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RADICALISM AND THE MODERN STATE: A CRITIQUE OF REPUBLICAN NOSTALGIA

*William E. Forbath**

Aziz Rana has produced a surpassingly good book. He has tied the history of ideas about liberty and citizenship to the history of empire and settlement, coined the notion of “settler freedom,” and used it to interpret the whole span of United States history. Rana has great synthetic powers and a rare gift for teasing out the core normative elements of complicated outlooks and ideologies. He is especially sure-footed in setting out the political and constitutional ideas of the American Revolution and founding period in the transnational context of overturning British imperial rule and projecting an American “empire of liberty.”¹ His discussion of the royal prerogative and the governance of colonial subjects becomes a brilliant organizing trope that he carries through to the book’s final pages on undocumented workers in the twenty-first century.² As Rana knows, he has few more enthusiastic fans outside his immediate family than I.

However, the task at hand is critique, and so I turn to the point where I think the book’s surefootedness ends—with the twentieth century. Re-reckoning with the twentieth century and the modern administrative state is a task ahead for Rana. The account he offers in *Two Faces of American Freedom* falls into a trap that besets many historians and theorists of republican liberty. Call it the “Golden Age” trap—the trap of a lost past and an irredeemably fallen present. This elegiac kind of historical narrative comes naturally for conservative thinkers, but Rana is no conservative. He is unabashedly in search of a past that offers normative resources, reform visions, and critical insights for social and political transformation in the present. Rana’s take on twentieth-century developments, however, ill-serves that critical and normative aim. What is more, his account is somewhat wrong-headed as historical analysis.

The Progressive Era and the New Deal were the decades that witnessed the creation of the modern administrative state in the United States.³ The gist of Rana’s account of these decades from the 1900s

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¹ See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 148 (2010).

² See *id.* at 106–11.

³ William Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 643, 643–97 (Michael Grossberg & Christopher Tomlins, eds., 2008); Daniel R. Ernst, *Law and the State, 1920–2000: Institutional Growth and Structural Change*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 1–33 (Michael Gross-

through the 1940s is this: Progressive Era reformers, according to Rana, largely abandoned the old republican project of outfitting Americans for self-rule.⁴ New Dealers, in turn, hammered into place a new intellectual and institutional framework that completed that abandonment and replaced it with a new vision.⁵ Freedom understood as self-rule—political participation and economic independence—gave way to freedom understood as material and military security.⁶ A decent livelihood was no longer a means or an underpinning for republican liberty.⁷ Instead, it became the ultimate object or goal of reform.⁸ The institutional accompaniment of this ideological sea change was the rise of the administrative state.⁹ Populism and the dream of a decentralized democratic economic life receded.¹⁰ In its place arose the new administrative apparatus, envisioned and built up by Progressivism, ruled by experts, and insulated from electoral or participatory check.¹¹ The Interstate Commerce Commission (ICC), the Federal Trade Commission (FTC), and later in the New Deal, the National Labor Relations Board (NLRB) all stand, in Rana's narrative, as monuments to the death of mass participation, and democratic ideals and practices.¹²

And no wonder: the administrative state, with its reliance on discretionary executive authority, is really, on Rana's account, the twentieth century resurrection of the old royal prerogative—the very kind of state power that the eighteenth-century North American colonists had waged a revolution to overcome. It is the very kind of state power that the nineteenth-century republican constitutional order reserved for dependent subjects: African Americans, Native Americans, and women—but not white men.¹³ Now, under the earnest gaze of Progressive state-builders and the warm smile of Franklin Delano Roosevelt, the royal prerogative returns in Rana's narrative, in the new guise of administrative discretion and bureaucratic regulation.¹⁴ To be sure, as Rana acknowledges, the New Dealers who fashioned the NLRB talked the language of “economic democracy,” and the era saw mass mobilization and insurgency in the

berg & Christopher Tomlins eds., 2008); *see also* STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982); BARRY KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945* (1983).

⁴ *See* RANA, *supra* note 1, at 241.

⁵ *See id.* at 239–40.

⁶ *See id.* at 240.

⁷ *See id.* at 240–41.

⁸ *See id.* at 242.

⁹ *See id.* at 240.

¹⁰ *See id.*

¹¹ *See id.* at 258–59.

¹² *See id.*

¹³ *See id.* at 106–11.

¹⁴ *See id.* at 324–25.

new industrial unions.¹⁵ However, the deep structure and the institutional DNA of the National Labor Relations Act (NLRA) ensured that the nation's labor law would channel labor discontent into administrative procedures and top-down rule.¹⁶ In sum, Rana claims that the Progressives and their New Deal progeny longed to make American government more European, and they ended up wrecking the republic on the shoals of European statism.¹⁷ The ideals of democratic self-rule and economic democracy that Rana finds so richly embodied in the reform movements of the Gilded Age retreated to the margins of social and political life, with no collective actors or social movements to carry them along until the 1960s civil rights movement.¹⁸ The civil rights movement, in turn, produced more radical strains of democratic practice than the social and political movements of the Progressive and New Deal periods. Indeed, the civil rights movement rekindled the old, nineteenth-century visions of economic empowerment and participatory democracy. But these visions proved evanescent without any room for institutional embodiment in the twentieth century's statist order.¹⁹

Inspired by the classic works of another distinguished Cornell historian, the late Christopher Lasch,²⁰ Rana presents an elegant, elegiac narrative. The return of the old royal prerogative is a brilliant trope. However, as a matter of both intellectual and political history, this interpretation of Progressive Era and New Deal state-building is misleading. Moreover, as a theoretical matter, from the perspective of Rana's own undertaking, it begs the question of what kind of legal and institutional apparatus one could imagine underpinning any alternative, deeply democratic, industrial economy. How does Rana imagine twentieth-century reformers setting about the project of transforming an emerging corporate, capitalist industrial economy in the direction of democratic forms of authority and participation without depending on various forms of central state administration to gain the necessary leverage and purchase on the organization of economic life? Rana's own heroes, the Populists, were quite clear about the need to build up central state authority—in their case, over banking and credit—in order to reinvigorate more democratic and decentralized modes of agricultural production.²¹

¹⁵ *See id.* at 312–14.

¹⁶ *See id.*

¹⁷ *See id.* at 329–36.

¹⁸ *See id.* at 328–36.

¹⁹ *See id.* at 329–36.

²⁰ *See, e.g.,* CHRISTOPHER LASCH, *THE NEW RADICALISM IN AMERICA 1889–1963: THE INTELLECTUAL AS A SOCIAL TYPE* (1966); CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991); CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES: AND THE BETRAYAL OF DEMOCRACY* (1994).

²¹ On the central government-based financial reforms and institutional innovations promoted by the Populists, see CHARLES POSTEL, *THE POPULIST VISION* (2007). Interestingly, one

Even for radicals, the devil is sometimes in the details. There were more radical hopes, possibilities, and achievements in these twentieth-century movements and initiatives than are visible in Rana's grand narrative of republican decline. To begin with, the Progressive movement was animated by two overlapping but competing currents. The dominant one was the managerial or administrative current that Rana emphasizes, with its celebration of expertise and top-down social control.²² The other was a democratic current that was far more continuous with nineteenth-century republicanism than Rana recognizes. For Rana, the old republican aspiration for economic and political self-rule became the exclusive property of intellectuals and philosophers. He argues that after the turn of the twentieth century, this aspiration ceased to figure meaningfully in the world of politics and social reform²³—but that is not so.

The inherited republican notion of freedom as participation in the governance of social and economic life did not repose merely in the works of John Dewey, Herbert Croly, and Randolph Bourne, as Rana insists.²⁴ One can see this notion at work in some of the state-building projects that Rana sees as ushering in republicanism's demise. Take, for example, the ICC: What were the stakes in the railroad-rate regulation debates that brought about the Interstate Commerce Act and the ICC's creation?²⁵ For republican-minded reformers who did much to shape the statute, the nation's market geography was at stake.²⁶ Their aim was to thwart what they called the "forced centralization" of the nation's manufacturing economy.²⁷ The thrust of national railroad consolidation aimed

could raise a parallel quarrel with Rana's account of the twentieth century return of the royal prerogative in the form of the administrative state and top-down bureaucratic discretion and domination. The idea of a royal prerogative over the persons and property of subjects underwent a more complex development with its own democratic aspect that Rana similarly overlooks. Late eighteenth- and early nineteenth-century constitutional doctrine dubbed this administrative and discretionary form of governmental power the "police power," or simply "police." From the perspective of republican thinkers, "police" was an essential counterpoint to common law protections of the rights of property. It was through the police power, according to the more radical republicans of the early nineteenth century (Rana's heroes, in other words), that government could ensure that the social and economic power inherent in property rights yielded to the imperatives of a well-regulated commonwealth and the interests of all in a rough measure of economic equality. *See, e.g.*, CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993). Thus, both central administrative state authority in the twentieth century and the discretionary power of "police" in the early nineteenth century were the offspring of the royal prerogative. Both were also contradictory creatures: at once as threats to republican liberty—as Rana would have it—but also as legal and institutional conditions for its survival.

²² *See* RANA, *supra* note 1, at 15.

²³ *See id.*

²⁴ *See id.* at 248–57.

²⁵ *See* GERALD BERK, *ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER 1865–1917*, 94–100 (1994).

²⁶ *See id.*

²⁷ *See id.*

to build up national markets around national industrial hubs and to subsidize cheap long-haul rates by over-charging rates on shorter hauls.²⁸ In the process, regional market cities and firms, and whole regional economies were being upended.²⁹ Yet, with the support of ICC-enforced bars on rate discrimination, regional railroads could achieve economies of scale and sustain a more decentralized path of industrial development.³⁰ That was the view of reformers like Thomas Cooley, the famous laissez-faire constitutionalist-turned-Progressive, and first Chairman of the ICC.³¹ The battle over market geography between the champions of “regional republicanism,” like Cooley, and the national corporate consolidators was won by the latter; but in the fields of politics and law, economic, bureaucratic, or technological necessity did not win the battle.³² In other words, at the heart of the ICC, which Rana associates with the demise of “true” republicanism, was a vision of using centralized administrative state authority in the service of preserving just the kind of republican political economy Rana prizes.³³

Take the NLRA as a second example.³⁴ The statute created an administrative agency—the NLRB—to oversee union elections and enforce employers’ duties to bargain with unions.³⁵ According to Rana’s account, the NLRA was the entering wedge for top-down bureaucratized labor relations and a pacified industrial working class.³⁶ Rana is right, of course, that the statute and the NLRB brought the administrative state into the governance of workers’ collective action and self-organization.³⁷ But does he really believe that the nation’s unskilled factory workers could have wrested the right to organize from overwhelmingly hostile corporate employers and a judiciary that, even in the 1930s and later, remained obdurately hostile to workers’ collective action? If not, then some new form of state involvement was indispensable. Many of the key architects and administrators of the NLRA envisioned and fashioned an agency that opened space for democratic engagement in the nation’s workplaces.³⁸ The support of such an agency depended on sustaining a politically active union movement with strong democratic commitments.

²⁸ See *id.* at 104–12.

²⁹ See *id.*

³⁰ See *id.* at 100–12.

³¹ See BERK, *supra* note 25, at 18.

³² See *id.* at 100–12.

³³ See *id.*

³⁴ National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935) (amended 1947).

³⁵ RANA, *supra* note 1, at 312.

³⁶ See *id.* at 312–13.

³⁷ See *id.*

³⁸ See *id.*

However, this support was afoot during the 1930s and 1940s.³⁹ The resurgence of pro-business Republicans, the Cold War, and many other developments brought to the fore lawmakers and administrative state actors inside the NLRB who were devoted to the kind of managerialism that Rana laments.⁴⁰ This resurgence, however, was not a hard-wired feature of either the statute or the Board. The history of organized labor under the NLRA was more open-ended, and the actual experience of unionized workers under the NLRA was a great deal more varied and emancipating than Rana allows; it involved a vast amount of participatory democracy that he overlooks.⁴¹

In sum, as he plunges into the twentieth century, Rana's marvelous eye for the complex and contradictory faces of ideas, ideologies, and institutions gets blinkered. He finds democratic and republican energies, and liberatory elements in Tammany Hall, where many historians see only a boss-ridden system of patronage and domination.⁴² He sees substantial public education afoot in the People's Party's lecture circuits.⁴³ Yet, he misses those hopeful dimensions in the outlooks and institutions that produced the ICC and NLRA. Rana is not wrong to underscore the bureaucratic and statist elements of twentieth-century social reform. But it is a weighty thing for a historian-critic, in search of normative resources and institutional imagination for democratic renewal, to suggest that these resources and imagination ran dry in the national polity for an entire century, while the institutions of contemporary government and society were being built. In doing so, he risks nostalgia or a kind of radical, chic utopianism. Fortunately, twentieth-century history is richer, and it awaits Rana's return engagement. In the meantime, we can be enormously grateful for the brilliant, critical, and historical light he has shed on the intertwined development of American freedom and subjugation.

³⁹ See generally NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (2003); NELSON LICHTENSTEIN & WALTER REUTHER, *THE MOST DANGEROUS MAN IN DETROIT* (1997).

⁴⁰ See RANA, *supra* note 1, at 314–15.

⁴¹ See generally DAVID BRODY, *LABOR EMBATTLED: HISTORY, POWER, RIGHTS* (2005); DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH-CENTURY STRUGGLE* (2d ed. 1993).

⁴² See RANA, *supra* note 1, at 206–08.

⁴³ See *id.* at 178–80.