histories around the study of such continuities"); J.G.A. POCOCK, The Concept of a Language and the Métier d'Historien: Some Considerations on Practice, reprinted in POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD, supra at 90 [hereinafter POCOCK, Concept of a Language] (positing that historians of political discourse are interested in specific "acts performed and the contexts in and upon which they are performed," and that the histories they write are "heavily textual, a matter of written and printed utterance and response").

from a normative standpoint – an irony that raises interesting questions about the role of historical argument in normative theory.

* * *

The settler freedom that Rana traces through the 19th 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, there appears to be little difference between Rana's characterization of settler freedom, and other theorists' definitions of republican freedom.¹⁰³ In each case, 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.¹⁰⁴ 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 action¹⁰⁵ – 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,¹⁰⁶ and most working people were wage laborers who owned no productive property.¹⁰⁷ 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.¹⁰⁸ For Rana, however, the settler ideology survived as an influence in politics and jurisprudence.¹⁰⁹

¹⁰³ Specifically, Rana's characterization is adapted from Quentin Skinner's definition of neoroman liberty, see supra note 16 and accompanying text, and also draws from Philip Pettit's definition of liberty as non-domination. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52 (1997).

¹⁰⁴ See SKINNER, LIBERTY BEFORE LIBERALISM, supra note 16, at 68-70.

¹⁰⁵ See supra note 19.

 $^{^{106}}$ Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 24-26 (rev. ed. 2009).

¹⁰⁷ See Forbath, Ambiguities, supra note 36, at 779.

¹⁰⁸ See Rodgers, supra note 15, at 29-30 (noting general scholarly consensus among 19th century historians that republicanism had been "killed dead by the Civil War").

¹⁰⁹ In his reading of *The Slaughterhouse Cases*, for example, the ideology animated Justice Field's dissent, in which he proclaimed that "equality of right in the lawful pursuits of life throughout the whole country is the distinguishing privilege of all citizens of the United States." 83 U.S. (16 (continued next page)

How, then, did the settler ideology survive? 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-19th century, Rana contends, the free market "appeared to exacerbate economic and bargaining inequalities between employers and laborers that promote broad-based self rule," and the language of Jacksonian populism did not offer a means of critiquing these structural inequalities.¹¹⁰ In such a society, those who were reduced to working as wage laborers could not participate in the settler ideal as it existed in the 19th 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 "wage servitude, tenancy, and economic dependence," poor settlers could escape to the frontier, where land (and hence the promise of economic and political independence) was widely available.¹¹¹ This promise gave poor settlers an investment in a constitutional order that supported territorial expansion, regardless of whether they were themselves property owners.

Thus, the settler concept of freedom changed, subtly but importantly, from the republican concept of freedom that Rana first equates it with. 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 purports to rely upon. However, unlike the concept of freedom Rana initially describes, this new ideal is one that appeals 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*

Wall.) 36, 93 (Field, J., dissenting); see RANA, supra note 3, at 227-28. Rana's reading of Justice Field's dissent is consistent with Willy Forbath's seminal analysis of how the dissent embodied a republican free labor ideology. See Forbath, Ambiguities, supra note 36, at 773-79. More generally, his account of settler freedom's end-date is compatible with that of other historians who identify traces of a republican ideology in American political discourse up to the 20th century. See Rodgers, supra note 15, at 30-34 (discussing the view held by some labor historians that a "notion of popular republicanism" was "lapping hard at the eges of the twentieth century").

¹¹⁰ RANA, *supra* note 3, at 152.

¹¹¹ Id

¹¹² 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 18th 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, LIBERTY BEFORE LIBERALISM, *supra* note 16, at 84; *see id.* at 84-93.

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. By relying on a protean definition of settler freedom when analyzing the 19th 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 may not only give rise to a particular constitutional structure, but might also evolve to keep that structure in place. If tracing a settler ideology into the 20th 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 colonialization does not typically mark a discrete stage in a nation's history. Settler colonization is "a structure rather than an event," and its history does not stop with the closing of a nation's frontier.¹¹³ A settler colonial state is, as described above, one that's organized around a project of eliminating native societies.¹¹⁴ At different historical junctures, however, the state may adopt different and more sophisticated strategies of elimination, such as assimilating the native group. 115 Accordingly, "[slettler 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."116 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."117 This view (which stands in tension with Rana's claim that the settler framework no longer informs American constitutionalism) is not only consistent with treating the concepts underlying a settler ideology as fluid; it seems to require it.

¹¹³ Wolfe, *Elimination*, supra note 31, at 390.

¹¹⁴ See supra notes 26-31 and accompanying text.

¹¹⁵ See, e.g., Patrick Wolfe, After the Frontier: Separation and Absorption in US Indian Policy, 1 SETTLER COLONIAL STUDIES 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).

ELKINS & PEDERSEN, *supra* note 26, at 3.

Wolfe, *Elimination*, *supra* note 31, at 402.

* * *

Notwithstanding these merits, Rana reverts back to a static, nonevolving 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."118 Even if Rana had consistently traced a fixed concept of settler freedom from the 18th century through the beginning of the 20th, this claim would merit 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." 119 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 for his claim that the concept had essentially been extinguished from constitutional politics by the 1930s. 120 (But this would raise another question: how is it that settler freedom's extinction came so late, and was able to creep its way into the reasoning of Lochner, when the historians that Rana relies upon thought that the concept of republican freedom no longer had currency in American constitutional thought?)

However, while it is may be more responsible 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 19th 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 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 New Deal's constitutional structure. William Forbath, for example, argues that the New

¹¹⁸ RANA, supra note 3, at 324.

POCOCK, Concept of a Language, supra note 101, at 89.

¹²⁰ See supra note 108 and accompanying text; see also, e.g., ERIC FONER, POLITICS AND IDE-OLOGY, supra note 37, at 97-108 (describing collapse of free labor ideology after the Civil War).

Deal ratified a vision of "social citizenship" wherein "the guarantee of equal citizenship entailed decent work, a measure of economic autonomy and democracy, and social provision for 'all Americans.'"¹²¹ While this concept differs in significant ways from classical republican freedom – it is compatible, for example, with an economy based on wage labor –a static definition of settler freedom precludes any exploration of how it might nonetheless intersect with Rana's settler framework.

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 Francis Perkin's claim that Roosevelt detested "the dole," and that he 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?" 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?" 123

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 level of local decision-making. As Forbath has argued, in talking in a language of economic and social rights, New Deal officials "tapped a protest language millions of industrial workers encountered in the groundswell of CIO organizing." Moreover, many New Deal accomplishments, including the right to collective bargaining and the creation of social insurance programs, reflected the demands of

Forbath, *Caste*, *supra* note 121, at 70.

lereinafter Forbath, Caste, Class, and Equal Citizenship, 98 MICH. L. REV. 1, 4 (1999) [hereinafter Forbath, Caste.] This vision of social citizenship was echoed, according to Forbath, in Roosevelt's "second, economic Bill of Rights," which included "[t]he right to a useful and remunerative job...; [t]he right to earn enough...; [t]he right of every farmer to raise and sell his products...; [t]he right of every businessman... to trade [free from] domination by monopolies at home or abroad... [and all of these rights] regardless of ... station, race, or creed." Id. at 74 (quoting Franklin D. Roosevelt, New Conditions Impose New Requirement upon Government and Those Who Conduct Government, Campaign Address at the Commonwealth Club, San Francisco, Calif. (Sept. 23, 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 752, 753 (1938)). It is possible to read such language, as Rana does, as expressing a commitment to mere security without any component of self rule. See RANA, supra note 3, at 302-03 ("[S]elf-rule as participatory control was seemingly evacuated from the public realm."). However, one can also identify in this language a commitment to non-domination and to a citizenry in which individuals have some measure of control over their economic fates.

 $^{^{122}}$ Frances Perkins, The Roosevelt I Knew 230 (1946); see id. at 230-39.

 $^{^{123}}$ NeIl Maher, Nature's New Deal : the Civilian Conservation Corps and the Roots of the American Environmental Movement 108 (2008) (quoting Robert Fechner, *Annual Report of the Director of the Civilian Conservation Corps: Fiscal Year Ended June 30, 1939*, at 8).

activists and leaders of the CIO, which "had become the organizational and financial mainstay of the Democratic Party." These successes, according to Forbath, did not simply reflect the influence of union leaders, but the mobilization of millions of working-class families into the base of the New Deal Democratic Party. 126 Finally, while the New Deal established an administrative bureaucracy under the control of the President, New Deal programs were locally administered and, notwithstanding their formal mandates, modified at the ground level to reflect regional political structures. 127

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 narrative, 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.

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 20th 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 20th century encouraged workers to purchase mortgaged homes on the theory that debt-ridden homeowners would be reluctant to go on strike.¹²⁸ This rise in corporate enthusiasm for mortgages coincided with one of the first federal subsi-

¹²⁶ Id

¹²⁵ *Id*.

¹²⁷ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 109 (2004). Klarman's account highlights, for example, how local control of New Deal programs allowed Southern officials to allocate resources to help white workers while ignoring the interests of disenfranchised African Americans. *See id.*

¹²⁸ See, e.g., MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 28 (new ed. 2006) (describing Los Angeles Merchants and Manufacturing Official boast that in 1914 "that 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 OF THE ASSOCIATION OF AMERICAN GEOGRA-PHERS 84, 103-104 (1995) (describing how home-owning workers in model town "expressed little interest in striking organizing so long as they held property or a mortgage on it").

dies 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. 129 Federal incentives toward individualized home ownership deepened during the New Deal, when Congress set up the Federal Housing Act to insure long-term mortgages, and created the Federal National Mortgage Association for the purpose of providing liquidity for those mortgages. 130

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 homeowership associations, even in the midst of plenty of isolated individualism."131 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."132 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, 133 as well as normative ones like how to determine which rights should (or should not) be guaranteed under a new, welfareoriented constitutionalism.134

¹²⁹ Revenue Act of 1913, ch. 16, 38 Stat. 114, 167; see Nadav Shoked, The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property, 28 YALE J. ON REG. 91, 94 n.8 (2011).

¹³⁰ Julie Andersen Hill, Bailouts and Credit Cycles: Fannie, Freddie, and the Farm Credit System, 2010 Wis. L. Rev. 1, 17 (2010); 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, 194 (2005).

¹³¹ DAVID HARVEY, THE ENIGMA OF CAPITAL 150 (2010).

¹³² Id. at 132.

^{133 545} 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); see Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 MINN. L. REV. 2100, 2102 (2009) ("The Kelo backlash probably resulted in more new state legislation than any other Supreme Court decision in history.")

¹³⁴ 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 suggesting "home ownership" as one of the guarantees in FDR's Second Bill of Rights that should be resurrected).

These are, of course, speculations. Perhaps settler colonial theory and contemporary constitutional law are too separate, and the connections between them too tendentious, for anything to be gained from this kind of inquiry. But Rana's compelling account of the settler ideology's evolution through the 19th century, and the theoretical potential of his decision to depart from the norms of traditional historical scholarship, suggest it might have been worth trying.