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THE TWO FACES OF AMERICAN FREEDOM: A REPLY

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INTRODUCTION

It is an honor to be read and read so carefully, especially by individuals whose work has been a shaping influence. Each of the comments on my recent book, *The Two Faces of American Freedom*, presents thoughtful and searching questions about my methodology, interpretation of past events, and normative conclusions. In addressing their reflections, I view this response as less a moment to answer every potential challenge and far more an opportunity to engage with the larger themes raised so compellingly by Richard Bensel, William Forbath, and Nancy Rosenblum. In particular, I see the commentators as broadly articulating three types of concerns. The first is a worry about historical persuasiveness and completeness. Second, the authors argue that my interpretation of the New Deal loses the nuance of my preceding discussions and presents a too one-sided critique of the modern administrative state. Finally, the authors wonder where my account leaves the possibility for agency and transformative change in contemporary politics. In particular, they rightly ask: What social groups can carry on the project of freedom as self-rule and what institutions will mediate these groups' interactions with government?

Let me begin by briefly describing the principal aims of the book, which I believe will provide a useful backdrop for working through the three comments. The book is motivated by a specific diagnosis of the prevailing moment. The United States today enjoys tremendous economic, political, and military power.[1] Yet, this paramount global posi-

* Assistant Professor of Law, Cornell Law School. I would to thank Natanya DeWeese and Emily Benson Pickering as well as the rest of the editorial team at the *Cornell Journal of Law and Public Policy*, for their excellent assistance and hard work on this symposium.

[1] *See* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 2 (2010).

tion is tied at home to a public life marked by popular uncertainty and a desire for basic change.[2] Although politicians ritualistically invoke words like "liberty" and "democracy," the current mood is one of ambivalence about what such words mean and how they could be achieved. As I write in the Introduction, the consequences for American politics have been profound: "In the absence of a substantive ideal of freedom, the goal of projecting power has placed security at the center of political discourse and has entrenched hierarchical forms of economic and political rule—most evident in corporate consolidation and the rise of an expansive executive."[3]

The book is an effort to make sense of these developments. In exploring the transformations in the relationship between American freedom and American power, I present a general reinterpretation of United States constitutional development. This reinterpretation situates the collective experience within the context of comparative global history. In particular, I argue that much like similar experiments in imperial conquest, such as the English in Ireland, South Africa, and Australia or the French in Algeria, the United States' earliest beginnings and political founding were first and foremost as a settler society.[4] This settler framework generated its own ideology and institutions, which tied rich internal accounts of freedom and membership to external and imperial modes of subordination.[5] Such national origins embody more than a distant period of conquest and exclusion, which, while reprehensible, have little to say about current practices. Rather, they established a constitutional regime that I term "settler empire"[6]—a regime that critically influenced political sovereignty and legal authority in American life for over three centuries.[7] In fact, in many ways today's dilemmas result from the difficulties Americans have had in constructing a post-settler society, one able to retain the robust internal ideals of economic independence and political participation while greatly expanding the domain for social inclusion and reining in the application of American police power abroad.

Each chapter of the book explores the conceptual relationship between the settler experience and notions of liberty during a given period. Chapter 1 reconceives the central causes and consequences of the American Revolution by reinterpreting the Revolution as a settler revolt over the future of imperial colonization.[8] Chapter 2 presents an argument for why anti-statist attitudes became increasingly dominant during the early

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2 *See id.* at 4.

3 *Id.*

4 *See id.* at 8–14.

5 *See id.* at 13.

6 *See id.*

7 *See* RANA, *supra* note 1, at 13.

8 *See id.* at 20–98.

republic—focusing especially on the analytical continuities between the postcolonial American position and that of more recently independent nations in Africa and Asia.[9] Chapter 3 explores how the late nineteenth century embodied a historical moment in which agrarian protest and the emerging labor movement sought to adapt the ideal of freedom as self-rule to new industrial realities.[10] In the process, these groups challenged both anti-statist presumptions as well as the modes of colonial subordination marking collective life (if only fitfully in the latter case).[11] Chapter 4 charts how in the wake of Populist defeat, political and legal actors developed a new constitutional framework for post-settler America, one structured around presidential authority and global primacy that took institutional root during the New Deal.[12] Finally, in my Conclusion, I focus on how the civil rights movement and more recent immigrant activism speak to the continuing power of longstanding ideals of self-rule.[13] At their most expansive, these popular mobilizations have highlighted the hope of a non-imperial and inclusive republic, connecting notions of independence and participation at home to a sustained critique of interventionism abroad.[14]

I. CHALLENGES TO THE HISTORICAL INTERPRETATION

The initial set of questions raised by the three comments concerns the persuasiveness of my historical argument. The first point to note is that the book does not aim at historical comprehensiveness or attempt to provide a totalizing account of the American experience. In part, this is because the purpose of the book is one that ultimately diverges from traditional historiography. The book's method is closest to approaches in "American political development," in seeking to explore the broader structures that have shaped our distinctive constitutional periods. My goal is to produce clear analytical tools—central among them the concept of settler empire[15]—which highlight the structural forces that have set the terms for constitutional and political debate at specific historical moments. By employing these analytical tools, I hope to assess how governing frameworks of hierarchy and exclusion emerged over time, as well as to think through what modes of political action would be necessary to confront these frameworks today.

As a result, the book discusses certain key events not principally in terms of their own causes, but rather in terms of their implications for

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9 *See id.* at 99–175.
10 *See id.* at 176–235.
11 *See id.*
12 *See* RANA, *supra* note 1, at 236–325.
13 *See id.* at 326–50.
14 *See id.* at 343–48.
15 *See id.* at 3.

settler and post-settler constitutional development—what role they played in producing, altering, or replacing the larger legal and political framework. I make no claim that the concept of settler empire is sufficient to explain everything in the American past. If anything, I view the lens of settler empire as one among many potential lenses, and as an analytical approach that inevitably hides some elements of the American experience while uncovering others that are ordinarily obscured. I believe that for the purposes of comprehensiveness, the book should be read alongside competing accounts of the larger national experience, as well as histories of the particular events mentioned in the book. However, the claim that I do make—and it is not an insignificant one—is that the settler empire lens better captures the structural forces that have sustained the specific combination of robust liberty and intense exclusivity marking United States constitutional practice.

It is for this reason that the American Civil War (not to mention World Wars I and II) is given relatively less attention in my historical narrative, something that Bensel regrets.[16] Consistent with Bensel's interpretation of the causes of the conflict, I too would argue that the Civil War was the product of disagreements *within* settler society over the structure and direction of expansion. In this sense, Northern and Southern communities were both ultimately committed to the same four components of the American settler empire: first, republican freedom as economic independence and productive control; second, territorial conquest and the supply of new land for settlement; third, an ethnically defined vision of membership; and fourth, essentially open European immigration.[17] Indeed, it was "free laborers" who (successfully) sought to bar non-slave blacks from entrance to frontier states like Illinois, Indiana, Iowa, and Oregon, in order to maintain whites' access to property and the internal conditions necessary for economic independence.[18] In essence, the disagreement between the North and South was not over whether to constitutionalize a vision of empire, but over which labor regime—slave plantation or pure white settlement—would go hand in hand with expansion.[19] For my interests—in how the constitutional structure shifted over time—the consequences of the Civil War are more central than its causes, which were internal to settler empire and, although deeply socially divisive, did not necessarily challenge the overriding regime. Nonetheless, in leading to the abolition of slavery and in illustrating the power of the federal government to intervene dramatically

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16 *See* Richard Bensel, *Comments on Aziz Rana, The Two Faces of American Freedom*, 21 CORNELL J.L. & PUB. POL'Y 127, 131 (2011) (Book Review).

17 RANA, *supra* note 1, at 175.

18 *See id.* at 118.

19 *See* Bensel, *supra* note 16, at 4–5 (discussing how "settler sovereignty" and "imperial prerogative" were to be combined).

in economic and social life, the Civil War generated a striking new politics of equality, one powerfully articulated by Radical Republicans like Thaddeus Stevens.[20] This politics placed pressure on the colonial and racial dichotomies marking settler empire and began the decades-long decline of settler institutions.[21] Still, I agree wholeheartedly with Bensel that there is a settler interpretation to give of the Civil War's causes and hopefully one that I can develop in future work. This interpretation likely would begin with the Louisiana Purchase, which in opening up new land for settlement also set the stage for regional conflict over territory and labor regime.[22]

Another important historical strand that the commentators, particularly Rosenblum, wish I had given greater attention to is the place of Christianity in American constitutional development. I agree with her assessment that faith has played a profound role in American political identity.[23] In my account, this role is most evident in the capacity of Protestant millennial ideals—the belief that God would one day rule on Earth and create a permanent condition of peace—to remain a constant theme of moral life, after both the retreat of explicitly Puritan ideologies and even the collapse of settler frameworks.[24] I argue that such millennialism during the Colonial period helped to generate and maintain a radicalized account of republican freedom in North America, which combined political, economic, and spiritual independence.[25] Settlers in Massachusetts and elsewhere, "by claiming land and harnessing raw nature to serve human industry . . . paved the way for the millennium and displayed their own religious fervor. In other words, ideas of productive labor and liberty became inextricably intertwined with practices of worship."[26] Accordingly, faith was ideologically critical in justifying both territorial expansion and in emphasizing the centrality for republican freedom of autonomous reflection over all sites of collective life.[27]

Moreover, I also argue that although it is dramatically altered from colonial and nineteenth-century iterations, millennialism today continues to serve a key political function.[28] In particular, the commitment to permanent peace sits at the heart of American's projection of international power. Since the emergence of the United States as a global force, at the

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20 *See* RANA, *supra* note 1, at 183–84.

21 *See id.*

22 *See id.* at 111.

23 Nancy Rosenblum, *"Lost Causes" Comment on* Aziz Rana, *The Two Faces of American Freedom*, 21 CORNELL J.L. & PUB. POL'Y 107, 118 (2011) (Book Review).

24 *See* RANA, *supra* note 1, at 56.

25 *See id.* at 55–58.

26 *Id.* at 56.

27 *See id.* at 55–58.

28 *See id.* at 326.

beginning of the twentieth century, the goal of pacification has been connected to the persistent idea that Americans would be safe at home only if all sources of foreign instability were eliminated.[29] In the book, I trace such international commitments to the arguments of Congregationalist pastor Josiah Strong, Teddy Roosevelt,[30] and, ultimately, Woodrow Wilson.[31] Each sought to capture that sense of moral purpose that had sustained settler expansion and to reorient it towards a new global mission. In particular, Wilson secularized classic Protestant ideals while retaining the notion that the United States enjoyed a historically redemptive project.[32] At present, such Wilsonian thinking dominates the foreign policy frames of both Democrats and Republicans, with those across the political spectrum often articulating claims about U.S. strategic objectives through a language of moral right—one that sees a global and interventionist posture as necessary for quelling all sites of disorder.[33]

In my view, the continued importance of such a moralized political identity suggests that we should see "millennialism or missionary efforts abroad" as more than simply "episodic."[34] Especially as concrete experiences of economic control and political participation have receded from the grasp of most Americans, "global standing has gained heightened symbolic meaning . . . [O]ne's participation in American global power (even if only remotely through U.S. birth and citizenship) embodies a rare political moment for individuals to enjoy a sense of shared purpose and achievement."[35] In other words, the redemptive mission abroad provides an ethical anchor for citizenship, giving content to the value of social membership and even justifying domestic practices. In this way, religious faith and moral certainty play essential roles in promoting an American political identity, framed around international primacy and presidential assertiveness. I would argue that rather than offering a "secular narrative"[36] of the rise of U.S. power and its related ties to domestic freedom, *The Two Faces of American Freedom* presents an account of

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29 *See id.* at 327.

30 *See id.* at 240, 268.

31 *See id.* at 287–96.

32 *See id.*

33 For more on the dominance of Wilsonian ideas on the right and the left, see Asli Bâli & Aziz Rana, *American Overreach: Strategic Interests and Millennial Ambitions in the Middle East*, 15 GEOPOLITICS 210, 212–17 (2010). For more on the appropriation of Wilsonian arguments—traditionally associated with the human rights rhetoric of Democratic Party presidents—by "Neoconservatives" on the right, see John Monten, *The Roots of the Bush Doctrine: Power, Nationalism and Democracy Promotion in U.S. Strategy*, 29 INT'L SECURITY 112 (2005).

34 *See* Rosenblum, *supra* note 23, at 119.

35 RANA, *supra* note 1, at 327.

36 Rosenblum, *supra* note 23, at 119.

secularization—or the ways in which religious ideals have persisted in collective life, although often in overtly non-religious form.

II. THE STATE AND THE AMBIVALENT LEGACY OF THE NEW DEAL

A second concern that the comments express is that the book loses subtlety in presenting its account of the New Deal, and, more generally, seems to picture the state only through the lens of imperial prerogative and subjugation.[37] For Forbath, not only is this surprising given my explicit political commitments, but it means that I ignore the important achievements of the New Deal and of the administrative state.[38] As an initial matter, I should note that my basic view of the state is that it is central to any transformative political project. Indeed, I believe that a long strand of American radical politics—from William Manning in the 1790s[39] to Terence Powderly at the Knights of Labor,[40] Tom Watson in the Populist Party,[41] Walter Weyl and John Dewey during the Progressive periods,[42] and Martin Luther King, Jr.[43] more recently—have emphasized that democratizing economic life requires energetic government action. However, each thinker in this tradition has also argued that government power is essentially open-ended: it can serve both liberating and oppressive purposes. Although a necessary instrument for fulfilling collective ends—for those like Manning, Dewey, and King—government power only is compatible with liberty as self-rule to the extent that it embodies the interests of an assertive public will. In other words, the state's transformative potential is bound to whether social groups—mobilized to create more emancipatory conditions at work or to pursue projects of greater social inclusion—actually determine political decision-making.[44]

In fact, the book's argument about the rise of anti-statist sentiment in the nineteenth century is an argument in large measure about the defeat of many small farmers and artisans in their efforts to employ local legislatures as instruments for expressing an immediate and communal good.[45] Invoking the specter of social disorder and potential dismemberment by Europe, gentry and commercial elites created a new federal constitution on the grounds of institutional balance and political insulation

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37 William E. Forbath, *Radicalism and the Modern State: A Critique of Republican Nostalgia*, 21 CORNELL J.L. & PUB. POL'Y 121, 122 (2011) (Book Review).

38 *See id.*

39 *See* RANA, *supra* note 1, at 121.

40 *See id.* at 178, 195.

41 *See id.* at 201.

42 *See id.* at 243–51.

43 *See id.* at 329–35.

44 *See id.* at 128–29, 205–10, 314, 326, 332–33.

45 *See id.* at 102–05.

from popular rule.[46] The long-run consequence was that this federal structure disconnected the hope of a democratic society of small producers from the belief in an energetic government in the service of the many.[47] As I write in the book, over time,

> [F]armers and townspeople came to see government authority, as employed by commercial and political elites, as a threat to what remained of popular autonomy. This sense was reinforced by the fact that federal power became increasingly associated with territorial expansion and the congressional assertion of the old imperial prerogative.[48]

Thus, American anti-statism became historically preeminent in part because of the demise of an alternative ideal that combined energetic government with the direct assertion of popular authority. In the centuries since, a central struggle for radical voices in American life has been to defend the state's transformative potential against both recalcitrant elites as well as social groups who view government authority as alienating or as appropriate only for conquest and the control of excluded communities.[49]

For all these reasons, I see the New Deal as a dramatic popular victory, establishing as law the goals that labor and agrarian protesters had fought to achieve for decades[50]—from social insurance schemes and minimum wage laws, to collective bargaining provisions, which greatly expanded meaningful economic freedom by eliminating the near-absolute power management historically enjoyed over the terms of work. Yet, my vision of the New Deal also is ultimately colored by what I see as its most lasting constitutional legacy at present. From the 1930s to the 1960s, the power of the New Deal's social bases in the labor movement and rural America helped to sustain a commitment to popular economic objectives. Moreover, as these social bases collapsed—partly precipitated by transformations in the economy—the New Deal legacy has come increasingly to be defined by its governmental framework, rather than its specific social policies. In particular, the New Deal outlined an emerging vision of constitutional politics that emphasized a powerful executive at home and abroad, committed primarily to goals of security and the expansion of American power.[51] This vision took for granted a direct

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[46] *See id.* at 133–35.

[47] *See id.* at 142.

[48] *See id.* at 15.

[49] *See id.* at 328–29.

[50] *See id.* at 194–200, 317.

[51] *See id.* at. 315–20.

representative relationship between the President and the people.[52] In the context of social groups able to link presidential discretion to an immediate public will—as during the "Popular Front" Era of the New Deal—such executive authority served important and emancipatory collective ends. However, with these constituencies largely demobilized, the result in recent decades has been a presidency that can substitute its own will for that of the public and which, in practice, has gone hand in hand with the entrenchment of corporate consolidation and an aggressive international posture.

Devoid of the substantive republican ideals that marked the settler period or the popular goals of industrial and rural workers in the 1930s, the institutional legacy of the New Deal has largely been today's framework of managerialism, corporate dominance, and plebiscitary politics.[53] From this perspective, the George W. Bush Administration—with its focus on unchecked executive authority and its commitment to global primacy—is in many ways the final result of New Deal presidentialism. George W. Bush (as well as Barack Obama) benefitted from those forms of executive sovereignty, which took root during Franklin Roosevelt's presidency.[54] In effect, these recent presidents enjoy the power that comes with a massive state infrastructure, but such power is not coherently bound to clear social constituencies—organized and directed to imposing liberating goals on collective life.[55]

In a sense, my account of the New Deal is meant to highlight persistent ambiguities in the American experience. On the one hand, settler empire was grounded in a deeply exclusive vision of social membership, which promoted both ethnic subordination and a coercive project of expansion.[56] On the other hand, it gave birth to a transformative account of self-rule.[57] At decisive historical moments, this account led some Americans to imagine the ideal of democratic equality as a guiding social practice, one that was tied neither philosophically nor politically to existing forms of bondage. Individuals as diverse as Thomas Skidmore, Thaddeus Stevens, Randolph Bourne, and W.E.B. DuBois all envisioned an alternative identity for the country, which would revise dramatically the uses of external power and thus create a new, universal, and non-imperial American polity.[58] Similarly, the New Deal expressed the possibility that the state could become a central instrument of collective action, alleviating the burden of necessity and creating the conditions for wide-

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52 *See id.* at 316.
53 *See id.* at 315–20.
54 *See id.* at 319–25, 326–27.
55 *See id.* at 318.
56 *See id.* at 12.
57 *See id.* at 12.
58 *See id.* at 158–62, 183–84, 290–96, 331–32.

spread economic independence.[59] John Dewey described this aspiration as, "giving . . . the great mass of individuals, an opportunity to find themselves and then to educate themselves for what they can best do in work which is socially useful and such as to give free play in development of themselves."[60] However, today the New Deal's constitutional importance increasingly lies elsewhere. This is because the 1930s also began an institutional trajectory, which gained particular prominence during the Cold War and that currently provides the outlines of presidential discretion without the content of Dewey's emancipatory vision.[61]

In other words, the prevailing constitutional order—just as with settler empire before it—speaks to the continued ways in which liberty and subordination remain bound together. My thought in detailing the politics of the settler period certainly is not to present a nostalgic or elegiac history of the past. The nineteenth century, after all, was a time in which free citizenship for a select few entailed profound and systematic forms of oppression.[62] Rather, I aim to uncover, by reference to previous ideals and historical moments, the forms of dependence that exist today and which are often cloaked in dominant narratives of constitutional development. My location of such dependence in the legacy of New Deal constitutionalism simply reinforces how in each era, modes of liberty and hierarchy are connected—albeit in different configurations—and similarly, how in each era social improvement requires unshackling the two.

As a final point on the state, I would like to note the complicated nature of criticizing elements of the New Deal legacy while rejecting political conservatism. Given today's atmosphere, in which various politicians and public figures are calling for the further retreat of the state in domestic life, it is quite tempting to defend government power regardless of potential concerns with its orientation or consequences. Yet, this approach refuses to come to grips with why anti-statist attitudes continue to have such popular resonance. The pervasive sense of alienation from state institutions is not simply a conservative ruse, but underscores the increased hierarchy of economic and political life and the reduced spaces that exist for citizens to exercise a meaningful voice. The project for those on what remains of the left cannot be to defend the state irrespective of who actually controls its operations, since at best this will embody a defense of existing arrangements. Certainly, to the extent that corporate elites and national security "experts" dominate statecraft and decision-making, it is hard to imagine that government action will promote

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59 *See id.* at 311–15.

60 John Dewey, *The Economic Basis of the New Society*, *in* 13 THE LATER WORKS, 1925–1953, 318 (Jo Ann Boydston ed., 1988).

61 *See* RANA, *supra* note 1, at 315–20.

62 *See id.* at 215–20.

economic independence or substantive equality for marginalized groups. In other words, any defense of the state must include a critique of its present orientation and an argument for linking government action to those mobilized social bases that could press for greater economic and political self-rule. I presented my account of the New Deal's constitutional legacy in this spirit.

III. POLITICAL AGENCY THEN AND NOW

Each commentator also raises a third set of issues focused on what contemporary spaces exist for collective agency aimed at recovering notions of economic and political self-rule.[63] As both Bensel and Rosenblum articulate it, the question is who are today's Populists or groups that could resurrect settler freedom?[64] To begin with, it is important to clarify the precise role of the Populist movement in the book. The agrarian protest does not occupy a central place in the historical account because I believe that Populists produced the most normatively compelling vision of freedom. Radical members of the Populist movement no doubt tied anti-imperial and inclusive positions to arguments about economic democracy and cooperative production. Yet, even these radicals—with no better example that Tom Watson[65]—had difficulty maintaining a commitment to interracial solidarity, and in the context of political defeat, fell back on old settler dichotomies and assumptions.[66]

Rather, Populism's centrality comes from my belief that agrarian protest and its defeat embodied a critical turning point in American constitutional development. The Populists—especially many of the movement's most popular and radical leaders like Jerry Simpson in Kansas,

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63 *See* Bensel, *supra* note 16, at 129; Forbath, *supra* note 37, at 123; Rosenblum, *supra* note 23, at 116.

64 *See* Bensel, *supra* note 16, at 129; Rosenblum, *supra* note 23, at 116–17.

65 *See* RANA, *supra* note 1, at 201, 211.

66 As an aside, as Rosenblum suggests in passing, I do believe that the internal failures of Populism were due in part to a lack of virtue—but virtue of a very particular sort and quite distinct from the elite republican vision commonly associated with the term. *See* Rosenblum, *supra* note 23, at 116. In fact, I am deeply suspicious, politically, of the arguments of today's "civic republicans" (such as Michael Sandel, J.G.A. Pocock, Frank Michelman, and Anthony Kronman) that emphasize the centrality of political excellence to liberty, and lament its decline. During constitutional debates at the founding and throughout the nineteenth century, such notions of virtue served a key function in sustaining the economic and political dominance of commercial forces and wealthy landowners. Traditional republican "virtue" was contrasted with the partiality and selfishness of the poor and landless so as to legitimate personalized forms of elite rule. By contrast, I believe that the Populists promoted a democratized account of virtue, which questioned the excellence of a select few and instead sought to widely distribute the ideal, viewing "virtue" as a person's full awareness of his or her own interests. In this way, virtue and economic self-interest were not opposites but deeply intertwined. Thus, my critique of the Populists derives in part from their failure to maintain these interracial commitments to a shared interest—to democratic virtue—in the face of Democratic Party opposition and pervasive settler arguments about white supremacy.

William Neville in Nebraska, Terence Powderly at the Knights of Labor, Eugene Debs at the American Railway Union, and of course Tom Watson in Georgia—sought both to adapt ideas of freedom as self-rule to new industrial realities and at their most emancipatory, to challenge colonial exclusivities.[67] Given the political power of the social movement and their allies in labor, one very well could have imagined an alternative set of constitutional arrangements that emerged from Populist electoral and social victory. In a sense, the Populists were the last of a long line of "frontier" settlers who revolted against the metropole—be it in London or in new financial and industrial centers in the United States.[68] In the past, settlers had sometimes won—as highlighted by the American Revolution—and sometimes lost, but they had always lived to fight another day. Instead, with the defeat of Populism—which ironically was itself, in part, an effort to move toward a new post-settler society while maintaining elements of the old framework—those on the frontier had finally been contained.[69] Thus, 1896 speaks to a moment of potential transformation that did not occur.[70] Certainly, a new post-settler order eventually emerged, although it took decades to develop fully.[71] This is because settlerism as an organizing political system disintegrated slowly and persisted in orienting constitutional practice well after the settler experience no longer substantively characterized much of collective life.[72] When this new consensus finally took hold, it was organized principally around presidential prerogative and global primacy, and was therefore far less constitutionally committed to ideals of participation and economic independence.[73]

Still, throughout the twentieth century, critics and social movements sought to sustain visions of widespread democratic self-rule (in government and in the economy) and, as with previous Populists, to adapt republican liberty to modern circumstances.[74] They may not have been settlers in any practical sense, but such individuals carried on the internal liberating vision that drove settler life—even if not always self-consciously.[75] As a consequence, rather than a divisive break, I see ideological continuity between the Populists and key Progressive figures—including Walter Weyl, Charlotte Perkins Gilman, Herbert Croly, Randolph Bourne, Horace Kallen, and John Dewey—not to mention ele-

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67 RANA, *supra* note 1, at 178.
68 *See id.* at 177–78, 240.
69 *See id.* at 210–11, 219–20.
70 *See id.* at 176–82.
71 *See id.* at 237.
72 *See id.*
73 *See id.* at 315–20.
74 *See id.* at 241–42.
75 *See id.*

ments of the 1930s labor movement and the post-World War II civil rights movement.[76] For instance, Progressives did not see the government's protection of economic security as an end in itself; they saw it as critical to making self-rule compatible with new bureaucratic conditions by overcoming experiences of dependence and impoverishment.[77] As I write of Dewey's reformist project, in terms that equally could describe Martin Luther King, Jr. in the years before his death,

> [T]he solution was threefold: it meant challenging the rigidity of the division [of] labor, democratizing intelligence, and democratizing leisure. Through a universal education system oriented toward giving individuals the cultural resources and practical skills to address workplace realities, individuals would gain the knowledge to be more than rote enforces of external directives. As a result, responsibilities could be made more diffuse, with fewer people engaged solely in executing tasks. Hedged in through the provision of economic security [including a guaranteed income] and the extension of free time, work itself would be both organized democratically and focused toward creativity and self-actualization. In this context, collective bargaining would . . . serve as a powerful bulwark, limiting the reemergence of corporate dominance and utilizing the collective strength of employees to sustain a proper balance of power.[78]

Such beliefs underscore the persistence of a larger democratic tradition well into the twentieth century, of which the 1820s Workingmen's Parties, the Radical Republicans, and the Populists were all earlier embodiments.[79] Although this tradition was born from settler empire, today we need not necessarily "resurrect . . . settlerism from the collective subconscious,"[80] as Bensel suggests, in order to find liberating ideals in politics. The problem for more recent movements has not been that the vision completely vanished. On the contrary, while less culturally dominant and no longer integrally bound to the post-New Deal constitutional structure, this vision of economic and political freedom still remains present. Rather, the difficulty is that its twentieth-century articulators primarily have served as voices of dissent.[81] In the nineteenth century, such accounts of self-rule were at the center of settler constitutional culture,

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[76] *See id.* at 242–57.
[77] *See id.* at 241–42.
[78] *Id.* at 314.
[79] *See id.* at 102, 208.
[80] *See* Bensel, *supra* note 16, at 129.
[81] RANA, *supra* note 1, at 295.

providing a common political language that shaped the practical disagreements of widely divergent and opposed figures—from labor republicans on the one end, to many of their opponents in the judiciary on the other. However, twentieth-century articulators have found themselves confronting a very different political landscape, in part due to the political defeat of agrarian protest. This governing landscape is one in which corporate power, American primacy, and discourses of security have come to structure constitutional culture and institutional frameworks. Thus, the longstanding vision of independence and self-rule—while present in the ideas of Dewey, DuBois, and others—has become disconnected from the dominant justifications for political practice. One consequence is that, at times, we no longer even see *as our own* notions of economic democracy and popular control embedded in centuries of American thought, from Thomas Skidmore to Martin Luther King, Jr.[82]

This is to say that twentieth-century critics and movement actors offer a powerful template of a non-imperial and inclusive polity, one more relevant to contemporary conditions than the old Populist vision.[83] The issue for the current moment is how to place their ideas back at the heart of constitutional life and political disagreement. At root, this means assessing which social bases exist in the United States to promote such goals and that could present a structural threat comparable to that which the Populists embodied. The thought I offer in the Conclusion is ultimately a limited and exploratory one. I argue that today, given the retreat of the civil rights and labor movements, the communities whose interests are most consistent with both a critique of American practices abroad and economic hierarchies at home are new immigrants.[84] These groups come from parts of the world long deemed ethnically "unfit" for U.S. membership, and face circumstances that tie together legal discrimination, economic dependence, and the harsh face of American power.[85] In coalition with other constituencies, immigrant activism has the potential to serve as a pillar for a new reform politics, one that reasserts the inclusive and non-imperial ambitions of past movements.[86] However, I make no claim that such political agency either is inevitable or likely.[87] Indeed, the dilemma for the political "left" is the demobilization of its historic constituencies—especially labor and African Americans—in recent decades and a lack of clear replacements.

This problem is not amenable to easy resolution, but nonetheless it has to be confronted. In fact, my focus on popular mobilization comes

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82 *See id.* at 18.
83 *See id.* at 290–96, 256–27, 313–14, 332–36.
84 *See id.* at 336–43.
85 *See id.* at 339–41.
86 *See id.* at 346.
87 *See id.*

from a basic insight about the requirements for political change. Too often, present-day reformers imagine that if they propose policies that help the country's majority (such as universal health care), those policies will find support, and—barring pathologies like corporate influence over elections—will be enacted into law. However, this idea ignores the fact that progressive majorities are created; they must be fought for and won over. This process of "creation" has two central components: (1) identifying the groups that likely will defend transformative agendas; and (2) pursuing initial political objectives or policies that will strengthen these groups' political power, commitment to change, and capacity to impose reform on oppositional forces. Rosenblum wonders where I see democratic institutions fitting in this story: "in particular political parties, elections, and the partisan organization of government."[88] For me, these institutions all serve a vital function, because through advocacy and actual legislation they can participate in this process of creation—strengthening the political leverage of tapped and untapped reform constituencies. In the immigrant context, one could imagine a political party pursuing amnesty measures, the decriminalization of immigration status, and checks on deportation practices, all with the aim of increasing the material resources and relative power of such groups. Thus, what I also take from the example of the Populist Party is how an organization, committed to representing the interests of particular constituencies, can facilitate coalition building and political action, and in the process transform a demobilized but receptive base into a potential political majority.

As a final point on agency, it is worth engaging with Bensel's very provocative thought that throughout *The Two Faces of American Freedom,* the group that seems to enjoy the greatest scope for agency and autonomous action are judges, particularly Supreme Court Justices.[89] My own view is that the Supreme Court plays two distinct roles in the book. At certain points, the Justices give legal imprimatur to a political consensus that has emerged in settler life. One such example is Chief Justice John Marshall's opinion written for a unanimous court in *Johnson v. M'Intosh,*[90] where he declared that the United States, in the form of the federal Congress, enjoyed ultimate sovereignty over land that Indian tribes occupied.[91] Here, Marshall, by further constitutionalizing both the juridical right of expansion and imperial prerogative power over non-settlers, reaffirmed widely accepted commitments in settler society.[92] On other occasions, however, the Justices also intervened in unresolved

88 *See* Rosenblum, *supra* note 23, at 117.

89 *See* Bensel, *supra* note 16, at 129.

90 21 U.S. 543 (1823).

91 *See id.* at 587.

92 *See id.* at 588–92.

political struggles to strengthen a particular side, and to give that side the added weight of the judicial system. This is how I read Court decisions in cases like *In re Debs*[93] and *Lochner v. New York*,[94] which placed a thumb on the scales in favor of corporate interests and political elites during open and contested debates regarding labor.[95]

Therefore, I do not claim that Justices are any more autonomous than other social actors; although the judiciary's potential to influence political outcomes clearly is quite extensive, as underscored by the decisive role judicial intervention played in the context of labor strife. Nor would I accept the idea that the courts impose finality on disputes; rather their adjudication is simply one iteration in an extended process of negotiation and contest. Instead, I focus on Supreme Court argumentation because judicial opinions provide powerful evidence regarding the contours of the constitutional regime at a given historical moment. In circumstances where a political agreement has emerged already, the cases highlight the governing arrangements and the legal justifications that defend this status quo. Under conditions of disagreement, judicial arguments clarify the ways in which constitutional structures are in flux. For instance, *Lochner* and *Debs* read together suggest increasing contradictions at the heart of settler constitutionalism at the turn of the twentieth century.[96] While political and legal elites were expanding executive prerogatives and applying these prerogatives domestically against settler insiders (white laborers),[97] the very same elites were still justifying the overall framework through ideals of republican freedom.

CONCLUSION: WHY THE LANGUAGE OF CRITICAL MOMENTS?

In conclusion, let me explore Rosenblum's worry about the use of "critical moments" in the book.[98] I admit that there is a rhetorical quality to invoking the idea of the United States as standing at a "crossroads." I agree with Rosenblum's implicit thought that virtually any historical moment may be described as epochal or critical. Yet, I do not think that this means we should reject any form of epochal language in favor of ordinary "political time."[99] I worry that given today's demobilization on the left and prevailing sense of uncertainty, the frame of ordinary political

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93 158 U.S. 564 (1895).

94 198 U.S. 45 (1905).

95 *See Lochner*, 198 U.S. at 64 (holding a law unconstitutional that limited the number of hours bakery employees could work because the law interfered with freedom of contract); *Debs*, 158 U.S. at 599 (holding that the president has the authority unilaterally to sue to enjoin railroad workers from striking).

96 *See Lochner*, 198 U.S. at 64; *Debs*, 158 U.S. at 599.

97 *See* RANA, *supra* note 1, at 168.

98 *See* Rosenblum, *supra* note 23, at 119.

99 *See id.* at 120.

time reinforces the intuition that our institutions are permanent social facts—here yesterday, here today, here tomorrow. They are neither the work of tangible political activity, nor truly alterable by collective effort.

Moreover, it strikes me that every period offers its own crossroads for those interested in social change. Nevertheless, while the sense of urgency may be constant, the substance of what constitutes this crossroads shifts. For the time being, our predicament concerns the relationship in the United States between the growth of external power and the retreat of internal freedom. This reality raises fundamental questions about the possibilities going forward for democratic inclusion and economic independence in American life. While our problems may be no more urgent in the greater scheme than those that faced earlier generations, confronting today's specific challenges will require a far more politicized public body than that which currently exists. It also will require a shared discourse capable of explaining why our institutions emerged as they did, and how they can be made subject to meaningful popular control. *The Two Faces of American Freedom*, through the analytical lens of settler empire, is one initial effort to reckon with these concerns.