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Roncarelli's Green Card: The Role of Citizenship in Randian Constitutionalism

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Article abstract

This article investigates the distinct character of Randian constitutionalism and how it may have been inspired by American discourse on constitutional values. More specifically, the author examines how Justice Rand's brand of constitutionalism is distinguishable from the more dominant strain of Diceyan constitutionalism that was prominent among Canadian jurists during the twentieth century. The author argues that the difference between Randian and Diceyan constitutionalism can be explained largely by the central role that "citizenship" played in Justice Rand's understanding of the Canadian constitutional order.

The author further argues that Justice Rand did not invent his conception of citizenship, but borrowed it from American constitutional jurisprudence regarding the Fourteenth Amendment to the Constitution of the United States. Accordingly, Justice Rand's opinion in *Roncarelli* and other cases shows how his constitutional vision was shaped by a series of strong dissenting opinions concerning the now-defunct Privileges or Immunities Clause in the Fourteenth Amendment. By doing so, Justice Rand sought to install in Canadian public law the same fundamental principles of equality and non-discrimination that the American Congress intended to establish by adopting the Fourteenth Amendment.

RONCARELLI'S GREEN CARD: THE ROLE OF CITIZENSHIP IN RANDIAN CONSTITUTIONALISM

*Matthew Lewans**

This article investigates the distinct character of Randian constitutionalism and how it may have been inspired by American discourse on constitutional values. More specifically, the author examines how Justice Rand's brand of constitutionalism is distinguishable from the more dominant strain of Diceyan constitutionalism that was prominent among Canadian jurists during the twentieth century. The author argues that the difference between Randian and Diceyan constitutionalism can be explained largely by the central role that "citizenship" played in Justice Rand's understanding of the Canadian constitutional order.

The author further argues that Justice Rand did not invent his conception of citizenship, but borrowed it from American constitutional jurisprudence regarding the Fourteenth Amendment to the Constitution of the United States. Accordingly, Justice Rand's opinion in *Roncarelli* and other cases shows how his constitutional vision was shaped by a series of strong dissenting opinions concerning the now-defunct Privileges or Immunities Clause in the Fourteenth Amendment. By doing so, Justice Rand sought to install in Canadian public law the same fundamental principles of equality and non-discrimination that the American Congress intended to establish by adopting the Fourteenth Amendment.

Cet article étudie le caractère distinct du constitutionnalisme randien et examine comment il a pu être inspiré du discours américain sur les valeurs constitutionnelles. Plus précisément, l'auteur examine les distinctions entre les approches constitutionnelles randienne et diceyenne, cette dernière étant proéminente parmi les juristes canadiens du vingtième siècle. L'auteur soutient que la différence entre les constitutionnalismes randien et diceyen s'explique en grande partie par l'importance qu'accordait le juge Rand à la citoyenneté dans sa conception de l'ordre constitutionnel canadien.

L'auteur fait aussi valoir que le juge Rand n'a pas inventé sa vision de la citoyenneté, mais l'a plutôt empruntée à la jurisprudence constitutionnelle américaine traitant du Quatorzième amendement de la Constitution des États-Unis. Par conséquent, l'opinion du juge Rand dans *Roncarelli* et dans d'autres affaires montre comment sa vision constitutionnelle a été influencée par une série d'opinions dissidentes relatives à l'ancienne clause « privilèges ou immunités » du Quatorzième amendement. Le juge Rand cherchait ainsi à incorporer au droit public canadien les mêmes principes fondamentaux d'égalité et de non-discrimination que le Congrès américain avait voulu établir en adoptant le Quatorzième amendement.

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> There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent.
>
> Justice Rand[1]

Introduction

Roncarelli v. Duplessis is rightly celebrated as a landmark decision of the Supreme Court of Canada. Part of that celebrated status is a function of the historical context of the case; part of it is a function of the cause of action that the Court invoked to award Frank Roncarelli $33,123.53 in damages for abuse of public power. But for the most part, *Roncarelli* owes its landmark status to Justice Rand's distinctive brand of constitutionalism, which he used to justify judicial redress for what was an egregious abuse of executive discretion.

Randian constitutionalism is intriguing because it is distinguishable from the strain of Diceyan constitutionalism that typified Canadian administrative law for the better part of the twentieth century. Diceyan constitutionalism is marked by its preoccupation with a formal separation of powers between the legislature and the judiciary, and its controversial assertion that there is no room for administrative law within the constitutional order. According to Dicey, the rule of law is maintained so long as the legislature has exclusive law-making authority, the judiciary has exclusive law-interpreting authority, and the executive is confined to implementing the law established by the legislature and determined by the judiciary. In other words, the Diceyan constitution is maintained so long as this analytical division of labour between legal institutions is preserved and judges have the last word on questions concerning legal interpretation.[2]

By contrast, Justice Rand's constitutional model, which is outlined in *Roncarelli* and some of his other judgments,[3] outlines an approach to judi-

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1 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 141, 16 D.L.R. (2d) 689, Rand J. [reference omitted, *Roncarelli*].

2 See David Dyzenhaus, "Formalism's Hollow Victory" (2002) N.Z.L. Rev. 525.

3 See e.g. *Smith & Rhuland v. Nova Scotia* [1953] 2 S.C.R. 95, [1953] 3 D.L.R. 690 [*Smith & Rhuland* cited to S.C.R.]; *Boucher v. R.* (1950), [1951] S.C.R. 265, [1951] 2 D.L.R. 369 [*Boucher* cited to S.C.R.]; *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299, [1953] 4

cial review that is both more and less ambitious than its Diceyan counterpart. Justice Rand's approach is more ambitious because it elucidates a more complex set of political values which, in turn, complicate our understanding of the constitutional relationships between legal institutions; but it is less ambitious, because it recognizes that judges should respect or defer to administrative decisions in ways that Diceyan constitutionalism does not. Mullan nicely summarizes the nuances of Randian constitutionalism when he writes:

> On the one hand, [Justice Rand] was clearly a judge who expected rectitude of those holding public office and, in particular, respect for the civil liberties of individuals. However, at the same time, he was always cognisant of the reasons for the creation of administrative tribunals and of the necessity for recognizing their expertise and role in working out their own policies as well as their desire to function efficiently and effectively.[4]

Thus, it seems that Dicey would agree with Justice Rand's statement in *Roncarelli* that "there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."[5] But whereas Dicey famously declared that the French notion of *droit administratif* was utterly incompatible with the rule of law, Justice Rand recognized that the judiciary ought to respect administrative decisions so long as they are "consonant with a rational appreciation of the situation presented"[6] and "within any rational compass" of the legislative framework.[7]

In this paper, I will investigate the inspiration behind Randian constitutionalism, but I will not conduct an examination of Justice Rand's views on curial deference toward administrative decisions, since his discussion of that particular theme is underdeveloped in his judicial opinions.[8] Instead, I will examine how Justice Rand's conception of "citizenship" helps explain the normative character of his constitutional model. I will argue that a deeper understanding of Justice Rand's conception of citizenship, which is front and centre in *Roncarelli*, helps explain the distinctive qualities of Randian constitutionalism. I will further argue that Justice Rand

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D.L.R. 641 [*Saumur* cited to S.C.R.]; *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337 [*Switzman* cited to S.C.R.].

4 David J. Mullan, "Mr. Justice Rand: Defining the Limits of Court Control of the Administrative and Executive Process" (1979) 18 U.W.O. L. Rev. 65 at 68.

5 *Roncarelli, supra* note 1 at 140.

6 *British Columbia (Labour Relations Board) v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46 at 55, [1953] 3 D.L.R. 641.

7 *Re Ontario (Labour Relations Board)* (*Toronto Newspaper Guild, Local 87 v. Globe Printing*), [1953] 2 S.C.R. 18 at 29, [1953] 3 D.L.R. 561 [*Globe Printing*]. See also Mullan, *supra* note 4 at 69-71, 89-90, 112-13.

8 For a more searching analysis of this point, see *ibid*.

did not invent his conception of citizenship; he rather lifted it from early American jurisprudence regarding the Fourteenth Amendment to the Constitution of the United States. More specifically, Justice Rand's opinion in *Roncarelli* and other cases show how his constitutional vision was shaped by a series of strong dissenting opinions concerning the now-defunct Privileges or Immunities Clause of the Fourteenth Amendment. By doing so, Justice Rand sought to install in Canadian public law the same fundamental principles of equality and non-discrimination that the Thirty-ninth Congress intended to provide through the Fourteenth Amendment, but which were given short shrift by a majority of the Supreme Court of the United States in its early decisions regarding that constitutional provision.

I. The Constitutional Significance of Citizenship

The concept of citizenship is one of the most important and complex ideas in political theory. It has its roots in classical political philosophy and figures prominently in discussions regarding the foundations of the city state in ancient Greece.[9] Citizens are persons who are recognized as full members of a particular political community, and it is generally assumed that genuine recognition of citizenship is something of great value. As Judith Shklar puts it, "[t]o be less than a full citizen is at the very least to approach the dreaded condition of a slave. To be a second-class citizen is to suffer derogation and the loss of respectable standing."[10] Thus, recognition of citizenship has significant normative content because it asserts that citizens cannot be treated as mere means toward political ends and political authorities have a duty to treat citizens with consideration and respect. In this regard it is telling that some of the most offensive forms of political repression in the modern era—slavery, apartheid, and the Holocaust—all involved overt government policies that attempted to strip people of their citizenship before subjecting them to profound mistreatment. However, as *Roncarelli* shows, government action may undermine someone's rights as a citizen without engaging in such gross forms of abuse.

The idea of citizenship is also complex because although it is closely associated with the political value of equality, that association can be conceived in a variety of different ways. The relationship between citizenship and equality is apparent in T.H. Marshall's famous analysis of the concept in his essay, "Citizenship and Social Class":

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9 See e.g. Aristotle, *The Politics*, trans. by Ernest Barker, Book III (Oxford: Oxford University Press, 1995).

10 Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass.: Harvard University Press, 1991) at 17.

> Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed. The urge forward along the path thus plotted is an urge towards a fuller measure of equality, an enrichment of the stuff of which the status is made and an increase in the number of those on whom the status is bestowed.[11]

However, as Marshall goes on to explain, equal citizenship has both negative and positive aspects. The negative aspect involves various rights of non-interference, which Marshall asserts are "necessary for individual freedom": rights to physical liberty, freedom of speech, freedom of conscience, property rights, liberty of contract, and the right to justice.[12] But Marshall also argues that citizenship includes important positive attributes, because a guarantee of non-interference is not a sufficient guarantee of equal respect. The most prominent positive aspect of citizenship guarantees "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body."[13] But another, more controversial, positive element concerns a variety of social and economic rights, which Marshall defines broadly as "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[14] Marshall's analysis of citizenship thus provides both an explanatory and normative account of citizenship; it both elucidates the different features of a shared concept and shows how a richer, more elaborate conception of citizenship serves to emancipate and dignify individuals in a variety of ways.

Marshall's analysis raises a couple of important points that help illuminate both the complexity of citizenship as a normative ideal and how that complexity explains the distinction between Randian constitutionalism and its Diceyan counterpart. First, people are likely to have differing views or conceptions about citizenship depending upon how they flesh out the content of the negative and positive aspects of citizenship (i.e., the civil, political, and social elements of citizenship). Thus, a libertarian conception of citizenship will be fundamentally distinct from that espoused by

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11 T.H. Marshall, "Citizenship and Social Class" in *Class, Citizenship, and Social Development: Essays by T.H. Marshall* (Garden City, N.Y.: Doubleday, 1964) 65 at 84.

12 *Ibid.* at 71.

13 *Ibid.* at 72.

14 *Ibid.*

a liberal democrat, because they disagree about the proper scope of non-interference in civil society and whether government can play a positive role in enhancing the content of citizenship.

This complexity is compounded by the fact that there is an interrelationship between the negative and positive aspects of citizenship. For instance, a civil right–like freedom of speech has both negative and positive aspects because it is necessary both for the development of one's individual identity and for meaningful political participation. As Desmond King and Jeremy Waldron argue, the fact that the negative and positive aspects of equal citizenship are closely interrelated shows that there is "a tight reciprocity between the duties individuals owe to the community and the duties the community owes to them."[15] The complex character of the citizenship ideal explains how Randian constitutionalism can reconcile its commitment to individual rights, on the one hand, with its recognition of the legitimacy of the administrative state, on the other. It shows how Justice Rand could both be committed to individual "immunities" from state interference—like freedom of speech[16]—and still appreciate that the legislative and executive branches of government could play a positive role in enhancing the quality of life enjoyed by its citizenry.[17]

The second, related point is that Marshall's analysis highlights an important issue regarding institutional responsibility. Although Marshall recognizes the advancement of rights through legislation, he argues that the development and protection of civil rights "was in large measure the work of the courts, both in their daily practice and also in a series of famous cases in some of which they were fighting against parliament in defence of individual liberty."[18] In vaunting judicial responsibility for the protection of individual rights, Marshall echoes Dicey's famous characterization of both the rule of law and the role of the judiciary.[19] However, unlike Marshall, Dicey did not appreciate the complex interrelationship between the negative and positive aspects of citizenship. In this respect, it is worth noting that Dicey's conception of the rule of law was driven in large part by the creed of "individualism" that he thought was the pre-

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15 Desmond S. King & Jeremy Waldron, "Citizenship, Social Citizenship and the Defence of Welfare Provision" (1988) 18 Brit. J. Pol. Sci. 415 at 420.

16 See e.g. *Boucher*, *supra* note 3 at 284ff.; *Saumur*, *supra* note 3 at 325ff.; *Switzman*, *supra* note 3 at 300ff.

17 See *Globe Printing, supra* note 7. See also Mullan, *supra* note 4.

18 Marshall, *supra* note 11 at 75.

19 See A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* 10th ed. by E.C.S. Wade (London, U.K.: Macmillan, 1959).

dominant feature of the common law,[20] and the idea that judges should preserve the common law against legislative reform.[21] Dicey admired Bentham's utilitarian principle—that legislation should promote the greatest happiness of the greatest number—but thought that the individual was the best judge of his own happiness. Given the diversity and complexity of individual desires, Dicey thought that the legislature could not advance individual welfare; it could only aspire to establish the conditions under which citizens might prosper.[22] Thus, Dicey claimed that "though laissez-faire is not an essential part of utilitarianism it was practically the most vital part of Bentham's legislative doctrine."[23]

Dicey's individualist sympathies are most apparent in his political writings, where he expresses hostile views toward what he calls "collectivist" legislative policies designed to enhance the welfare of British subjects. For instance, while Dicey advocated expansion of freedom of contract, he was troubled by implications of the trade union movement for laissez-faire economic policy.[24] Further evidence of Dicey's preoccupation with individualism is contained in his *Lectures*, where he derides publicly funded education (for compelling disinterested individuals to bear the expense of educating future citizens);[25] workmen's compensation schemes (for eroding freedom of contract, personal responsibility, and forcing employers to pay for insurance);[26] and welfare reform and old-age pensions (for comforting undeserving individuals).[27] Dicey's tone is even more strident in the introduction to the second edition of his *Lectures*, where he advocates outright disenfranchisement of persons in receipt of social assistance in addition to lamenting the advent of labour standards legislation and progressive taxation.[28]

The point of this abbreviated critique is to show that the Diceyan conception of the rule of law is premised, at least partially, upon an impoverished conception of citizenship that prioritizes individual immunities from state action and lashes out against the emergence of the welfare state. In

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20 See Mark D. Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55 McGill L.J. 563; Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58 U.T.L.J. 75 at 96-100.

21 See A.V. Dicey, *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century*, 2d ed. (London, U.K.: Macmillan, 1962) at 126ff. (Lecture VI).

22 See *ibid.* at 137.

23 *Ibid*. at 147.

24 See *ibid*. at 158.

25 See *ibid*. at 278-79.

26 See *ibid*. at 282-83.

27 See *ibid*. at 292-96.

28 See *ibid*. at xxxiv, li-lii.

what follows, I will argue that, by contrast, Randian constitutionalism is built upon a more complex understanding of the relationship between citizens and their government. As this article's epigraph from *Roncarelli* suggests, Justice Rand was just as concerned that citizens have access to the "privileges" of citizenship that are distributed by the state, as he was with "immunities" from state interference like freedom of speech. But in order to fully appreciate the Randian perspective, one needs to gain a better understanding of how his views about citizenship were shaped by his exposure to American constitutional law.

II. A Brief History of American Citizenship

American constitutional history provides a poignant case study regarding the constitutional significance of citizenship. The narrative begins poorly with a constitution that expressly enshrines slavery and a series of cases that are depressing by contemporary human rights standards. But there are also some striking attempts along the way to enlarge the rights of citizens through constitutional amendments and congressional legislation. And while the judiciary lagged behind Congress in its attempt to enlarge the scope and content of American citizenship, there have nevertheless been some profound judicial dissents along the way that foreshadowed decisions like *Brown v. Board of Education*[29] and *University of California Regents v. Bakke*[30] that have become emblematic of constitutional values like the principle of equal concern and respect.

The early constitutional history of the United States is replete with contradiction. On the one hand, there were lofty statements regarding the "self-evident" truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[31] The Constitution also included a Comity Clause, which was designed to prevent state discrimination against out-of-state American citizens by ensuring that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[32] In *Corfield v. Coryell,* Justice Washington held that the Comity Clause provided constitutional protection for both the negative and positive elements of citizenship:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits,

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29 347 U.S. 483, 74 S. Ct. 686 (1954).

30 438 U.S. 265, 98 S. Ct. 2733 (1978).

31 *Declaration of Independence, 1776*, 1 Rev. Stat. 3 at 3 (1878).

32 U.S. Const. art. IV, § 2, cl. 1 (also known as the Privileges *and* Immunities Clause). See also John Harrison, "Reconstructing the Privileges or Immunities Clause" (1991) 101 Yale L.J. 1385 at 1398.

> or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."[33]

While there is disagreement among legal historians about whether the right to vote was generally recognized at the time to be a "privilege" of citizenship, there is general consensus that the Comity Clause was intended to establish a principle of equality and non-discrimination.[34] In short, the principle behind the Comity Clause demanded that "if a state bestowed a benefit ... on its citizens as an incident of citizenship, then that state was required to extend the same benefit to American citizens visiting from other states."[35]

On the other hand, the new Constitution repudiated the principle of equality and non-discrimination by guaranteeing local self-rule and, by extension, the practice of slavery that was prevalent in Southern States.[36] The Tenth Amendment gave state legislatures exclusive jurisdiction over any subject not explicitly reserved for the federal government, the federal government was constitutionally prohibited from regulating the interstate slave trade for twenty years,[37] and Northern States had a duty under the Constitution to return escaped slaves to their owners.[38] In addition, slave-owning states were given disproportionate representation in Congress, because the allocation of house representatives was to be calculated on the basis of the number of free persons plus three-fifths of the slave population.[39]

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33 6 F. Cas. 546 at 552 (Pa. Cir. Ct. 1823).

34 See e.g. Robert G. Natelson, "The Original Meaning of the Privileges and Immunities Clause" (2009) 43 Ga. L. Rev. 1117.

35 *Ibid.* at 1187.

36 U.S. Const. art. IV, § 2, cl. 1.

37 U.S. Const. art. I, § 9, cl. 1.

38 U.S. Const. art. IV, § 2, cl. 3.

39 U.S. Const. art. I, § 2, cl. 3.

While this constitutional compromise held initially, by the time *Dred Scott v. Sandford* was decided it was clearly beginning to unravel.[40] In that case, the Supreme Court of the United States held that Scott could not sue in a federal court for his freedom, because he was black and therefore not a "citizen" within the original meaning of the Constitution. When elaborating the framers' original intent, Justice Taney declared that black people were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, ... and had no rights or privileges but such as those who held the power and the Government might choose to grant them."[41] While Justice Taney thought that his decision would help defuse the political controversy concerning slavery by reasserting the constitutional compromise, if anything it stoked the political conflict that culminated in the American Civil War.

During the antebellum period, state legislatures were generally perceived to be the primary guarantors of individual rights and the locus of legitimate government within the federal system. By contrast, the federal government was regarded as either irrelevant or, to the extent that it possessed legislative power, a threat to individual liberty and home rule.[42] This sentiment even extended to the judicial branch; state superior courts frequently blocked or frustrated federal legislation and did not regard decisions from the Supreme Court of the United States as binding precedent. Furthermore, the relative weakness of the national military and dependency upon local militias presented a practical problem of enforcement. Even if the federal government wished to impose its will on intransigent states, it could not effectively enforce federal law against local authorities because it lacked the means to sanction local officials.[43]

All of this changed after the American Civil War when the balance of power shifted toward the city of Washington during Reconstruction. Republican politicians recognized that they had an opportunity to change the course of race relations in the South, and were determined to use the means at their disposal—especially their political dominance in Congress and executive control over the military—to initiate social change. Southern resistance to Reconstruction was fierce: republican politicians in the South lived under the threat of violence, and were often frustrated by state courts still populated by judges with sympathies toward the Confederacy. But the most disturbing acts of hostility were directed at freed slaves. In communities where Union forces were weak, blacks lived in constant fear of being beaten or lynched if they attempted to assert their

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40 60 U.S. 393, 15 L. Ed. 691 (1857) [*Dred Scott* cited to U.S.].

41 *Ibid.* at 404-405.

42 See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988) at 27.

43 See *ibid.* at 27-36.

rights of citizenship—their rights to own property, to vote, or to associate with white persons in public establishments. Beginning in 1865, southern states began replacing slave codes with so-called "black codes", which imposed second-class status on blacks by restricting their ability to enter and enforce private contracts, to own or convey personal property, to pursue certain trades, to seek relief from the courts, and "to participate in common life as ordinary citizens."[44]

It is important to point out that during the Reconstruction period, Congress played a crucial role in enlarging the rights of black citizens under the Constitution. It ratified the Thirteenth Amendment, which abolished slavery; it introduced measures to preserve federal control over the South, and to strip politicians with confederate sympathies of their public offices;[45] and, in order to ensure that blacks could exercise their rights of citizenship, it passed the *Civil Rights Act of 1866*, which stated "[t]hat all persons born in the United States ... are hereby declared to be citizens of the United States" and that every citizen "shall have the same right ... to full and equal benefit of all laws ... as is enjoyed by white citizens."[46] However, the congressional agenda was difficult to reconcile with the historical priority given to local rule and there remained serious doubts as to their constitutional validity. These concerns prompted President Johnson to veto the *Civil Rights Act* on the grounds that civil rights were a matter of exclusive state jurisdiction.[47]

Even though Congress was able to pass the two-thirds threshold required to overcome the presidential veto, lingering doubts about the legitimacy of federal intervention led it to pursue a series of additional constitutional amendments and legislation to guarantee the principle of equality and the rights of black citizens throughout the Union.

First, the Fourteenth Amendment, which was ratified in 1868, counteracted the traditional view that the federal constitution did not impose limits on state legislatures. Accordingly, the amendment imposed explicit limits on state action, which echoed the substance of the *Civil Rights Act of 1866*: (1) it reversed *Dred Scott* by declaring all persons born on American soil to be citizens of the United States; (2) it prevented states from abridging the "privileges or immunities of citizens of the United States"; (3) it prohibited states from depriving any person of "life, liberty, or property, without due process of law"; and (4) guaranteed all persons within

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44 Harrison, *supra* note 32 at 1388.

45 See Nelson, *supra* note 42, c. 3.

46 *Civil Rights Act of 1866*, 14 Stat. 27. The specific rights enumerated included the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property" (*ibid*. at 27).

47 See Harrison, *supra* note 32 at 1403-405.

state jurisdiction "equal protection of the laws."[48] Second, the Fifteenth Amendment, which was ratified in 1870, guaranteed all American citizens the right to vote.[49] Third, the *Civil Rights Act of 1870* entitled American citizens to vote in all elections and criminalized any attempt by public officials or private individuals to frustrate or intimidate anyone seeking to exercise their right to vote.[50] Fourth, the *Ku Klux Klan Act of 1871* made it a federal offence to conspire or travel in disguise upon public highways for the purpose of denying any citizen the exercise of his lawful privileges or immunities.[51] But perhaps the most far-reaching legislative measure adopted by Congress during this period was the *Civil Rights Act of 1875*, which declared

> [t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[52]

This act was an attempt to extend to blacks the same rights of access to public facilities (e.g., railroads, hotels, restaurants, ferries and theatres) that were available to white citizens at common law. These common law entitlements required those who provided such facilities to admit everyone who could pay the fare, subject to reasonable limits required for public convenience.[53]

Initially, these Reconstruction measures seemed to bear fruit. For the first time, blacks voted in large numbers, resulting in large numbers of elected black officials in both the North and South; blacks were permitted to serve on juries and to receive a public education; and even some forms of public transport were desegregated for a brief period.[54] The result of this initial success was that it altered, to a modest extent, public perceptions regarding federal intervention in local politics; people began to recognize that the federal government could be a positive agent for constitu-

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48 U.S. Const. amend. XIV, § 1.

49 U.S. Const. amend. XV.

50 *Civil Rights Act of 1870*, 16 Stat. 140.

51 *Civil Rights Act of 1871*, 17 Stat. 13.

52 *Civil Rights Act of 1875*, 18 Stat. 335, § 1.

53 See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004) at 17-21.

54 See *ibid.* at 10. See also Barbara Y. Welke, "When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to *Plessy*, 1855–1914" (1995) 13 L.H.R. 261 at 295.

tional change, and that legislative reform initiated by the federal government did not inevitably devolve into "tyranny or inefficiency".[55]

However, even as these Reconstruction measures were beginning to take root, the Supreme Court of the United States remained reluctant to alter its understanding of the American Constitution. In *Slaughter-House Cases,* the first decision concerning the Privileges or Immunities Clause of the Fourteenth Amendment, the Supreme Court of the United States refused to compromise the principle of states' rights.[56] In that case, the Louisiana legislature established the Crescent City Live-Stock Landing and Slaughter-House Company to build a centralized slaughterhouse in the city of New Orleans, and required all butchers in the city to slaughter their livestock at that location instead of operating independently. The purpose of the legislation was to prevent the proliferation of animal waste within the city. Twenty-five independent butchers challenged the constitutionality of the legislation, arguing that it had created a monopoly with "odious and exclusive privileges" and infringed the equal privileges guaranteed to all citizens of the United States under the Fourteenth Amendment.[57]

In rejecting the butchers' claim, Justice Miller held "that it is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted."[58] Moreover, he pointed out that the legislation did not prevent the butchers from earning a living; the butchers were free to pursue their chosen occupation, provided that they killed their animals at the central slaughterhouse and paid a reasonable fee to use the facilities.[59] But instead of resting his decision on the ground that the butchers had equal access to the public facility, Justice Miller advanced a further argument that gutted the Privileges or Immunities Clause:[60] he held that the clause only protected the privileges or immunities of national citizenship, which left states with exclusive jurisdiction over the broad array of rights traditionally associated with state citizenship (e.g., rights to enter contracts, own property) unencumbered by the Fourteenth Amendment. So although the Privileges or Immunities Clause guaranteed the rights of *national* citizenship (i.e., relatively obscure rights such as the right to address the national gov-

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55 Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Oxford: Hart, 2009) at 23 [footnote omitted].

56 *Re Slaughter-House Cases,* 83 U.S. 36, 21 L. Ed. 394 (1872) [*Slaughter-House Cases* cited to U.S.].

57 *Ibid*. at 60.

58 *Ibid.* at 61.

59 *Ibid*.

60 See Harrison, *supra* note 32 at 1414.

ernment, the right to claim the protection of the national government abroad, and to bring suit in federal courts), it did not impose any limits on a state's ability to determine and distribute the privileges of *state* citizenship.[61]

Thus, the majority decision in the *Slaughter-House Cases* eviscerated the Privileges or Immunities Clause, causing the litigants in future cases to shift the locus of their arguments to the Due Process and Equal Protection Clauses.[62] By the 1880s, it was clear that the Supreme Court of the United States was not interested in advancing the cause of Reconstruction and was beginning to articulate another constitutional compromise. In the *Civil Rights Cases,* the Supreme Court of the United States held that the constitutional principles of equality and non-discrimination did not apply to action deemed to be "private".[63] The majority opinion asserts that the Constitution "cannot be impaired by the wrongful acts of individuals," and that after years of "beneficent legislation," the black man should take on "the rank of a mere citizen" instead of being "the special favorite of the laws."[64] By the time the *Civil Rights Cases* was decided, support for federal intervention had collapsed and federal troops had withdrawn from the South, leading to an outbreak in violence, the resumption of home rule, the beginning of Jim Crow, and a stark deterioration in race relations.[65]

The Supreme Court of the United States further retracted the Fourteenth Amendment in *Plessy v. Ferguson* when it held that a Louisiana statute requiring railroad companies to enforce "equal but separate accommodations for the white, and colored races" was constitutional.[66] In his majority opinion, Justice Brown recognized that the purpose of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law," but held that "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[67] In his view, the Constitution only

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61 *Slaughter-House Cases, supra* note 56 at 77, 79-80.

62 See generally Harrison, *supra* note 32. See e.g. *Munn v. Illinois,* 94 U.S. 113, 24 L. Ed. 77 (1877); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886). Hence, the Supreme Court of the United States based its decision to declare segregated public schools unconstitutional in *Brown v. Board of Education* (*supra* note 29) upon the Equal Protection Clause of the Fourteenth Amendment rather than the Privileges or Immunities Clause.

63 *The Civil Rights Cases,* 109 U.S. 3, 3 S. Ct. 18 (1883) [*Civil Rights Cases* cited to U.S.].

64 *Ibid.* at 17, 25.

65 See Klarman, *supra* note 53 at 10-17.

66 163 U.S. 537 at 540, 16 S. Ct. 1138 (1896) [*Plessy*].

67 *Ibid.* at 544.

prevented state legislatures from promulgating "unreasonable" legislation, which for Justice Brown meant only legislation that was expressly enacted "for the annoyance or oppression of a particular class."[68] Thus, he rejected Plessy's claim that the statute stamped his race "with a badge of inferiority," saying that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[69]

While all of these cases—the *Slaughter-House Cases,* the *Civil Rights Cases*, and *Plessy*—are disappointing by current human rights standards, they also gave rise to a strong dissenting tradition in American constitutional law. For instance, in his dissenting opinion in the *Slaughter-House Cases,* Justice Field offered an interpretation of the Privileges or Immunities Clause that was consistent both with the antebellum jurisprudence concerning the Comity Clause and Congress's stated desire to establish a constitutional principle of equality. Thus, although he acknowledged that state legislatures could regulate "health, good order, morals, peace, and safety of society," he held that these police powers "cannot be permitted to encroach upon any of the just rights of the citizen."[70] The purpose of the Fourteenth Amendment, according to Justice Field, was to establish a principle of equal treatment that constrained, but did not usurp, the ability of state legislatures to determine the privileges of citizenship:

> This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name.[71]

Thus, Justice Field thought that the Louisiana statute was inconsistent with the principle of equality, because it granted an exclusive privilege to the Crescent City Company that infringed the plaintiffs' economic freedom to pursue their chosen trade.

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68 *Ibid.* at 550.

69 *Ibid.* at 551.

70 *Slaughter-House Cases, supra* note 56 at 87.

71 *Ibid.* at 109-10.

This dissenting tradition was further advanced by Justice Harlan—a former slaveholder and political opponent of the Emancipation Proclamation—in both the *Civil Rights Cases* and *Plessy*. As Attorney General of Kentucky in the aftermath of the American Civil War, Justice Harlan had witnessed first-hand acts of white terrorism perpetrated against blacks, and understood that Congress could not simply abolish the practice of slavery and leave blacks "free" to be at the mercy of their former captors. In the *Civil Rights Cases*, he excoriated the majority's "narrow and artificial" interpretation of the Fourteenth Amendment, saying that constitutional rights should be construed with the same spirit of generosity that the Supreme Court of the United States had extended to slave owners prior to the American Civil War.[72] In order to emphasize his point, he detailed a series of embarrassing Supreme Court of the United States decisions from the antebellum period to show how the court had broadly interpreted congressional power under the Constitution to pass the fugitive slave acts and enforce slave owners' rights.[73]

Justice Harlan reasoned that the court should employ the same approach in order to give full effect to the Thirteenth and Fourteenth Amendments. The former, according to Justice Harlan, did not merely abolish the institution of involuntary servitude—it also prohibited "the necessary incidents of slavery," which deprived black citizens of their ability to enter and enforce contracts, sue, give evidence, and own or dispose of property.[74] Likewise, with respect to the Fourteenth Amendment, Justice Harlan emphasized that many private enterprises—like highways, railways, ferries, inns, and places of public amusement—were nevertheless affected by the public interest at common law. The proprietors of such undertakings therefore had a legal duty, which could be enforced in state courts, to admit members of the public provided that they were willing to pay a reasonable fee. The purpose of the Fourteenth Amendment, according to Justice Harlan, was to ensure that "there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority."[75]

Similar themes crop up in Justice Harlan's dissent in *Plessy* when he again chastised the majority opinion for failing to uphold the equal privileges of citizenship. As in the *Civil Rights Cases,* Justice Harlan pointed out that certain conveyances like railroads were affected by the public interest at common law and that the state was acting contrary to this tradition when it imposed a policy of segregation on these undertakings. In Justice Harlan's view, this did not mean that the state was constitution-

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72 *Civil Rights Cases, supra* note 63 at 26.

73 *Ibid.* at 28-32.

74 *Ibid*. at 35.

75 *Ibid.* at 48.

ally prohibited from regulating railways; courts were required to respect legislative will so long as it was "constitutionally expressed". What Justice Harlan meant was that state legislatures were constitutionally barred from imposing what he called "unreasonable" regulations—regulations that undermined the equal status of citizens:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.
>
> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*. … The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge.[76]

Thus, he declared that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[77] In retrospect, Justice Harlan's dissents in both the *Civil Rights Cases* and *Plessy* proved to be prescient in the sense that they foreshadowed the Warren Court's civil rights agenda in the mid-twentieth century.

I have identified both Justices Field and Harlan as members of the dissenting tradition of American constitutional jurisprudence, because both judges sought (albeit in different ways) to preserve the principle of equality that was embedded in the Privileges or Immunities Clause of the Fourteenth Amendment. As I mentioned earlier, the effect of the Supreme Court of the United States's decision in the *Slaughter-House Cases* was to read that clause out of the Constitution, whereas both Justices Field and

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76 *Plessy*, *supra* note 66 at 559-60.

77 *Ibid*. at 562.

Harlan attempted to breathe life into it through their opinions. For Justice Field, the Privileges or Immunities Clause guaranteed to every citizen of the United States equal economic rights to enter and participate in the marketplace by preventing state legislatures from granting special privileges or state-sanctioned monopolies. Justice Field reasoned that state legislatures could regulate market activities so long as the regulations were reasonable in the sense that they did not obstruct anyone's ability to earn a living.

By contrast, Justice Harlan thought that the Privileges or Immunities Clause guaranteed to every citizen of the United States equal rights to enter and participate in the social and political life of his or her community. Thus, the protection of the Fourteenth Amendment extended to public spheres beyond the gates to the marketplace—to highways, railways, inns, theatres, and restaurants. Moreover, Justice Harlan's dissent in the *Civil Rights Cases* shows that he thought that the federal government had a positive role to play in ensuring that private individuals did not undermine the equal privileges or immunities of their fellow citizens by barring access to the public sphere. Justice Harlan thought that the state could regulate social interaction, so long as the regulations were reasonable in the sense that they did not stigmatize certain classes of individuals as inferior or less worthy than other citizens. Unlike the majority in *Plessy*, Justice Harlan thought that state-sanctioned segregation on railways was motivated by the racial animus that blacks were not fit to share the public sphere with their fellow white citizens. However, Justice Harlan's dissent in *Plessy* turned out to be a last-gasp effort to revive the juristic concept concerning the privileges or immunities of citizenship. While the dissenting tradition continued through the next important phase in the Supreme Court of the United States's treatment of the Fourteenth Amendment, the *Lochner* era, the focal point of the court's analysis during that period revolved around the Due Process Clause of the Fourteenth Amendment.

III. The Role of Citizenship in Randian Constitutionalism

Although the Privileges or Immunities Clause was marginalized in American constitutional law after the *Slaughter-House Cases*, it lived on in Justice Rand's jurisprudence. It is common knowledge that Ivan Rand admired American jurisprudence: he received his legal education at Harvard Law School from 1909 to 1912, and he regularly cited American constitutional law as worthy of imitation.[78] Justice Rand's Americophilia is particularly prominent in his Holmes Lecture, which he delivered at Har-

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[78] See e.g. Ivan C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951) 9 U.T.L.J. 1; Ivan C. Rand, "Except By Due Process of Law" (1961) 2 Osgoode Hall L.J. 171.

vard Law School shortly after he retired from the Supreme Court of Canada. In his address, entitled "Some Aspects of Canadian Constitutionalism", Rand observes how American secession in 1783 "signalized the ascension of reasoned government over autocracy," and asserts that American and Canadian constitutional thought have "followed parallel courses" since the American War of Independence.[79] Moreover, he suggests that American lawyers examine Canadian constitutional history, because it shows how Canadians "have been able to draw implicit judicial support for some part ... of those fundamental rules and principles that with you are constitutionally explicit."[80]

Then, in the middle of his lecture, wedged in between the topics of freedom of speech and the rule of law, Rand devoted a section to the principle of citizenship, which he thought was entrenched by Canadian constitutional law:

> Today citizenship is a status of complexity and importance; and not being expressly enumerated as a provincial or Dominion matter, falls within the residual powers of the Dominion Parliament.
>
> Being the totality of personal relations between the individual and the state, questions may arise of its constituent attributes and incidents. A citizen moves across the Canadian territory in a dimension free of provincial boundaries; he is entitled to enter provincial courts; he would not, I venture to say, as a resident be subject to discrimination by provincial legislation related to, for instance, his place of birth, or his racial origin; a departure on any such case would be in derogation of constituent elements of citizenship. ... No doubt the right to sue and be sued in provincial courts, or the inability to enter into contracts based on recognized disabilities, may be determined by general provincial laws operating on all persons alike; but to single out particular persons for discriminatory action on grounds that trench upon an indivisible status, is to infringe the status.[81]

The only Canadian case authority Rand cited for this passage is his opinion in *Winner v. S.M.T. (Eastern) Ltd.*[82] But while Rand used *Winner* as authority for asserting that citizenship was a fundamental value in Canadian law, the passage mirrors the very same ideas expressed in cases like *Corfield v. Coryell* and Justices Field and Harlan's dissents in the *Slaughter-House Cases,* the *Civil Rights Cases*, and *Plessy*.

Rand's comments in his Holmes Lecture were not merely a rhetorical flourish in a speech to an American audience. When one looks over Justice Rand's record from the Supreme Court of Canada, it is clear that he

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79 Ivan C. Rand, *Some Aspects of Canadian Constitutionalism* (Cambridge, Mass.: Harvard Law School, 1960) at 1.

80 *Ibid.* at 2.

81 *Ibid.* at 24-25 [footnote omitted].

82 *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, [1951] 4 D.L.R. 529 [*Winner*].

practised what he preached. The theme of citizenship crops up constantly in his decisions and, as Mullan points out, shows that Justice Rand appreciated both the negative and positive elements of citizenship.[83] Justice Rand's decisions regarding the implied bill of rights show that he recognized the importance of what Marshall called rights of non-interference "necessary for individual freedom."[84] Thus, in *Boucher*, he held that Aimé Boucher should be acquitted of seditious libel, saying that "[f]reedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life";[85] and in *Saumur*, he held that a municipal by-law prohibiting the distribution of religious material was ultra vires, stating that "freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."[86]

However, it is equally clear that Justice Rand appreciated that freedom of speech was not merely a matter of non-interference; it also had a positive aspect, which entitled citizens with unpopular views to participate in the political life of the community. So when Justice Rand held the Quebec padlock law to be unconstitutional in *Switzman*, he did not merely characterize John Switzman's right to advocate communism as liberty from restraint or interference with property rights; he also pointed out that "[p]arliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves," which required "individual liberation from subjective as well as objective shackles."[87]

But Justice Rand's appreciation for the positive aspects or "privileges" of citizenship comes through most clearly in *Roncarelli*. His decision in this case shows why the constitutional ideal of citizenship demanded that privileges created by the state (e.g., liquor licences) be distributed in a non-discriminatory manner. To briefly recount: Roncarelli's liquor licence was revoked "*définitivement et pour toujours*" by the Quebec Liquor Commissioner (Commissioner), who was acting under the direction of the Prime Minister and Attorney General, Duplessis. Duplessis had instructed the Commissioner to cancel Roncarelli's licence after he learned that Roncarelli had been acting as a bondsman for members of the Jehovah's Witnesses—a religious sect that was much maligned in Quebec society for its "seditious" public criticism of the Roman Catholic Church. Roncarelli operated his restaurant without a liquor licence for six months, but then sold the premises because it was impossible for him to earn a living

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83 See Mullan, *supra* note 4.

84 Marshall, *supra* note 11 at 71.

85 *Boucher, supra* note 3 at 288.

86 *Saumur, supra* note 3 at 329.

87 *Switzman, supra* note 3 at 306.

operating a restaurant in Montreal that could not sell liquor. He then sued Duplessis under the *Civil Code of Lower Canada* for damages. In a six-to-three decision, the Supreme Court of Canada held that Duplessis was liable in delict for abuse of public power, because he exceeded his legal authority by directing the Commissioner to cancel Roncarelli's liquor licence.

Out of the majority opinions in *Roncarelli* written by Chief Justice Kerwin and Justices Rand, Martland, and Abbott, only Justice Rand's involves a serious discussion regarding the relationship between Roncarelli's rights as a citizen and his interest in the liquor licence. Chief Justice Kerwin's opinion simply asserts that Duplessis had not satisfied the requisite threshold for overturning the findings of fact made at trial regarding causation and liability. Similarly, Justice Abbott affirmed the trial decision after reviewing the necessary elements in Roncarelli's cause of action: he confirmed that the evidence adduced at trial showed that Duplessis had caused the revocation of the licence by dictating the decision to the Commissioner; he held that the decision to revoke the licence was unrelated to the legal objects or purposes of the act in question; and since Duplessis had exceeded his statutory authority, Justice Abbott held that he was not entitled to certain procedural protections reserved for public officials under the *Civil Code of Lower Canada*.

Justice Martland's opinion adopts a similar tack, but examines the structure of Roncarelli's cause of action in greater detail. At each turn in the argument, he (1) considers whether there was a plausible factual basis for a necessary finding of causation to support the cause of action; (2) reviews the express statutory powers associated with the office of Attorney General; (3) considers whether it was within the scope of the provincial *Alcoholic Liquor Act*[88] to cancel a liquor licence on the ground of the licensee's religious views; and (4) inquires whether the cause of action was compromised by a procedural flaw. But Justice Martland's opinion is especially interesting because he held in Roncarelli's favour *in spite of the fact* that Duplessis had revoked Roncarelli's "privilege" to sell liquor.

One of Roncarelli's arguments on appeal was that the revocation of his liquor licence was unlawful because the Commissioner had not complied with the rules of natural justice. The Liquor Commission had not given Roncarelli notice that it intended to cancel his permit nor had it afforded Roncarelli the opportunity to be heard. But in Justice Martland's view, Roncarelli's natural justice argument was without merit, because the House of Lords had decided in *Nakkuda Ali v. Jayaratne* that natural justice was not required in cases where a government decision affected a

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88 R.S.Q. 1941, c. 255.

"privilege" that had been created by legislation.[89] Thus, Justice Martland held that it was "doubtful" that Roncarelli was entitled to natural justice because the Commissioner's decision merely revoked a government privilege,[90] which the government could rescind without a hearing or giving reasons for its decision.

Justice Rand's opinion also recognizes that Roncarelli's liquor licence was a "privilege", but unlike Justice Martland, Justice Rand thought this meant that the government could not discriminate against citizens when determining who was entitled to exercise it. In language reminiscent of American cases regarding the privileges of citizenship, Justice Rand points out that although the liquor licence was a legislative creation, it was also a matter of fundamental importance to Roncarelli because it had become deeply entwined with one of the privileges of citizenship—the freedom to enter the market and the ability to pursue one's trade on equal terms with one's fellow citizens:

> The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity to a superior class restaurant but also its indentification with the business carried on. ... As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.
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> The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.[91]

This passage resonates strongly with Justice Field's dissent in the *Slaughter-House Cases*, because it emphasizes that the privilege at stake—the liquor licence—is required in order for Roncarelli to compete with his fellow restaurateurs. But it also differs from Justice Field's approach in one crucial respect; namely, Justice Rand recognized that government regulation of liquor sales was not illegitimate per se. He recognized that government regulation of the market was acceptable—even desirable—provided that it was administered in a manner that recognized

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89 *Nakkuda Ali v. Jayaratne,* [1951] A.C. 66 at 78 (P.C.).

90 *Roncarelli*, *supra* note 1 at 156.

91 *Ibid.* at 139-40.

the equal status of the citizens. Thus, the foregoing passage is followed immediately by Justice Rand's iconic statements regarding the rule of law: "there is no such thing as absolute and untrammelled 'discretion'" so the exercise of executive power must always be exercised in a manner consistent with the objects and purposes of empowering legislation.[92] But the crux of Justice Rand's analysis is a principle of equality and non-discrimination, which constrains government distribution of privileges created by legislation. Accordingly, Justice Rand's held that the decision to revoke the licence was beyond the discretion conferred because Roncarelli was "free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence."[93]

In this respect, *Smith & Rhuland* is of a piece with *Roncarelli*.[94] As in *Roncarelli,* the issue in *Smith & Rhuland* concerned the distribution of a statutory privilege—the certification of a union for the purposes of collective bargaining. The Nova Scotia Labour Relations Board had refused certification solely on the ground that the secretary-treasurer of the union was a communist who held subversive political beliefs. However, Justice Rand, who wrote the lead judgment for the Supreme Court of Canada, held that the board could not exclude employees "from the rights and privileges of a statute designed primarily for their benefit" unless it could be shown that the union was pursuing goals that were destructive to the declared purposes of the legislation.[95]

However, while Justice Rand was keen to protect the privileges of Jehovah's Witnesses and communist sympathizers whose activities were deemed subversive by political authorities, his record in upholding the rights of non-citizens and aliens is more equivocal. For instance, in *Reference Re Persons of the Japanese Race*, Justice Rand held that the order-in-council directing the deportation of all Japanese persons in the aftermath of World War II was ultra vires only to the extent that it affected "natural born British subjects" and their dependents.[96] While Justice Rand recognized that "one sovereignty has no legal power to force its own citizen into the territory of another,"[97] he nevertheless thought that the order to deport Japanese nationals was valid because "[t]he power of Parliament to deal with aliens is unquestioned, and that field is under delegation to the Governor in Council."[98] Although Justice Rand held in *Winner* that a deci-

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92 *Ibid.* at 140.

93 *Ibid*. at 132.

94 *Smith & Rhuland*, *supra* note 3.

95 *Ibid.* at 100.

96 *Reference Re Persons of the Japanese Race,* [1946] S.C.R. 248, [1946] 3 D.L.R. 321 [cited to S.C.R.].

97 *Ibid.* at 289.

98 *Ibid.* at 286.

sion of the New Brunswick Motor Carrier Board restricting the operating licence of an American bus line was ultra vires because it infringed the privileges of free access to the market and public highways,[99] he silently concurred in *Narine-Singh*—a case in which the Supreme Court of Canada held that a regulation setting out strict requirements for the admittance of "Asians" to Canada justified an administrative decision to deport two immigrants from Trinidad.[100]

Conclusion: The Legacy of Randian Constitutionalism

If the influence of Randian constitutionalism ended with Justice Rand's departure from the Supreme Court of Canada, one might be tempted to conclude that his project fell short of the mark insofar as it concerns the interests of aliens and immigrants. However, that conclusion would ignore the continuing relevance of Justice Rand's opinion in *Roncarelli*. The manner in which Justice Rand articulated his understanding of constitutionalism and legality in that case makes a difference today because it forged a path distinct from theories premised exclusively upon parliamentary sovereignty or the prepolitical rights of individuals. That distinct path remains an active memory in Canadian legal practice; it continues to inform and inspire the way we conceive of the rule of law, fundamental legal values, and judicial review of administrative action.[101]

The point is that the legacy of *Roncarelli* can be only partly illuminated by an exegesis of Justice Rand's reasons in particular cases. It also includes *Roncarelli*'s "gravitational force",[102] which is evident in Justice L'Heureux-Dubé's reasons in *Baker*.[103] So while one might understandably criticize Justice Rand's opinions in *Reference Re Persons of the Japanese Race* and his acquiescence in *Narine-Singh*, that criticism is tempered by the fact that another judge in another era was able to advance the constitutional project first articulated in *Roncarelli*. The decision in *Baker*, which has already become an active memory in its own right, established that Mavis Baker (a non-citizen) was entitled to be treated with the same concern and respect as Frank Roncarelli (a citizen) in at least one impor-

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99 *Winner, supra* note 82.

100 *Narine-Singh v. Canada (A.G.),* [1955] S.C.R. 395, 111 C.C.C. 321 [*Narine-Singh*]. For a more extensive critique of this decision, see James W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Osgoode Society for Canadian Legal History & Wilfrid Laurier University Press, 1997) c. 5.

101 See David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill L.J. 491; David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 U.N.B.L.J. 111.

102 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 110-15.

103 *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 53, 174 D.L.R. (4th) 193 [*Baker*].

tant respect: she was entitled to an administrative decision that was reasonable, in the sense that it provided an adequate justification for denying her a statutory privilege. The Supreme Court of Canada held that the immigration officer was required to give reasons showing why Baker should be deported, and those reasons had to be consistent "with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*." [104]

In short, it seems that Justice Rand's views about the rights of legal subjects were both informed and constrained by his historical context. While his ideas about the immunities and privileges of citizens were enriched by his understanding of American constitutional law, they were also constrained by his reluctance to apply those ideas in cases concerning the interests of non-citizens. Nevertheless, in the fifty years since *Roncarelli* was decided, the logic of Justice Rand's decision has been bolstered by a constitutional discourse of human rights—one that asserts that all persons are entitled to some fundamental legal rights in virtue of their personhood as opposed to their formal political status.[105] Therefore, in order to fully appreciate the legacy of *Roncarelli* in the twenty-first century, one must not only understand the historical context of that case but also examine how judges and legal scholars continue to employ Justice Rand's judgment in order to develop a richer understanding of the Canadian constitutional order.

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[104] *Ibid.* at para. 56.

[105] See e.g. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) c. 2; James W. Nickel, *Making Sense of Human Rights*, 2d ed. (Oxford: Blackwell, 2007) c. 4; Allen Buchanan, "Human Rights and the Legitimacy of the International Order" (2008) 14 Legal Theory 39.