IVAN RAND'S ANCIENT CONSTITUTIONALISM

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I. INTRODUCTION

Few names loom larger in the history of Canadian law than Ivan Rand. The late Supreme Court of Canada Justice, law dean, lawyer, politician, and Royal Commissioner was, according to E. M. Pollock's 1979 biographical piece, "destined for greatness".[1] Even today, the judicial work of "one of the greatest— if not the greatest— jurists in Canadian history"[2] remains required reading in law schools; and many of his most important decisions retain a central place in the minds of judges and legal commentators. For example, his judgments in the so-called "Implied Bill of Rights" cases were called the Supreme Court of Canada's "most distinguished achievements,"[3] "the 'golden' moments of the civil liberties decade"[4] and the theory of implied rights described as "valuable",[5] "one of the most original and provocative contributions ever made to Canadian constitutional law"[6] with Rand's Court "ahead

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1 E. M. Pollock, "Ivan Rand: The Talent is the Call" (1979-1980) 18 *University of Western Ontario Law Review* 115, at 115.

2 R. Yachetti, "Ivan Cleveland Rand – The Teacher: A Student Viewpoint" (1979-1980) 18 *U.W.O.L. Rev.* 145 at 146.

3 E. Cline and M. J. Finley, "Case Comment: Whither the Implied Bill of Rights?" (1980-1981) 45 *Saskatchewan Law Review* 137 at 137.

4 M. Cohen, "The Judicial Process and National Policy – A Problem for Canadian Federalism" (1970) 16 *McGill Law Journal* 297 at 301.

5 J. A. Barron, "The Constitutional Status of Freedom of Speech and Press in Canada: The History of a Quiet Revolution" (1963-1964) 58 *Northwestern University Law Review* 73 at 80.

6 D. Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966-1967) 12 *McGill Law Journal* 497 at 497.

of their time."[7] If anything, Justice Rand has retained his image as a courageous judge with deep "moral convictions",[8] willing to bend the law in creative ways to seek justice and protect the rights of oppressed minorities, like the Jehovah Witnesses under Quebec's nationalist and reactionary regime of Maurice Duplessis.[9]

But Justice Rand's legal philosophy has not faired as well. Over the years, his theory of "implied rights" has received harsh criticism from prominent critics[10] and, in particular, his ideas about the role of the judiciary and rights adjudication have been called "muddled"[11], "difficult",[12] "contradictory", [13] even "abstruse"[14]. How could this be? How could this "giant of a man intellectually"[15] known for the "brilliance of his record on the Bench"[16] offer such problematic, allegedly mediocre,[17] legal thought? Some explanations -- that Justice Rand's personal philosophy was "hopelessly equivocal"[18] or that he tried, without success, to "combine and recite traditional doctrines of liberal thinking"[19]-- leave much to be desired. Andrée Lajoie, whose thoughtful account also tried to come to terms with these problems, first put Justice Rand as a proponent of the Harvard school of sociological jurisprudence (advanced by the likes of Roscoe Pound and others in the 1950s), only to accuse Rand of base "social engineering" while decrying the "lack of research" concerning ideas underlying implied rights.[20]

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[7] L. E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 *Canadian Bar Review* 699 at 704.

[8] A. Lajoie, "The Implied Bill of Rights, the Charter and the Role of the Judiciary" (1995) 44 *University of New Brunswick Law Journal* 337 at 341. Though as William Kaplan's recent work has shown, Rand may have been less than heroic in certain aspects of his private life. See generally, William Kalpan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: Toronto University Press for the Osgoode Society for Canadian Legal History, 2009).

[9] Premier of Quebec, 1936-1939 and 1944-1959 (Union Nationale).

[10] B. Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 *Can. Bar Rev.* 77; P. C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 *University of Toronto Law Journal* 307; P. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 784-785.

[11] Lajoie, *supra* note 8, at 337.

[12] Yachetti, *supra* note 2, at 148.

[13] Lajoie, *supra* note 8, at 337.

[14] R. P. H. Balcome, E. J. McBride, and D. A. Russell, *Supreme Court of Canada Decision – Making: The Benchmarks of Rand, Kerwin and Martland* (Carswell: Toronto, 1990) at 113.

[15] Yachetti, *supra* note 2, at 145.

[16] J. R. Cartwright, "Ivan Cleveland Rand 1884-1969" (1969) 47 *Can. Bar Rev.* 155.

[17] Balcome, McBride and Russell, *supra* note 14, at 113 (noting Rand "not by any means a professional philosopher or an accomplished legal theoretician").

[18] *Ibid.*, at 115.

[19] *Ibid.*, at 131.

[20] Lajoie, *supra* note 8, at 353.

The central aim of this article is to challenge such assumptions about Justice Rand's work. I want to resolve some of these lingering questions and puzzles by reconstructing an overlooked component of his legal thought: a form of customary, or "ancient" constitutionalism, derived from, and very much akin to, the kind of ideas advanced by early common lawyers like Sir Edward Coke. Rand's thinking was not mired in centuries past; but his knowledge of, and appeal to, these ideas, as important precursors to modern notions of fundamental law, can help explain some of the inconsistencies and controversies apparent in his work. Ultimately, my argument will serve to rehabilitate aspects of Justice Rand's legal thought, while providing a window into the minds of scholars and critics who have ignored this aspect of his writings.

The first section describes an ongoing controversy and puzzle concerning the scope of Justice Rand's concept of implied rights: could they bind both provincial *and* federal legislatures? Many scholars have concluded that Justice Rand never meant implied rights to bind Parliament, only provincial legislatures, thus acting as a form of policing tool for the division of powers. I offer evidence that this conclusion is wrong. This raises a further nagging question: how could Justice Rand believe this? How could he think a system based on the British constitutional principle of parliamentary sovereignty could include implied rights that limit that sovereignty? The answer is that ideas associated with "ancient constitutionalism" underlay Justice Rand's notion of unwritten and implied rights, a school of thought based on the premise that certain liberties and customs were, by their original and ancient character, beyond the power of either the executive or, arguably, even Parliament to limit or control. After setting out some of the key tenets of ancient constitutionalism, I then attempt to identify those tenets in Justice Rand's writings, both judicial and academic. The final section revisits Justice Rand's legal thought and offers reasons why legal scholars and historians need to address his ancient constitutionalism.

II. AN ONGOING CONTROVERSY

A. The Implied Rights and Their Scope

In the "Implied Bill of Rights" cases, handed down shortly before and after the Second World War, various members of the Supreme Court of Canada seemingly found within the *British North America Act, 1867* certain implied rights analogous to a modern bill of rights.[21] Though Chief Justice Duff authored the first so-called "implied rights" case, it was Rand who "remains the father of the Implied Bill of Rights".[22] Among the implied interests recognized in Rand's decisions were "[l]iberty" in "thought",[23] "freedom of

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[21] For a general discussion see, P. Hogg, *supra* note 10, at 782-785; D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 8-12.

[22] Lajoie, *supra* note 8, at 337.

[23] *Switzman v. Elbling*, [1957] S.C.R. 285.

speech", "religion" and the "inviolability of the person".[24] Some have suggested these also included certain "economic rights"[25] and, based on Rand's judgment in *Roncarelli v. Duplessis*,[26] protection from governmental abuse of the rule of law.

Commentators generally agree that these interests were not derived from the *explicit* text of the *British North America Act, 1867*, nor any other Canadian constitutional instrument. Rather, they were implicit or unwritten constitutional norms. They have thus been called an "implied bill of rights"[27], an "interstitial bill of rights",[28] and a set of "implied constitutional limitations".[29] Where there has been more disagreement is with the scope of these unwritten interests. As others have written, the "litmus test" for Rand's rights is "whether the restriction of certain fundamental liberties is beyond the powers of *both* federal and provincial governments".[30]

Though scholars like Dale Gibson suggest implied rights could not be limited by any level of government,[31] the vast majority have concluded that Rand understood them to limit only the powers of provincial legislatures. This was the conclusion of both Andrée Lajoie[32] and Bora Laskin[33] writing over forty years apart. Prominent scholars like William R. Lederman,[34] Walter Tarnopolsky,[35] Edward McWhinney[36] and others,[37] concluded the same. This is not surprising. The traditional view in Canada during Rand's time was that "parliamentary sovereignty reigned supreme" and so,

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[24] *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at 329; E. McWhinney, "Mr. Justice Rand's 'Rights of the Canadian Citizen' – The 'Padlock' Case" (1957-1958) 4 *Wayne Law Review* 115 at 120.

[25] Lajoie, *supra* note 8, at 338; Balcome, McBride and Russell, *supra* note 14, at 54-55 (more accurately... the right to freely operate business).

[26] [1959] S.C.R. 121.

[27] Gibson, *supra* note 6, at 497.

[28] McWhinney, *supra* note 24, at 120.

[29] Barron, *supra* note 5.

[30] Balcome, McBride and Russell, *supra* note 14, at 56 [emphasis in original]

[31] Gibson, *supra* note 6, at 497 (but, it should be noted, Gibson only cited the lone opinion of Abbott J. in *Switzman* for this proposition). Others like Weinrib, *supra* note 7, at 717 and Balcome, McBride and Russell, *supra* note 14, at 57, acknowledged Rand may have been inclined toward this conclusion, but failed to do so in a judgment.

[32] Lajoie, *supra* note 8, at 338-9.

[33] Laskin, *supra* note 10, at 100-101, 119 (other than judgment of Abbott J. in *Switzman* there is "no high judicial utterance which recognizes gaps... in 'effective legislative power'").

[34] W. R. Lederman, "Mr. Justice Rand and Canada's Federal Constitution" (1979-1980) 18 *U.W.O.L. Rev.* 31 at 43.

[35] W. S. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966) at 5-6 (writing on the assumption that rights only apply to provincial legislatures).

[36] McWhinney, *supra* note 24.

[37] Balcome, McBride and Russell, *supra* note 14, at 57.

presumably, nothing was beyond the jurisdiction of *both* levels of government.[38] Rand's implied rights were no different.

But this conclusion was wrong. Though Rand never acknowledged in a judgment that the unwritten and implied interests he defined could not be limited by either Parliament or provincial legislatures (he came close in *Switzman*), he did so explicitly in non-judicial writings. In fact, in a rarely cited personal correspondence with Jerome Barron in 1962 (after retiring from the Court), Rand was asked directly whether implied rights like freedom of speech and the press also placed "constitutional limitations on the legislative jurisdiction of the Federal Parliament".[39] His letter in response was informative:

> I should say it was clear that the provinces have no jurisdiction to regulate free speech as such for the reason that that subject matter is not within any head of Section 92.
>
> On the other hand, in view of the presence in the preamble of the reference to the constitutionalism of Great Britain, coupled with the legislative structure for both province and Dominion, that is, parliamentary government, and taking into account also the specific allocation to the Dominion Parliament of the exclusive jurisdiction over crime and the residual powers, *although there is necessarily a restriction upon interference with free speech including the press*, as with your constitutional provision, the problem is in the balancing considerations, the delimitation of that restriction.... *But the restriction as a necessary corollary of parliamentary government will remain until that institution is abolished.*[40]

Rand here asserted unequivocally that there were limitations on interference with such freedoms by provincial legislatures and by the federal parliament. The unwritten and implied rights were a general limit on legislative powers.

But what about other implied rights? Did they also apply to both levels of government? The answer must be yes. First, Rand's writings elsewhere suggested that implied rights and freedoms placed limits on governmental restrictions. Writing in 1954, he said freedom "must be taken to be an absolute in the sense that it is inseparable from our form of organization".[41] Similarly, in an article written in 1960, Rand contrasted freedom of religion from "civil rights", writing:

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[38] *Ibid.*, at 56.

[39] Barron, *supra* note 5, at 100.

[40] *Ibid.*, at 100-101; [emphasis added].

[41] I. C. Rand, "Man's Right to Knowledge and its Free Use" (1953-1954) 10 *U.T.L.J.* 167 at 167.

> [A] "civil right"... is the creation of positive law, to be distinguished from those freedoms that remain within the residue of unregulated conduct, fundamental, even "natural" freedoms because they are not, so far, circumscribed by law.[42]

Here, Rand implied that freedom of religion was not a creature of statute, but rather a "fundamental" freedom existing beyond the regulation of positive law, *i.e.*, laws enacted by federal and provincial legislatures equally. Moreover, Rand often wrote of implied rights like freedom of speech, religion and "inviolability of the person" together.[43] It would be unusual for him to conclude that, of these implied interests, only freedom of speech could limit Parliament.

Indeed, Barron himself immediately understood the "importance" of Rand's disclosure in the letter cited above, writing:

> The importance of Justice Rand's statement...that the Federal Parliament operates under constitutional limitations lies in the fact that some scholarly opinion has believed the scope of Justice Rand's theory of implied constitutional limitations did not extend to the legislative jurisdiction of the Federal Parliament.... Such reasoning, however, has failed to come to grips with the radical departure that Justice Rand has taken from the entrenched modes of thinking in Canadian constitutional law.[44]

B. Two Puzzling Questions

As interesting as these revelations may be, they also raise troubling questions. How could Rand believe in unwritten rights or freedoms that could not be limited by Parliament? The Preamble to the *British North America Act, 1867* ("BNA, 1867") said that Canada has a "Constitution similar in principle to that of the United Kingdom". But the "central feature" of the Constitution in the United Kingdom in 1867, as well as in the 1950s when Rand was writing, was parliamentary sovereignty.[45] That is, any civil liberties and freedoms could be abolished by Parliament.[46] As Lajoie has observed, it would be an "oxymoron" for Rand to refer to British constitutionalism via the preamble to the *BNA, 1867* to suggest that certain individual rights or interests could override parliamentary supremacy.[47]

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[42] I. C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 *Can. Bar Rev.* 135 at 154.

[43] *Saumur*, *supra* note 24, at 329; McWhinney, *supra* note 24, at 120.

[44] Barron, *supra* note 5, at 101, n. 75.

[45] Hogg, *supra* note 10, at 784.

[46] *Ibid.*

[47] Lajoie, *supra* note 8, at 338-9.

A further question: Why did Rand spend so much time linking the implied rights to the structure of Parliament? Though he called freedom of speech or religion "original freedoms", he went at great lengths to link them to structures of government. For example, he wrote of freedom generally as "inseparable" from "our form of [governmental] organization".[48] Elsewhere, he wrote of free discussion and "the interplay of ideas" in relation to "government... by parliamentary institutions".[49] If the implied rights were truly original or, in Laskin's terms, represented "independent constitutional value[s]",[50] why the reliance on parliamentary structures?[51]

These questions can be answered, but not by reference to parliamentary sovereignty, the distribution of legislative powers, or more modern or Americanized notions of constitutional rights. Instead, answers lie in a mode of constitutional thinking exemplified and, arguably, popularized by the man Charles Gray called "the greatest lawyer in English history":[52] Sir Edward Coke, and other early English lawyers and constitutionalists like Sir Matthew Hale and William Blackstone. But before we get there, some background is necessary.

III. ANCIENT CONSTITUTIONALISM

A. Rand and English Common Law Theory: Preliminary Thoughts

Ivan Rand's work has been analyzed primarily through the lens of two schools of legal thought. The first, the "rights" school, approached Rand's legal thought as a product of a rights perspective largely shaped by modern or American notions of rights. Rand's most famous judgments articulating unwritten or implied constitutional interests have become known as an "implied bill of rights",[53] as if Rand was creating something like the U. S. Bill of Rights in the *BNA, 1867*. Additional examples for this school would be Jerome Barron's work, which noted that Rand bore the "imprint of an unmistakably American influence", whilst citing Rand's frequent references to the U. S. Bill of Rights.[54] Similarly, Lorraine Weinrib explained Rand's "implied bill of rights" judgments in terms of what she called the postwar model of rights protection.[55]

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[48] Rand, "Man's Right", *supra* note 41, at 167.

[49] *Saumur*, *supra* note 24, at 330.

[50] B. Laskin, "Our Civil Liberties: The Role of the Supreme Court" (1954) 61 *Queen's Quarterly* 455 at 469 referring to "independent constitutional value".

[51] I am not the first to raise this question: R. R. Price, "Mr. Justice Rand and the Privileges and Immunities of Canadian Citizens" (1958) 16 *Faculty Law Review* 16 at 27.

[52] C. M. Gray, "Introduction" in Charles M. Gray (ed.), *Matthew Hale, The History of the Common Law of England* (Chicago: University of Chicago Press, 1971) at xii.

[53] Gibson, *supra* note 6.

[54] Barron, *supra* note 5, at 84.

[55] Weinrib, *supra* note 7, at 704.

A few other works have analyzed Rand's work as advocating natural law or natural rights, most notably Michael Schneiderman's 1968 article.[56]

The second, which I call the "sociological school", analyzed Rand's legal philosophy as reflecting the ideas of American legal realists like Louis Brandeis and Roscoe Pound; the realists' "sociological" jurisprudence advocated a flexible approach to law that revolutionized American legal thought in the 1950s. Examples of this include Lajoie who, as noted earlier, "pegged" Rand as "upholding" the principles of the "sociological jurisprudents" Brandeis and Pound, which required adjudication to "adapt law to social requirements" and took into account "context, facts and their evolution".[57] Similarly, Balcome, McBride and Russell in their "biographical sketch" of Rand, cited "sociological jurisprudence" and Rand's fondness for Brandeis in discussing his approach to law.[58]

Unfortunately, as already noted, these perspectives have failed adequately to explain Rand's legal thought, leaving apparent "contradictions" unexplained and puzzling questions unanswered. But, has something been overlooked? No scholar has attempted to analyze Rand's work in terms of the "ancient constitutionalism" of early common law theorists and lawyers like Coke, Hale and Blackstone.

But what preliminary evidence is there that Rand was even aware of such common law thought?[59] First, we know that Rand was "deeply read in both literature and history, as well as in legal philosophy"[60] and surely would have come in contact with these great common law writers. Second, as documented by E. M. Pollock, we know that Rand read and committed to memory much of Blackstone's *Commentaries* in preparation for Harvard.[61] Blackstone himself deployed a form of ancient constitutional thought and explicitly discussed England's "ancient constitution" extensively in this work. Third, Rand would also have been exposed to these ideas at Harvard Law School in the writings and teachings of Brandeis and Pound.

Other scholars have drawn on Rand's experience and education in the U. S. to help explain his work.[62] This is not surprising. Rand was deeply influenced by his

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[56] M. Schneiderman, "The Positivism of Hugo Black v. The Natural Law of Ivan Rand: A Study in Contrasting Judicial Philosophies" (1968) 33 *Sask. L. Rev.* 267.

[57] Lajoie, *supra* note 8 , at 339-340.

[58] Balcome, McBride and Russell, *supra* note 14, at 35-6.

[59] I say "preliminary" evidence because, as we will see later, Rand's own judicial and non-judicial writings provide clear evidence of this awareness and ancient constitutional thought.

[60] Cartwright, *supra* note 16, at 158.

[61] Pollock, *supra* note 1, at 121.

[62] Lajoie and authors Balcome, McBride and Russell noted that Rand was deeply influenced by his "mentor" Louis Brandeis, the legal realist, who taught at Harvard when Rand attended: Balcome, McBride and Russell, *supra* note 14, at 33; Lajoie, *supra* note 8, at 340. Barron,

time at Harvard, and the ideas of Brandeis and Pound and other prominent members of the school's faculty. He often referenced his American experiences[63] and, according to J. R. Cartwright, one of Rand's "fondest memories" was of his years at Harvard Law School.[64] Rand also frequently cited Brandeis and Pound in his writings, dedicating one piece solely to Brandeis[65] and, elsewhere, referencing Pound's lectures[66] and reviewing works dedicated to Pound's legal jurisprudence.[67]

However, scholars have focused on a rather narrow aspect of the work of the Harvard legal realists. True, Roscoe Pound and Louis Brandeis advocated a flexible approach to law and a "sociological jurisprudence" but they were also knowledgeable of English common law history and theory, believing it formed the foundation of modern American constitutionalism. Pound wrote of English common lawyers like Bracton, Glanvill, and Blackstone[68] and proclaimed Coke a "determining factor in [American] legal history".[69] Indeed, Pound was deeply committed to the common law tradition, dedicating an entire book to the subject.[70] Brandeis likewise understood the importance of English law, believing that "To study law ... is necessary to understanding our own and British history."[71] Rand would likely have encountered these ideas at Harvard or later in the writings of his mentors.

In other words, a strong preliminary case can be made that Rand was exposed to the kind of ideas and writings associated with common law theory and ancient constitutional thought. Had he adopted many of its ideas as his own?

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too, drew this connection, writing that "Perhaps [Rand's] theory of implied constitutional limitations in the Act of 1867 is indebted in essence to the fact that Mr. Justice Rand received his legal education in the United States": *supra* note 5, at 84, n. 32.

[63] Balcome, McBride and Russell, *supra* note 14, at 33.

[64] Cartwright, *supra* note 16, at 156.

[65] I. C. Rand, "Louis D. Brandeis" (1947) 25 *Can. Bar Rev.* 240.

[66] I. C. Rand, "Review— Minimum Standards of Judicial Administration: A Survey of the Extent to Which the Standards of the American Bar Association for Improving the Administration of Justice Have Been Accepted Throughout the Country" (1951) 9 *U.T.L.J.* 133 at 133 (citing Pound's address to the ABA).

[67] I. C. Rand, "Review— Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound" (1949) 27 *Can. Bar Rev.* 126.

[68] R. Pound, "Common Law and Legislation" (1907-1908) 21 *Harvard Law Review* 383 at 388-391.

[69] R. Pound, *Criminal Justice in America* (New York: Henry Holt & Co., 1930) at 94.

[70] R. Pound, *The Spirit of the Common Law* (Boston: Marshall Jones Co., 1921).

[71] R. A. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930* (New York: New York University Press, 1987) at 15.

B. The Nature of Ancient Constitutional Thought

Seventeenth century English legal thought was largely shaped by the so-called "ancient constitution".[72] The classic study is J. G. A. Pocock's *The Ancient Constitution and the Feudal Law*.[73] It's central argument was that English lawyers of the seventeenth century understood common law as ancient customary law practiced in the courts of England since time immemorial; that is, beyond "the earliest historical record that could be found".[74] Taking Sir Edward Coke as a key figure, Pocock argued that ancient constitutionalism was based on certain assumptions or "patterns of thought" about the common law shared by lawyers and other elites dominating social and political thinking of the day.[75]

Though Pocock's work has been criticized,[76] his account remains generally accepted by scholars and historians today.[77] Others have supported his main ideas with inquiries beyond Coke, Sir John Davies or Hale, to a broader cross-section of thinkers like Sir Henry Finch, William Noy and Sir Francis Bacon,[78] or even a radical clergyman such as Samuel Johnson.[79] Lawyers and other thinkers in the seventeenth and, in some quarters, eighteenth century, *did* share a relatively consistent view of the common law as ancient customs and liberties that, together, made up an immemorial or ancient constitution.[80] Even the great Sir William Blackstone spent considerable time discussing the "ancient constitution" in his *Commentaries on the Laws of England*, though, as Robert Willman has shown, with more historical insight than his colleagues of the earlier century.[81]

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[72] J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); P. Christianson, "Young John Selden and the Ancient Constitution, ca. 1610-18" (1984) 128 *Proceedings of the American Philosophical Society* 271; G. Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (University Park, Penn.: Pennsylvania State University Press, 1992).

[73] Pocock, *ibid.*

[74] Pocock, *ibid.*, at 36, 37.

[75] Pocock, *ibid.*, at 38.

[76] Pocock offered a good survey of his critics, and his own responses, in his reissue, *supra* note 72. See also Burgess, *supra* note 72.

[77] J. S. Hart and R. J. Ross, "The Ancient Constitution in the Old World and the New" in F. J. Bremer and L. A. Botelho (eds.), *The World of John Winthrop: Essays on England and New England, 1588 - 1649* (Boston: Massachusetts Historical Society, 2005).

[78] *Ibid.*, at 40.

[79] M. Zook, "Early Whig Ideology, Ancient Constitutionalism, and the Reverend Samuel Johnson" (1993) 32 *Journal of British Studies* 139; Pocock, *supra* note 72, at 365.

[80] Hart and Ross, *supra* note 77, at 40; J. G. A. Pocock, "Burke and the Ancient Constitution—A Problem in the History of Ideas" (1960) 3 *The Historical Journal* 125, at 142.

[81] R. Willman, "Blackstone and the 'Theoretical Perfection' of English Law in the Reign of Charles II" (1983) 26 *The Historical Journal* 39. Willman argued that Blackstone's subtle

The ancient constitution was considered fundamental law. Today, the phrase is often converted to describe a written constitution that constitutes the supreme law of a state. In seventeenth century England, the fundamental and supreme law was an unwritten immemorial constitution.[82] The ancient customs and liberties of this constitution were arguably capable of limiting the authority of the King[83] and, at times, even Parliament.[84]

Ancient constitutionalism involved a unique combination of legal, historical and political thoughts. Its authority was not based on natural law or abstract reason (like Locke's social contract theory), but the deep past. It was thus a form of "historical jurisprudence"[85] because its proponents appealed primarily to history and custom, rather than reason or natural right, as found in natural law or legal positivism.

Though a survey of its many permutations is far beyond the scope of this article, the common tenets of this mode of legal thinking relies primarily on Pocock's account. It remains the seminal or classic study, but his focus on Coke is important since I believe Rand was influenced by Coke's life and work. The next section sets out each feature of ancient constitutionalism and locates it in Rand's work.

IV. IVAN RAND'S ANCIENT CONSTITUTIONALISM

A. Ancient and Immemorial Liberties and Customs

First and foremost, ancient constitutionalists understood the common law to recognize and preserve certain liberties and customs enjoyed by Englishmen from time immemorial. This was an important, if not central, part of ancient constitutional thought. The "immemorial" character justified their authority and binding nature in the present.[86] The argument was not only the "sanctity" of ancient practice or that such practices should not be disturbed, having served people for so long, but also that:

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discussion of ancient constitutionalism incorporated historical facts about feudal laws, thus rendering the doctrine more "respectable" than its more mythical seventeenth century cousin (at 46-7).

[82] Pocock, *supra* note 72, at 49-51.

[83] *Ibid.*, at 35.

[84] See my discussion of *Bonham's Case*, *infra.* at text, note 164 *et seq.*

[85] H. J. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale" (1993 - 1994) 103 *Yale Law Journal* 1651, at 1652.

[86] J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Toronto: Cambridge University Press, 1995) at 149; Pocock, *supra* note 72, at 21.

> [T]he people were originally (and had remained) free and sovereign, and could be discerned in the deeps of time arranging their constitution to suit their convenience....[87]

In other words, the ancient liberties affirmed by the common law were "original" liberties possessed by free men who fashioned their institutions and laws to preserve those liberties.

Moreover, the idea that ancient liberties were "immemorial" offered justification (based on historical myth) to minimize the impact of the Norman Conquest, the lone "breach" in the "continuity" of the common law from past to present.[88] King William I might have conquered England but he could not usurp the common law's ancient authority.[89] Sir Matthew Hale's *The History of the Common Law of England*[90] offered a "classic exposition" of this aspect of ancient constitutional thought.[91] For Hale, the Norman Conquest did not "alter the Laws of this Kingdom, or impose Laws upon the People *per Modum Conquestus*" because English laws derived "power" from their "usage and custom".[92] Hale, like Coke before him, invoked William I's alleged affirmation of the ancient laws of the realm.[93] Thus: "King William I could not abrogate or alter the ancient Laws of the Kingdom, any more than if he had succeeded the Confessor as his lawful Heir...."[94] So compelling was the idea of the ancient constitution that lawyers could wield it to protect ancient liberties and customs from the sword of conquest. Thus was the power of ancient laws existing "before Time of Memory".[95]

Ivan Rand's judicial and extra-judicial writings demonstrated a remarkably similar understanding of original freedoms and ancient liberties, preserved and recognized in the common law. In *Saumur* , the famous "Implied Bill of Rights" case,

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[87] Pocock, *supra* note 72, at 21.

[88] *Ibid.*, at 42.

[89] Tully, *supra* note 86, at 149. This is closely related to the myth of the Norman Yoke, as explained by Christopher Hill: "The Norman Yoke" in *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17th Century* (New York: Schocken, 1958) at 57 "before 1066 the Anglo-Saxon inhabitants of this country lived as free and equal citizens, governing themselves through representative institutions...". Pocock explained the difference between the proposition that the ancient constitution remained despite the Conquest, and the idea of the Norman Yoke, that the Conquest was a temporary and oppressive usurpation of these ancient laws: *supra* note 72, at 319.

[90] M. Hale, *The History of the Common Law of England (and Analysis of the Civil Part of Law)*, 6th ed. (London: Butterworth, 1820).

[91] Tully, *supra* note 86, at 149.

[92] Hale, *supra* note 90, at 94, 88; Tully, *supra* note 86, at 149.

[93] Hale, *supra* note 90, at 107-108; Pocock, *supra* note 72, at 44.

[94] *Ibid.*, Hale at 108.

[95] *Ibid.*, at 4.

a Jehovah's Witness challenged a Quebec provincial law that banned distribution of religious material on the street without permission of the police. Rand found the law unconstitutional, but began his analysis, just as Coke or Hale might, by describing the ancient and immemorial character of the custom at issue:

> What is proposed before us is that a newspaper, just as a religious, political or other tract or handbill, for the purposes of sale or distribution through use of streets, can be placed under the uncontrolled discretion of a municipal officer; that is, that the province, while permitting all others, could forbid a newspaper or any writing of a particular colour from being so disposed of. *That public ways, in some circumstances the only practical means available for any appeal to the community generally, have from the most ancient times been the avenues for such communications, is demonstrated by the Bible itself....*[96]

By recognizing the ancient character of the custom at issue– the use of public ways for religious pamphleteering– Rand bolstered the importance of the underlying liberty interests of freedoms of speech and religion.[97]

In fact, Rand often invoked ancient constitutionalism, appealing to ancient law, custom or liberty, to emphasize the importance of a legal interest or to limit an abuse of power. Writing in dissent in *MacKenzie v. Martin*, Justice Rand found that a justice of the peace ("JP") had abused his authority for jailing a man for mere "annoyance".[98] In his reasons, Rand cited "ancient law" that defined and limited the "immemorial exercise" of the JP's authority. Like Coke or Hale, he found that the JP acted beyond his authority by violating limits that existed since "early Saxon law" and the "time of Edward the Confessor",[99] in other words, since time immemorial. He offered liberty as the basis for these ancient limits: "It is necessary to remind ourselves that personal liberty is one of the supreme principles of our law...."[100] In other cases, Rand similarly invoked rules with "ancient roots in the common law"[101] or the "ancient law" like the "deodand" to justify his legal rulings.[102]

Rand's non-judicial writings were even more indulgent with ancient constitutional thought. In a 1960s lecture, the "Role of the Supreme Court in Society", he concluded Canada was ready to "trust our highest tribunal" with "application of our

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[96] *Saumur*, *supra* note 24, at 332 [emphasis added].

[97] *Ibid.* It is worthwhile noting in passing that Justice James Estey, perhaps taking a cue from Rand, also invoked ancient constitutional language in *Saumur*, writing at 361 that "[d]istribution of pamphlets and other printed matter has taken place since time immemorial".

[98] *MacKenzie v. Martin*, [1954] S.C.R. 361, at 373.

[99] *Ibid.*, at 371.

[100] *Ibid.*, at 372.

[101] *Alberta v. Huggard Assets Ltd*, [1951] S.C.R. 427, at 444.

[102] *Goodwin Johnson Ltd. v. The Ship (Scow) AT & B*, [1954] S.C.R. 513, at 531.

common law tradition as an instrument of modification".[103] But what did he mean by the "common law tradition"? Rand explained that Canada had received the common law based on "customary laws, which arose out of the life of the people in England".[104] Rand believed the common law derived its authority through ancient and unwritten custom:

> When the Germanic tribes from western Europe came to England, they brought with them their institutions and their customs. Those features constitute the basis upon which over these fifteen hundred years has been erected what we now call the common law, that is, the law that is unwritten, the law that is enforced by courts and the law which derives its force from custom reinforced by the holdings of courts.[105]

To explain this authority, Rand even invoked Hale's myth of King William affirming ancient English law: "[It] is rather interesting that William the Conqueror, among his other promises, gave the assurance that the customs of the English people would be respected".[106]

Rand certainly exhibited aspects of ancient constitutional thought, but did he understand the "implied rights" he famously recognized as ancient rights or liberties, or as natural rights? The lecture cited above would suggest the former; if the common law was a product of custom, presumably any rights recognized by the common law arose from rights of the people recognized through said custom, rather than any abstract notion of natural law or human rights. He appeared to say the same elsewhere, when he wrote that in law "freedom is an immanent potentiality" with the "positive law as the conservator of that freedom".[107]

These same ideas became even more apparent in *Saumur*. Having emphasized the "ancient" character of the liberty (in the excerpt noted above), Rand explained the nature of the interest further:

> Strictly speaking, civil rights arise from positive law; but 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

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[103] I. C. Rand, "The Role of the Supreme Court in Society" (1991) 40 *U.N.B.L.J.* 173 at 192.

[104] *Ibid.*, at 176. Rand, however, exempted Quebec from this, explaining that the common law of Quebec was based on the "unwritten customs of Paris", meaning the *Coutume de Paris* adopted for Lower Canada in 1663.

[105] *Ibid.*, at 176.

[106] *Ibid.*, at 177.

[107] I. C. Rand, "The Role of an Independent Judiciary in Preserving Freedom" (1951-1952) 8 *U.T.L.J.* 1 at 3-4.

> human beings and the primary conditions of their community life within a legal order.[108]

He said important liberty interests – freedoms of speech, religion and the inviolability of the person – were "original" and distinct from "positive law". This might suggest Rand was talking about natural rights, but he was not. Instead, he was explaining the age-old character of these fundamental liberties (by saying they were "original" and existed prior to laws) and, additionally, how these freedoms came to be protected by the law, with the "civil rights" of the common law growing up around them and protecting them. After the above paragraph, he continued:

> [These original freedoms'] significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them.... So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law... as protection against infringements of these freedoms.[109]

Rand believed people possessed certain freedoms and liberties in their natural or original state; and positive laws, particularly the common law, developed around these freedoms to protect them. Rand offered a similar approach in another famous "Implied Rights" case, *Switzman v. Ebling*, where he also spoke of liberty and free speech:

> This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.[110]

Once again, liberty was described as a primary condition of the individual and thus became embodied within the positive laws of the land: citizenship. Rand's thinking here was entirely consistent with a line of ancient constitutional thought described by Pocock:

> [T]he people were originally (and had remained) free and sovereign, and could be discerned in the deeps of time arranging their constitution to suit their convenience....[111]

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[108] *Saumur*, *supra* note 24, at 329.
[109] *Ibid.*, at 329.
[110] *Switzman*, *supra* note 23, at 306-307.
[111] Pocock, *supra* note 72, at 21.

Rand was not a natural lawyer.[112] He specifically rejected natural law as a foundation for laws, arguing it concerned no law, but only the natural or original condition of people prior to the "civil law" of "mankind".[113] So when Rand wrote things like "Natural law ideas... have for centuries been sealed in the deep foundations of common law assumptions...,"[114] he meant only that the common law had, since the beginning, incorporated through custom, ideas about and protections for "original freedoms" that people presumably possessed in their natural state in the "deeps of time". This reasoning was not foreign to ancient constitutionalism. As Harold Berman noted, Coke, whom Rand often cited, did not deny the existence or validity of natural law, but believed "its legal effect in England is determined by its having been incorporated into the English common law".[115]

Rand not only invoked the language of the ancient constitution, but also conceived his unwritten or "implied" legal rights similar to how Coke, Hale and others conceived the ancient constitution, as preserving the original freedoms and customs of 'Englishmen'. As James Tully wrote (of the ancient constitution), the "common-law liberties of a free people survived the [Norman] conquest and were authoritative in virtue of their long use and practice".[116] But these were not the only ideas Rand shared with ancient constitutionalists.

B. The Law as Artificial Reason

Ancient constitutionalists also understood the common law as ancient wisdom unfolding over time. Coke encapsulated this in his famous idea of the law as "artificial reason", which invoked the central role of courts in ancient constitutionalism: the common law was ancient but constantly refined by courts that applied its immemorial principles to contemporary cases.[117] But, importantly, this process was itself understood as ancient; that is, the common law embodied accumulated wisdom and experience of the ages, passed down, refined and applied since time immemorial.[118] In *Calvin's Case* Coke wrote:

> ...our daies upon the earth are but as a shadow, in respect of the old ancient dayes and times past, wherein the Laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of right and truth) fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the

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[112] This was also the conclusion of Balcome, McBride and Russell, *supra* note 14, at 124.
[113] Rand, "Supreme Court", *supra* note 103, at 179-180.
[114] I. C. Rand, "Review— Legal Theory by W. Friedmann" (1955) 33 *Can. Bar Rev.* 237 at 237-238.
[115] Berman, *supra* note 85, at 1692.
[116] Pocock, *supra* note 72, at 35; Tully, *supra* note 86, at 149.
[117] *Ibid.*, Pocock at 35.
[118] *Ibid.*

> men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmior in jure, neminem oportet esse sapientiorem legibus*: no man ought to take upon him to be wiser than the law.[119]

For the seventeenth century common lawyer, the law did not incorporate natural reason but the "artificial" reason of many generations of lawyers and judges, making the ancient constitution wiser than any one person, even the King.[120]

Rand shared this understanding. His view of law was organic and flexible, allowing legal principles and rules to be modified for contemporary circumstances.[121] But much like the "common law mind" that Pocock described, Rand also believed the law contained accumulated "ancient" experience:

> [T]he common law really is pushing forward under the urge of changing social demands and as it pushes ahead, it has behind it the accumulated judicial experience. We have had *seven or eight centuries now of judicial experience in settling disputes by men of high intellectual attainment familiar with the ancient customs*, familiar with the changes in institutions and in social conditions.[122]

Rand went further in another article, even invoking Coke's concept of the law as "artificial reason". Discussing the role of an "independent judiciary in preserving freedom", he proclaimed, in great rhetorical flourish, that the "basic principles and considerations" of legal decisions must be gathered from:

> ...precedents and affirmations of the traditional law, from legislative enactments, from universally accepted attitudes and working assumptions of our polity and their organic tendencies, from the fundamental conception of freedom in society, and from tested experience of what, considering all factors and interests, the mass of free and rational men applying the rule of universality will ultimately accept or demand: these and the modes of reasoning built up over the centuries, "the artificial reason", as Coke called it, of the law, expanded and made flexible by the nature of the new matter of which it partakes.[123]

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[119] *Calvin's Case* (1607), 77 E.R. 377, at 381 (K.B.).
[120] Pocock, *supra* note 72, at 35.
[121] Rand, "Supreme Court", *supra* note 103, at 179-180.
[122] *Ibid.* [emphasis added].
[123] Rand, "Independent Judiciary", *supra* note 107, at 12-13.

Rand rejected the idea that courts should decide questions based on "private opinion".[124] Rather, the principles and rules to decide present disputes must be drawn from the "tested experience" and wisdom of law built up "over the centuries".

These ideas were not limited to Rand's academic writings. In a subtle nod to Coke's "artificial reason", Rand remarked in *Johnson v. Alberta*, that "law is reason is in such a sense as applicable to statutes as to the unwritten law".[125] And in *R. v. Boucher*, while discussing the evolution of the laws of sedition, Rand explained the "basic nature" of the common law:

> The basic nature of the Common Law lies in its flexible process of traditional reasoning upon significant social and political matter; and just as in the 17th century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new jural conclusions.[126]

Evidently, Rand shared the ancient constitutionalists' understanding of the common law as accumulated wisdom and experience; or in Rand's own words, the "tested experience" of "free and rational men... over the centuries".

C. The Ancient Constitution and Parliament

The idea of the common law incorporating ancient custom through time led to a third feature of ancient constitutionalism: that other social institutions were themselves shaped by immemorial custom. The existence and development of the common law since time immemorial disclosed a societal "process" by which institutions beyond the common law, namely Parliament, were also fashioned to preserve ancient liberties and customs.[127]

Coke and Selden acknowledged this aspect of the ancient constitution, but Hale offered a deeper exploration.[128] To understand the common law was to understand the ancient process by which numerous "judgments, decisions, amendments and refinements" accumulated to constitute the law over time.[129] In *History of the Common Law*, Hale discussed three "organs" by which the law developed (custom, judicial decision-making and Acts of Parliament)[130] but was less concerned with details of

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[124] *Ibid.*, at 12.
[125] *Johnson v. Alberta,* [1954] S.C.R. 127, at 138.
[126] *R. v. Boucher*, [1950] 1 D.L.R. 657, at 680.
[127] Pocock, *supra* note 72, at 35.
[128] *Ibid.*, at 173-179.
[129] *Ibid.*, at 173.
[130] Hale, *supra* note 90, at 88-91; Pocock, *supra* note 72, at 177.

law-making than with the nature of law itself.[131] He emphasized the "universality" of ancient custom,[132] and assumed that parliaments, like the common law, were immemorial and primarily shaped by the very ancient customs, laws, and liberties they developed and affirmed.[133]

This focus on Parliament became more pronounced as ancient constitutionalism evolved in the late seventeenth and eighteenth centuries. After the Glorious Revolution of 1688, for example, Whig historians like William Petyt heralded an ancient constitution emphasizing the antiquity of Parliament to legitimize its new powers. In Pocock's words, what was a theory with "profundity" in Hale's work became "nothing but a crude dogma" in the hands of Petyt who sought only to establish the immemorial authority of Parliament.[134] Indeed, even when ancient constitutionalism (as ancient custom and liberty) saw a revival in the work of prominent writers like Blackstone and Burke in the eighteenth century, Parliament retained an important, if not central role.[135]

Blackstone aimed to reconcile the ancient constitution with the feudalism of both the Norman Conquest and England's own past.[136] He had read Hale and was familiar with the work of Sir Henry Spelman, who argued that England's ancient laws were originally feudal.[137] Unlike early ancient constitutionalists like Hale, who denied the Conquest's serious legal significance, Blackstone believed William I had usurped the ancient "Saxon" constitution, which was "originally intended as a law of liberty".[138] For Blackstone, the Glorious Revolution of 1688 was not so much a revolution than an important affirmation of a long historical process whereby "ancient freedoms"[139] had been slowly restored since the Conquest.

Blackstone's ancient constitution was a constitution of liberty, with a central parliamentary role. Though there is some disagreement as to whether Blackstone understood the ancient constitution as necessarily feudal,[140] he did view it as a mix of ancient customary and statutory laws originating in the days of the Saxons but abrogated by the Normans. Parliament was responsible not only for the noble task of

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[131] *Ibid.*, Pocock at 178.
[132] *Ibid.*, at 173.
[133] *Ibid.*, at 177-178.
[134] *Ibid.*, at 235.
[135] Willman, *supra* note 81, at 48.
[136] *Ibid.*, at 46; J. Cairns, "Blackstone, the Ancient Constitution and the Feudal Law" (1985) 28 *The Historical Journal* 711 at 712.
[137] Willman, *supra* note 81, at 43.
[138] William Blackstone, *Commentaries on the Laws of England*, vol. II, bk. III and IV, 19th ed. (New York: William E. Dean, 1853) at 325.
[139] *Ibid.*, at 328.
[140] Generally, see the critique thereof: Cairns, *supra* note 136 at 712-713 (outlining Willman's argument about the importance of feudalism to Blackstone's work, then setting out how he intends to challenge this argument).

restoring the ancient constitution after the Conquest, but preserving and protecting it in modern times.[141] Blackstone believed the ancient constitution had been gradually restored and improved over several generations, with Parliament, and its "great wisdom", its caretaker.[142]

Edmund Burke likewise appealed to the antiquity of the common law tradition and immemorial character of custom.[143] Burke saw the Revolution of 1688 as an act to preserve "ancient indisputable laws and liberties" and an "ancient constitution of government".[144] He also noted that "learned" jurists like Coke and Blackstone had maintained that great enactments like the *Magna Carta* of 1215 simply re-affirmed even more ancient laws and liberties.[145] Burke's ancient constitutionalism was closely related to his "doctrine of the superior wisdom of traditional institutions".[146] Following Coke and Hale's idea of "artificial reason", Burke believed age-old and tested institutions like Parliament and the common law embodied ancient wisdom.

The point was that ancient constitutionalists from early jurists, like Coke, Hale and Selden to later theorists like Blackstone and Burke, linked, in one way or another, the liberties and customs of the ancient constitution to the institution of Parliament. Part of the "common law mind" that Pocock and others have documented, was the idea that ancient customs and liberties shaped the common law; inevitably, the ancient constitutionalists extended that line of thinking to other key institutions of the day, like Parliament.

This was important because Ivan Rand likewise linked his "implied rights" to the structures of Parliament. In his "Implied Bill of Rights" judgment in *Switzman*, Rand found a Quebec law unconstitutional for attempting to regulate free discussion which, in his view, was beyond the competence of the provinces. Yet, he went on to suggest that free discussion might also be beyond the competence of the federal Parliament to regulate, but he left that issue for a future case.[147] Before arriving at this conclusion, he painted free discussion as essential to the structure of parliamentary institutions:

> But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas.

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[141] Blackstone, *supra* note 138, at 342.

[142] *Ibid.*, at 61, 342.

[143] Pocock, *supra* note 80, at 141-142.

[144] E. Burke, "Reflections on the Revolution in France" in *Works*, vol. II (London: Apollo Press, 1814) 32; Pocock, *supra* note 80 at 128.

[145] *Ibid.*, Burke at 33.

[146] Pocock, *supra* note 80, at 143.

[147] *Switzman*, *supra* note 23, at 307. This suggestion is consistent with the views Rand expressed in correspondence with Jerome Barron, *supra* note 5, at 100-101, n. 75.

> Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles.[148]

This was not necessarily controversial. Parliamentary government required some measure of free discussion to work. Thus, commentators like Dale Gibson described Rand's "implied rights" as merely reflecting those essential structures of Parliament.[149]

This was an over-simplification. Rand did not begin his analysis with a discussion of Parliament only to extrapolate "implied rights" from its structures. The opposite was true. Rand believed that over time Parliament came to embody certain assumptions through custom; many of its "fundamental postulates" were fundamental assumptions of free people and of how they conceived their institutions of government to operate. Discussing "freedom of speech" in an article, Rand wrote:

> In the past, the freedom of speech assumed an underlying and fundamental honesty: the individual spoke in at least relative good faith, what he advocated or designed was within the structure of democracy's fundamental postulates. That honesty of purpose was taken for granted. Men felt free to clarify or quarrel over internal relations because they were agreed on the basic structure. They were at one in assuming, among other things, that democratic government would forever rest upon freely expressed opinion.[150]

Rand's arguments often began, like this, with customs and assumptions among people and then illustrated how the institutions they built, or fashioned through custom, incorporated those assumptions. In "Man's Right to Knowledge and its Free Use", Rand similarly linked the "right to knowledge" to freedom, which he called our "original attribute and mode of expression through which man has evolved".[151] Immediately following this passage, he related this "original attribute" of freedom to the structures of government, finding it "inseparable" from "our form of [governmental] organization".[152]

This suggested that Rand's approach reflected another aspect of ancient constitutional thought. Like Coke, Hale, Burke and Blackstone before him, Rand understood parliamentary institutions as embodying important liberties and interests

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[148] *Ibid.*, *Switzman*, at 306.
[149] Gibson, *supra* note 6, at 497.
[150] Rand, "Independent Judiciary", *supra* note 107, at 11.
[151] Rand, "Man's Right", *supra* note 41, at 167.
[152] *Ibid.*

that deserved to be protected and preserved. He believed that "fundamental postulates" of democratic and parliamentary government were based upon important assumptions, customs, and ideas among people and communities (for parliaments, the English people and communities) that shaped those democratic institutions over time. Thus, in *Switzman* Rand cited with approval a passage from an early Supreme Court of Canada decision in *Brassard v. Langevin*, wherein Justice Taschereau proclaimed Parliament one of the "excellent institutions which we have borrowed from England".[153]

D. The Politics of Ancient Constitutionalism

A final area to examine is the politics of Ivan Rand's ancient constitutionalism. This historic idea had important political implications. Though Pocock did not attempt to elaborate these politics, he admitted that they were inextricably linked to ancient constitutional thought.[154] Again, I will not attempt a broad survey of the numerous political arguments based upon an ancient constitution, instead offering a few historical examples where these ideas were wielded with distinct political implications.

A preliminary point should be made. Ancient constitutionalism was not an inherently conservative school of thought. Though an appeal to history was often associated with the conservatism of Burke, other scholars like Janelle Greenberg have chronicled the "radical face" of the ancient constitution.[155] Pocock himself warned against imputing conservative motives to any appeal to the past.[156] The idea of common law as immemorial custom constantly refined by courts over time, as we will see, arguably led to some radical legal and political consequences: that unwritten custom might be seen as superior to the written law of Parliament,[157] containing accumulated wisdom (and thus legal force) beyond that of any one man, even the King.[158]

Indeed, Coke famously appealed to the ancient liberties of the common law to confront King James I more than once. In 1607, James summoned the common law judges to order them to stop interfering in certain matters before the ecclesiastical courts. Coke, Chief Justice at the time, demurred and enraged James by replying that the King, too, was governed by the artificial reason and judgment of law:

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[153] *Brassard, et al. v. Langevin* (1877), 1 S.C.R. 145, at 195.
[154] Pocock, *supra* note 72, at 46.
[155] Janelle Greenberg, "The Confessor's Laws and the Radical Face of the Ancient Constitution" (1989) 104 *The English Historical Review* 611.
[156] Pocock, *supra* note 72, at 357-58, 360 - 61.
[157] *Ibid.*, at 34.
[158] *Ibid.*

> [T]rue it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* [That the king ought not to be under man but under God and the law].[159]

Coke contradicted James in other decisions;[160] but it was their confrontation in 1621 that led to his removal from the bench. Parliament had challenged the King's policies on Spain and the Catholic Church, and James responded by forbidding members of Parliament from debating the matters further.[161] Coke officially protested the move in the parliamentary journals with an official entry declaring that "the liberties, franchises, privileges and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England".[162] The suggestion that Parliament and its members "inherited" their liberties, rather than possessing them at the pleasure of the King, prompted James to remove Coke from the court and confine him for months in the Tower of London.[163]

But Coke also appealed to the common law to limit the powers of Parliament. In the famous *Bonham's Case*, which came before Coke in 1611 when he was still sitting at Common Pleas, he held that common law courts would not enforce the London College of Physicians' statutory monopoly over the medical profession in London.[164] Coke found the College's statutory scheme was improper because it allowed the College to act as both a party and judge in medical practice disputes.[165] But

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[159] *Prohibitions Del Roy* (1607), 77 Eng. Rep. 1342 at 1343 (K.B.), which further cites Bracton and Fleta: *Rex habet superiores in regno Deum et legem.*

[160] For example, *Peacham's Case* (1615) where Coke found that the King had to respect the custom that common law judges decided sentences collectively: 2 *Howell's State Trials* 870 at 873 (K.B); Berman, *supra* note 85, at 1686, n. 92.

[161] Berman, *supra* note 85, at 1677.

[162] "Debates in the Commons on Privilege (1621)," in C. Stephenson and F. G. Marcham (eds.), *Sources of English Constitutional History: A Selection of Documents From A.D. 600 to the Present* (New York: Harper & Row, 1937) at 427-429.

[163] Berman, *supra* note 85, at 1677.

[164] (1610), 77 E.R. 646 (K.B.).

[165] "The censors cannot be judges, ministers and parties: judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture...." (1611) 11 E.R. 646, at 652.

Coke went further to say that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void,"[166] implying that courts could declare an Act of Parliament void if contrary to the common law. This single sentence has spawned volumes of commentary, on what the phrase means and whether Coke had laid the foundation for the modern (and American) practice of constitutional judicial review.[167]

We may never know precisely what Coke meant and I do not intend to rehearse old debates here. For our purposes, it is enough to say that if *Bonham's Case* is placed within Coke's broader understanding of the ancient constitution, the idea that immemorial common law principle could, in certain instances, be "adjudged" superior to present written law was conceivable enough to warrant debate among historians over the years,[168] as well revival in the work of modern scholars of "fundamental law" like Professor Trevor Allan.[169] One should not forget Sir Thomas Hedley's remarkable speech to the English Parliament in 1610, where he declared that "the parliament hath... power and authority from the common law" and that the authority of the common law was established through the test of time: "Time is wiser than the judges, wiser than the parliament, nay wiser than the wit of man."[170] Hedley even denied Parliament the power to "abrogate the whole [common] law", as Parliament's power itself "hath by the common law".[171] If ancient common law liberties were thought to limit the "natural reason" of the King, it seemed only a short step further that they might also limit certain legislative excesses of Parliament.

Though much has been written on the politics of the ancient constitution, Pocock's summation remains best: while unclear if ancient constitutionalists like Coke or Hale wished to "protect" the common law from "the legislature", Pocock was "doubtless" that both wanted to "protect it from the natural reason of a sovereign acting outside due process".[172] Berman similarly concluded:

> Coke relied on history not only as a check against the arbitrary exercise of power but also as a guide to determining the limits and channels of political and legal authority. He was concerned to find legal guidelines not only for

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[166] *Bonham's Case*, *supra* note 164, at 652.

[167] For a brief assessment of these debates, with citations included, see D. J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence" (2003) 21 *Law and History Review* 439 at 441-442.

[168] Berman, *supra* note 85, at 1686, notes. 92-93.

[169] T. R. S. Allan, *Law, Liberty and Justice -- The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993); *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003).

[170] Reprinted in Pocock, *supra* note 72, at 271-272.

[171] *Ibid.*, at 271.

[172] *Ibid.*, at 339.

> the Crown but for all branches of government, including Parliament and the judiciary itself.[173]

The ancient constitution was a means to limit and oppose arbitrary power.

These same motives were the politics of Ivan Rand's ancient constitutionalism. He believed that nothing was more "significant and essential" to the judicial task than courage.[174] Rand even explicitly cited Coke's confrontation with James I as the epitome of judicial courage.[175] As the sovereign, King James wielded great powers and had little tolerance for dissent, often threatening and intimidating those who opposed his actions, notwithstanding how abusive or arbitrary. Coke, with nothing but the common law at his side, courageously stood up to James by appealing to the authority of ancient law and custom to limit the King's powers.

Rand in many ways followed Coke's example. Though criticized as confused and legally problematic, his "implied rights" judgments were nonetheless praised as courageous and innovative. These decisions often involved Rand championing the rights of unpopular minority groups like the Jehovah's Witnesses against the oppressive excesses of Duplessis' Quebec government.[176] The padlock laws in *Switzman*, the restrictions on pamphleteering and religious speech in *Saumur*, the arbitrary and abusive licensing regulations in *Roncarelli*; all of these cases involved the kinds of arbitrary abuse of power that Coke aimed to curtail with the ancient constitution.

Rand was also aware of Coke's decision in *Bonham's Case*, and its "ratio" that courts had authority to "adjudge" Acts of Parliament void for being contrary to unwritten legal principles. He wrote:

> The 17th century gloss of "the law of the land", used in the charter [of 1215], expressed as "due process of law", made to serve the purpose of a commanding legal figure, was conceived to inhere as reason in the human establishment of England, as fixed precepts and principles of law by which the Sovereign himself was bound; natural law written in the constitution of man as part of nature, and expressing itself in the unwritten law, which not even the statutes of parliament could abridge, abrogate or supersede without due process, statutes which the courts of common law could pronounce null and void: *Bonham's Case* 8 Coke 114a, 118a. His pronouncement in that case not even his authority associated with Magna Carta could sustain; but it

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[173] Berman, *supra* note 85, at 1689.

[174] Rand, "Independent Judiciary", *supra* note 107, at 8.

[175] *Ibid.*, at 8.

[176] Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929 - 1960* (Montreal: McGill-Queen's Press, 2003) at 112-114.

> is an historic assertion that even in the 19th century exercised a remarkable influence....[177]

Such is the evidence that Rand believed his concept of unwritten and implied rights could not be limited by either level of government. So, might Rand have used Coke's "pronouncement" in *Bonham's Case* as a template for these implied interests? He did not cite the case in his decisions, but that was expected because the case was a fairly old English precedent. Moreover, if Rand shared Coke's "politics" for appealing to unwritten law to limit abuses of power, he might also have shared the controversial suggestion in *Bonham's Case* that parliamentary authority might be trumped by unwritten law.

Indeed, while historians may question the scope and meaning of *Bonham's Case*, the decision has nevertheless become an important precedent for modern lawyers and scholars aiming to challenge parliamentary sovereignty.[178] For fundamental law scholars like Professor Allan, *Bonham's Case* offers both historical support *and* legal reason to suggest that parliamentary sovereignty was not as supreme as its advocates, like Dicey, proclaimed.[179] Modern ideas of fundamental rights take on a powerful new interpretation through the lens of *Bonham's Case*, and its controversial suggestion that courts can "adjudge" Acts of Parliament void based upon unwritten legal principles.

There is no need, however, to overestimate the importance of *Bonham's Case* in Rand's legal thought. There is enough evidence in Rand's judicial and extra-judicial writings that he employed many aspects of ancient constitutional thought and we need not surmise too much from his awareness of this controversial case. The purpose of this discussion has not been to show Rand adopted the politics of ancient constitutionalism entirely, but merely to draw some parallels between these ideas and the apparent politics of Rand's famous use of unwritten and implied rights.

Throughout history, Berman suggested, we find others like Coke, those men and women of the law with the courage and determination to stand up to arbitrary authority and oppression:

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[177] I. C. Rand, "Except by Due Process of Law" (1961) 2 *Osgoode Hall Law Journal* 171, at 177.

[178] Allan, *Constitutional Justice, supra* note 169. Mark Walters noted Allan quoted *Bonham's Case* on the front page of *Constitutional Justice*: M. D. Walters, "Review— Common Law, Reason, and Sovereign Will" (2003) 53 *U.T.L.J.* 65 at 68; and J. R. Stoner, Jr, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992). Thomas C. Grey, " Origins of The Unwritten Constitution: Fundamental Law in American Revolutionary Thought" (1977-1978) 30 *Stanford Law Review* 843, at 868, wrote that *Bonham's Case* was treated by American courts as a "judicially enforceable higher law" and became a direct forerunner of judicial review.

[179] *Ibid.*, Walters at 66-67.

> One may find parallels in twentieth century authoritarian regimes, where courageous persons have stood up against oppressive dictatorships, challenging them to live up to their own laws.[180]

I would argue that Rand was one such example.

V. REVISITING RAND'S LEGAL THOUGHT

The foregoing discussion has not meant to paint Rand as an ancient constitutional lawyer, applying ideas of the seventeenth century to circumstances of modern Canadian constitutionalism; nor has it intended an exhaustive account of ancient constitutionalism. Rather, it sheds light on an important and overlooked component of Rand's legal thought. In fact, Rand shared many of the ancient constitutionalists' ideas and assumptions about the law: (a) he often defined unwritten "implied rights" with reference to ancient liberties and custom; (b) described the idea of law as "artificial reason", that is, as embodying accumulated wisdom and experience of judges and lawyers through the centuries; (c) linked his unwritten and implied rights to the structures of Parliament; and (d) shared some of the politics of Coke and the ancient constitutionalists who aimed to limit excesses of sovereign powers.

This discussion also has offered answers to the two questions posed at the outset. The first question concerned troubling implications of Rand's "implied rights". I offered evidence that Rand understood his unwritten and implied rights as beyond the legislative capacity of all levels of government; but this raised troubling questions about *how* he could believe such things, given that Canada inherited Britain's legal tradition, characterized by parliamentary sovereignty. To this, the historian or well read English lawyer would say that the British constitutional tradition was not always characterized by supremacy of Parliament, notwithstanding claims by later-Victorians like A. V. Dicey and more recent advocates. Lawyers in the seventeenth and, in some quarters, eighteenth centuries, believed in the authority of ancient and immemorial custom as fundamental law, which bound the King and, arguably, even Parliament.

If we approach Rand's concept of implied rights through the lens of ancient constitutionalism, his belief (implied in judgments and expressed explicitly in extra-judicial writings) in certain implied or unwritten rights and liberties, as protected by the common law and embodied in the structures of parliamentary government, appeared less controversial and problematic in the face of Canada's purported inheritance of the

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[180] Berman, *supra* note 85, at 1677-78.

British tradition of "parliamentary sovereignty"; for that tradition had a much more complicated history than Rand's critics have acknowledged or allowed.

Ancient constitutionalism also offered a simple answer to the second question, about the puzzling way that Rand linked his unwritten and implied rights to the structures of Parliament. This, as explained earlier, was a common feature of ancient constitutionalism. Rand's unwritten and implied rights were indeed "original freedoms", but not free-standing or independent constitutional norms. Rather, they were ancient and original rights of free people that, over the centuries, became embodied and protected in the important social institutions of the broader community: the common law and the parliamentary institutions of government. Thus, these original freedoms were "inseparable" from "our form of [governmental] organization".[181]

It is unclear whether Rand was consciously or unconsciously deploying ancient constitutional ideas in his work. Balcome, McBride and Russell have concluded that, in attempting to champion the rights and interests of unpopular groups, Rand struggled with the complicated task of reconciling American and British legal traditions.[182] Understandably, scholars have been perplexed by Rand's references to natural law, the common law, and seemingly modern forms of rights, leading them to conclude that his ideas were muddled or confused. I have tried to offer a coherent explanation for these references in this article. As such, Rand was not reconciling anything, nor mixing natural law or rights, only deliberately appealing to an important aspect of the British common law tradition he sincerely believed was received by Canada, if not by the common law, then by the Preamble to the *BNA, 1867*, which required a constitution "similar in principle" to that of the United Kingdom.

On the account presented here, we should conclude, against critics, that Rand was neither confused nor muddled in his ideas. He was simply better read, or simply more interested, in the history of English common law constitutionalism than his contemporaries, and employed ancient constitutionalism to protect and preserve the rights and interests of Canadian citizens in the turbulent post-war era. Rand was, after all, "deeply read in both literature and history, as well as in legal philosophy"[183] Then, we might see Rand as an early scholar of fundamental law, thinking and writing decades ahead of later scholars whose ideas would transform constitutional debates in Britain and elsewhere in the Commonwealth.[184]

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[181] Rand, "Man's Right", *supra* note 41, at 167.

[182] Balcome, McBride and Russell, *supra* note 14, at 129-131.

[183] Cartwright, *supra* note 16, at 158.

[184] I am not the first to suggest this. Weinrib also believed Rand was ahead of his time, advocating a judicial approach later affirmed in the *Charter* era: Weinrib, *supra* note 7, at 704.

Finally, this discussion has offered insight into the minds of Canadian legal scholars of the period in which Rand was writing. Most scholars, impressed by Rand's education at Harvard, explained his ideas in terms of American-style rights, judicial review, and the legal realism of Brandeis or Pound. Only Michael Schneiderman, in a 1968 article,[185] took a slightly different approach, exploring Rand as a proponent of natural law; but even this analysis was light on English law or theory, offering instead a comparison to American Supreme Court Justice Hugo Black. Why was "ancient constitutional thought" not identified in Rand's writings before? Why were Rand's English legal interests and influences, like Coke, so neglected? The 1950s and 1960s were an interesting time in Canadian academia. As legal historian Philip Girard has documented, the "post-war generation" of Canadian legal scholars was intent on bringing "modernity" to Canadian law and education with an important shift in perspective:

> Modernity would be achieved by lessening the colonial dependence of Canadian lawyers and judges on English law-ways and by opening up Canadian law to other influences, especially but not exclusively American ones.[186]

In other words, Canadian scholars were turning away from the English legal tradition and focusing on other influences, "especially" American ones. Finding that Rand's "English law-ways" were neglected by scholars is consistent with Girard's thesis.

In a typically eloquent passage discussing the "shadowy provisional postulates" underlying "all systems of social law", Rand made a cryptic statement about the course of life: "Our lives are said to be rounded with a sleep and a forgetting, but they are couched also in assumptions".[187] This is, in fact, a subtle reference to the fifth stanza of William Wordsworth's *Ode: Intimations of Immortality*:

> Our birth is but a sleep and a forgetting:
> The Soul that rises with us, our life's Star,
> Hath had elsewhere its setting,
> And cometh from afar:
> Not in entire forgetfulness,
> And not in utter nakedness,
> But trailing clouds of glory do we come
> From God, who is our home:
> Heaven lies about us in our infancy!

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[185] Schneiderman, *supra* note 56.
[186] P. Girard, "Who's Afraid of Canadian Legal History?" (2007) 57 *U.T.L.J.* 727 at 730.
[187] Rand, "Independent Judiciary", *supra* note 107, at 4.

More than anything, Rand's ideas continue to challenge our assumptions, legal or otherwise, that perpetuate the forgetting that Wordsworth laments; an appeal to a line of constitutional thought should not be lost in the "trailing clouds" of a distant history.