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Complexifying *Roncarelli*'s Rule of Law

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Résumé de l'article

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COMPLEXIFYING *RONCARELLI*'S RULE OF LAW

*Robert Leckey**

The accepted reading of *Roncarelli v. Duplessis* requires revision. Accounts by which Justice Rand defended the rule of law while the dissenters were indifferent to it mischaracterize the judgment. Justice Rand's judgment is bolder and less explicit than is typically supposed: his treatment of the notice requirement constitutes part of his defence of the rule of law. For its part, Justice Fauteux's dissent enacts a plausible understanding of the judge's role within the rule of law. Disagreement on the overlooked procedural issue is best viewed as fully internal to the rule of law. The judgment's relevance for rule of law scholars is its exemplification of the possibility for rule of law impulses to conflict, making it a much richer and more interesting text. Scholars' dismissiveness toward the procedural issue reveals an unsatisfactory view on the part of legal scholars, one by which judges simply apply the rule of law, rather than being also themselves constrained by it.

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Introduction

A great judgment's fiftieth anniversary occasions reflection on the practices of reading accumulated around it. Scholars and judges repeatedly cite Justice Rand's clarion warning in *Roncarelli v. Duplessis* against the "beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."[1] Scholars of the rule of law have studied the opposition between his repudiation of "absolute and untrammelled" discretion and Justice Cartwright's characterization, in dissent, of the liquor commission's discretion as "unfettered".[2] But few see this opposition as a live debate: casebooks excerpt Justice Rand's reasons as exemplary of the rule of law, and Justice Cartwright appears as standard bearer for a discredited view.[3] *Roncarelli* has come to stand for one issue, executive discretion as constrained by the rule of law, and a one-sided issue at that. Its other issues lie in relative neglect, including the requirement in article 88 of Quebec's *Code of Civil Procedure* for thirty days' notice in suits against public officers.[4] Roncarelli's lawyers had passed much

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1 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142, 16 D.L.R. (2d) 689 [*Roncarelli* cited to S.C.R. unless specified otherwise; reasons issued in French are also cited to the English translation in the D.L.R.].

2 *Ibid*. at 140, 167; David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 U.N.B.L.J. 111 at 125-32 [Dyzenhaus, "Deep Structure"].

3 See e.g. The Constitutional Law Group, *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 640-44; F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3d ed. (Calgary: University of Calgary Press, 2002) at 8-13; Pierre Lemieux, *Droit administrative : doctrine et jurisprudence*, 4th ed. (Sherbrooke: Revue de Droit de l'Université de Sherbrooke, 2006) at 695-700 (unusual for also quoting a bit of Martland J.'s reasons). But see Lorne Sossin, "The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55 McGill L.J. 661 (on subsisting areas of "untrammelled" public regulation).

4 Article 88 C.C.P. read:

No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.	*Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.*
Such notice must be in writing; it must state the grounds of the action and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.	*Cet avis doit être par écrit : il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.*

of the six months' prescription period in the pursuit of public-law recourses requiring authorization that was withheld before they turned their minds to a claim in civil liability against Duplessis personally. When they eventually did so, the prescription period left them less than the thirty days for the required notice.[5] If they think of it, readers today regard this procedural matter, like the question of discretion, as unevenly weighted. On one side stands Justice Rand, the rule of law's champion, whom the "obstacle" posed by article 88 "did not bother ... for more than a moment";[6] on the other, narrow-minded, formalist judges who disposed of the case on "purely technical grounds."[7]

This accepted reading of the judgment requires revision. Accounts by which Justice Rand and the other majority judges defended the rule of law while the dissenters were indifferent (if not hostile) to it mischaracterize the judgment. Such accounts advance an understanding of the rule of law that is partial in both main senses. Uncritical acceptance of the majority judges' presentation of the procedural issue as straightforward has impoverished scholars' appreciation of the case. Justice Rand's judgment—which should be not only praised, but parsed—is bolder as well as less explicit than typically supposed. For its part, Justice Fauteux's dissent, in which he regards the legislature's procedural rule as preventing him from doing justice for the plaintiff, should be seen as enacting a particular, defensible understanding of the rule of law, one consistent with recent sophisticated accounts of limits on the judicial role. Disagreement on the notice requirement, then, is appropriately viewed as a debate fully internal to the rule of law. Understood better, *Roncarelli*'s relevance to the rule of law is not solely the incandescent, unequivocal rightness of Justice Rand's reasons, but rather its exemplification—in the contrast between his opinion and Justice Fauteux's dissent—of the possibility for rule of law impulses to conflict. The judgment is thus a much richer and more interesting rule of law text than scholars credit. Moreover, scholars' dismissiveness toward the procedural issue reveals an unsatisfactory view on their part, one by which judges simply apply the rule of law, rather than being also themselves constrained by it. The failure to recognize Justice Rand's treatment of the procedural rule as a key part of his performance suggests the need for rule of law scholars—reading as both philosophers and lawyers—to expand the judicial conduct of interest to them so as to include so-called technicalities.

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5 Sandra Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland and Stewart, 1987) at 308-309.

6 Dyzenhaus, "Deep Structure", *supra* note 2 at 124.

7 Randall P.H. Balcome, Edward J. McBride & Dawn A. Russell, *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 283.

I. The Notice Requirement as Disputed

By demonstrating that article 88 presented "compelling and real" issues,[8] this part aims to unsettle the accepted wisdom that on that matter the majority adopted the sole credible option. It would follow that the dissenters who relied on article 88 cannot be dismissed as partisans of mere proceduralism or as having dressed in procedural garb their preference for Duplessis on the merits. Mention of the rule of law evokes its ostensible opposite, rule by men. In this instance, rule by men is usually detected in the premier's usurpation of the power to revoke a liquor permit. Recovering article 88 as genuinely disputed will show that the damages award sanctioning the abuse of executive power did not emerge from an uncontroversial, syllogistic deduction from the premises of legal rules. Instead, that award resulted from several men's—the majority judges'—contingent, and contestable, human judgment.[9]

Article 88 attracted competing interpretive considerations. As noted by both dissenting judges, the rule's imperative character called for courts to raise lack of notice *ex proprio motu*. The clause "nor can any verdict or judgment be rendered" limited the court's jurisdiction.[10] While a provision's imperative character cannot dictate whether its terms properly encompass a particular act, it alerts judges to the possibility that, on its best reading, it might constrain them. It manifests the drafter's contemplation that the rule would sometimes preclude the issuing of a judgment otherwise appropriately rendered. Considerations also pulled the other way. Article 88's character as an exception from the law of general application for the benefit of a class arguably subjected it to strict interpretation in the plaintiff's favour.[11] While neither consideration dictated an outcome, together they signalled the need for a more than cursory interpretation.

At trial, Justice Mackinnon found that Duplessis was not entitled to avail himself of article 88 on the basis that his "were not acts 'in the exercise of' but 'on the occasion of public duties'."[12] At the Quebec Court of Appeal, where four judges allowed Duplessis's appeal, the dissenting judge, Justice Rinfret, agreed with the trial judge on article 88.[13] The majority judges at the Supreme Court of Canada held likewise that Duplessis was

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8 Claude-Armand Sheppard, "*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized" (1960) 6 McGill L.J. 75 at 92, reprinted in (2010) 55 McGill L.J. v.

9 For a reading of the judgment as situated demographically and ideologically, see Roderick A. Macdonald, "Was Duplessis Right?" (2010) 55 McGill L.J. 401.

10 *Roncarelli*, *supra* note 1 at 176 (S.C.R.), at 723 (D.L.R.).

11 Philippe Ferland, "Le préavis à l'officier public (art. 88, 97 et 429 C.P.)" (1945) 5 R. du B. 476 at 477.

12 *Roncarelli v. Duplessis* (1951), [1952] 1 D.L.R. 680 at 700 (Qc. Sup. Ct.) [*Roncarelli (Sup. Ct.)*].

13 *Duplessis v. Roncarelli*, [1956] B.R. 447 at 518 (C.A.).

not entitled to the notice. They seem to have regarded the matter of article 88 as straightforward. On Justice Rand's understanding, the act underlying Roncarelli's claim "was quite beyond the scope of any function or duty" entrusted to Duplessis, "so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it."[14] In Justice Martland's fuller discussion, he referred to his prior conclusion on the merits that Duplessis's declared belief that he had acted within his official functions failed to justify his conduct. Justice Martland reasoned that the classification of acts as within or without the exercise of a public officer's functions was to be determined not on the officer's appreciation, subjectively, but according to law, objectively. For authority, he cited an English court's denial of notice to a justice of the peace on the basis that he had acted absent any authority, despite his belief to the contrary.[15] Justice Abbott, the sole Quebec judge to side with the majority, cited two Quebec authorities in support of his view that article 88 applied only to public officers who, unlike Duplessis, had had "reasonable ground" for believing their act to fit within their authority.[16]

Two dissenting judges, Justices Taschereau and Fauteux, would have disposed of the appeal by finding that the failure to give notice barred the plaintiff's claim. On the merits, however, they held opposing views. Justice Taschereau hinted that he would have regarded withdrawing the permit as within the Liquor Commissioner's discretion.[17] By contrast, had proper notice been given, Justice Fauteux would have accepted Roncarelli's claim.[18] Justice Taschereau held that, however the premier might have influenced the liquor commission, he remained a public officer, acting in the exercise of his functions. That italicizing the statutory language was Justice Taschereau's chief justificatory method indicates his sense that in the circumstances, article 88 required mere reading and application, not interpretation.[19]

Justice Fauteux's dissent provides an ampler challenge to the majority's determination that Duplessis's order to the liquor commission oc-

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14 *Roncarelli*, *supra* note 1 at 144.

15 *Ibid*. at 158-59, citing *Agnew v. Jobson* (1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.

16 *Roncarelli*, *supra* note 1 at 186, citing *Lachance c. Casault* (1902), 12 B.R. 179; *Asselin c. Davidson* (1914), 23 B.R. 274.

17 *Roncarelli*, *supra* note 1 at 129 (S.C.R.), at 695 (D.L.R.).

18 *Ibid*. at 174 (S.C.R.), at 721 (D.L.R.).

19 *Ibid*. ("*l'intimé ... demeurait quand même un* officier public, agissant dans l'exécution de ses fonctions" S.C.R. at 129 [emphasis in original]; "the respondent remained nevertheless a *public officer acting in the performance of his duties*" D.L.R. at 695 [emphasis in original]). On the distinctions between application and interpretation, see Paul-André Crépeau, "Essai de lecture du message législatif" in *Mélanges Jean Beetz* (Montreal: Thémis, 1995) 199.

curred outside "the exercise of his functions."[20] On his view, several, mutually reinforcing bases led to the understanding that the set of acts within the exercise of a public officer's functions for the purposes of article 88 was larger than the set of acts authorized or reasonably believed to be so. That is, statutory authorization for the contested act or reasonable belief therein could not be the criterion for applying article 88. Conversely, excess of jurisdiction or the ultra vires character of conduct could not be the basis for denying the defendant its benefit. The following paragraphs draw on Justice Fauteux's dissent but have reorganized the justifications for his conclusion. While heuristically useful, the separation of these bases is artificial.

At the outset, recall that article 88 refers to a suit against a public officer "for damages" and that the claim against Duplessis was one under the general provision on extracontractual liability, article 1053 of the *Civil Code of Lower Canada*.[21] Article 88 was not directed at a public law action aiming to quash an administrative decision.

One basis for Justice Fauteux's conclusion was the text of the *Code of Civil Procedure*. Read as internally consistent, it provided clear grounds for supposing that acts performed by a public officer could be illegal and nevertheless within the exercise of official functions. Article 429 contemplated that a judge could order the relocation of the trial of a public officer sued for damages "by reason of any illegal act done by him in the performance of his functions."[22] An act's alleged illegality could, then, coexist with its having been committed in the performance or exercise of official functions.[23] Indeed, in Justice Fauteux's view, the drafters of article 88 had assumed that those for whose benefit it would operate would have committed an illegality for which they would be accountable.[24]

A second basis for separating the exercise of functions from an act's validity resulted from comparing article 88 with related statutory regimes. Comparison with previous and existing analogous rules revealed grounds for supposing that article 88's application should not have de-

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20 Art. 88 C.C.P.

21 Art. 1053 C.C.L.C. ("Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill").

22 Art. 429 C.C.P.; *Roncarelli*, *supra* note 1 at 178 (S.C.R.), at 725 (D.L.R.).

23 Fauteux J. noted the similar language in art. 1054 C.C.L.C. in respect of the vicarious liability of masters and employers, but reasoned that art. 88 C.C.P.'s purely procedural effects distinguished it from the substantive liability under the former. *Ibid.* at 177-78 (S.C.R.), at 724 (D.L.R.).

24 *Ibid.* at 178 (S.C.R.), at 725 (D.L.R.). A Quebec Superior Court judge had thought it obvious that art. 88's core beneficiaries included officials having brought litigation on themselves by maliciously abusing their functions (*Charland c. Kay* (1932), 70 C.S. 249 at 251, [*Charland (Sup. Ct.)*], aff'd (1933), 54 B.R. 377 (C.A.) [*Charland (C.A.)*]).

pended on the public officer's reasonable belief that he was acting within valid authority, framed as the question of good faith. A Lower Canadian statute had stipulated for justices of the peace, magistrates, and other officers a month's notice prior to a suit as well as a subsequent right to tender amends to the plaintiff and, if the plaintiff refused, to the court. That statute had conditioned its "privileges and protection" on the public officer's having acted "*bonâ fide* in the execution of his duty."[25] By the time of *Roncarelli*, two distinct but interlocking regimes had descended from that statute. Article 88 stipulated the month's notice but said nothing about good faith. The *Magistrate's Privilege Act* continued the right to tender amends within the month following the notice required by article 88, but it conditioned that right on the public officer's having "acted in good faith in the execution of his duty."[26] Relying on authority from the Quebec Court of Appeal,[27] Justice Fauteux reasoned that, in renovating the pre-Confederation regime, the legislature had confined the right to tender a settlement to officers who had acted in good faith, while extending article 88's notice requirement less selectively.[28]

A third basis for separating the exercise of official functions from the scope of valid authorization derived from the concern not to nullify article 88. Justice Fauteux cautioned against associating the right to notice with justification for the act.[29] On his view, a determination that a public officer was entitled to the benefit of notice, like one that it was appropriate to relocate his trial under the provision already noted, operated independently from any assessment as to the merits of the case against him. If not, a mere allegation of bad faith might render article 88's protection "illusory":[30] such an action without notice would necessarily go to trial in order to determine whether or not the failure to have given notice should bar the action. Moreover, only those defendants who would ultimately be found not liable would be found entitled to notice. The respondent had argued to this effect on the basis of article 88's stipulation that no "verdict or judgment" could be rendered against a public officer failing notice. He contended that article 88 contemplated an illegal act since it anticipated a

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25 *An Act for the protection of Justices of the Peace, Magistrates and other Officers, in the performance of public duties*, C.S.L.C. 1861, c. 101, ss. 1, 8.

26 *Magistrate's Privilege Act*, R.S.Q. 1941, c. 146, s. 8. The judges of the Supreme Court of Canada were fully aware of this condition, which had proven decisive in another Jehovah's Witnesses case. See *Chaput v. Romain*, [1955] S.C.R. 834 at 850, 853, 856, 862, 1 D.L.R. (2d) 241 [*Chaput*].

27 *Corporation de la Paroisse de St-David de l'Auberivière c. Paquet* (1936), 62 B.R. 140 (C.A.).

28 *Roncarelli*, *supra* note 1 at 179-80 (S.C.R.), at 725-26 (D.L.R.).

29 *Ibid*. at 179 (S.C.R.), at 725 (D.L.R.).

30 *Houde c. Benoit*, [1943] B.R. 713 at 725 (C.A.). See also *Charland (C.A.)*, *supra* note 24 at 378-79.

verdict or judgment, "while no action in damages can exist and no judgment can be rendered if the act is performed within the limits of the functions of the public officer and therefore is perfectly legal."[31] That is, article 88's bar to the rendering of a verdict or judgment would have teeth only where a verdict or judgment would otherwise be rendered—and rendered for wrongdoing. Denying the benefit of article 88 on the basis of want of jurisdiction would render that provision "nugatory".[32] Specifically, Justice Fauteux held that the majority wrongly collapsed the article 88 inquiry with its conclusion that Duplessis had committed a fault. The collapse is plainest in Justice Martland's reference, while addressing article 88, to his determination on the merits, though it also infected the reasons of Justices Rand and Abbott.

A fourth, related basis for Justice Fauteux's conclusion was provincial jurisprudence interpreting article 88. Justice Fauteux acknowledged the historical conflict in the case law on article 88 and its predecessors as to the place of the public officer's good faith (his belief that he had acted within his authorization). Since 1933, however, Quebec courts had segregated the procedural question from the merits, consistently viewing the public officer's good faith as irrelevant.[33] Justice Fauteux identified a legislative amendment in 1929 as the decisive factor having led to this development. It required that every inscription of law be disposed of "without ordering proof and without reserving it for decision on the merits."[34] If the defendant's inscription in law—i.e., his claim that notice under article 88 had not been given—required adjudication without evidence, in advance of the decision on the merits, it could not turn on a substantive, evidence-based evaluation of the defendant's conduct.[35]

These concerns of Justice Fauteux's are more negative than positive. They are not reasons for affirming that the telephone call to the Liquor Commissioner fell within the exercise of Duplessis's functions. They do,

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[31] *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (Factum of the Respondent at 41) [*Roncarelli* FOR].

[32] Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Oxford: Clarendon Press, 1965) at 144.

[33] *Charland (C.A.)* (*supra* note 24) was referred to by Ferland as the jurisprudential "*coup de barre de 1933*": Ferland, *supra* note 11 at 489. See also *Houde c. Benoit*, *supra* note 30.

[34] *An Act to amend the Code of Civil Procedure respecting inscription in law*, 19 Geo. V, c. 81, s. 1. An inscription in law is a substantive means of contestation (as opposed to a preliminary exception). Article 191 C.C.P. stated: "An issue of law may be raised as to the whole or part of the demand whenever the facts alleged or some of them do not give rise to the right claimed."

[35] The submission of evidence for determining inscriptions in law having been precluded, further support against the relevance of good or bad faith to art. 88 C.C.P. derived from art. 2202 C.C.L.C. "He who alleges bad faith must prove it": *Roncarelli*, *supra* note 1 at 179-80 (S.C.R.), at 725-26 (D.L.R.).

though, raise doubts about the majority's determination that the lack of authorization for the act necessarily and self-evidently placed it outside the exercise of his functions.

More positively, the legislative intention that article 88's availability be decided before trial called for two distinguishable approaches to characterizing Duplessis's conduct: one, more superficial, without evidence, for the purpose of article 88; the other, more searching, for the claim in civil liability at trial. The procedural determination arguably should have relied on a rough-and-ready criterion, devised in openness to the possibility that an action done "in the exercise of his functions" might well turn out, on scrutiny at trial, to have been illegal or otherwise unauthorized and thus a basis for civil liability.[36]

The reasons of those judges who concluded that Duplessis was not entitled to the benefit of article 88 indicate that his act might have satisfied such a crude criterion. After all, the Liquor Commissioner "obeyed" Duplessis only because he believed the premier to have instructed him in an official capacity.[37] A telephone call by the Attorney General to a public official appears to be an exercise of his functions. It looks a good deal more like government business than, say, conduct in previous cases where courts had found article 88 inapplicable, such as violent assaults by a liquor commission employee or by a policeman.[38] Awareness that Duplessis's call to the Liquor Commissioner appeared to be part of the valid exercise of his functions likely led the trial judge to use the category of acts "on the *occasion* of public duties."[39] Without acknowledgement, this approach departed from the Quebec Court of Appeal's earlier view of official and personal conduct as exhaustive categories.[40]

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36 The risk of collapsing the procedural question with the merits was lesser where the norms of reasonable conduct were not coterminous with the bounds of enabling legislation. See e.g. *Beauchemin c. Weir* (1938), 44 R.J.Q. 468 (Sup. Ct.) (determination that a police officer's collision with a citizen's car occurred in the exercise of his functions distinct from the assessment on the merits of his driving as diligent or negligent).

37 Rubinstein spoke of the quandary that "disturbs the whole structure upon which this branch of the law has been founded" (*supra* note 30 at 132). If the basis of liability in tort is that a public officer exceeded his power, his unauthorized order should have carried no more weight than that of any private person.

38 See respectively *Houde c. Côté* (1925), 28 R.P.Q. 27; *Pednault c. Buckingham* (1899), 5 R.J.Q. 40, 1 R.P.Q. 279.

39 *Roncarelli (Sup. Ct.)*, *supra* note 12 at 700.

40 *Houde c. Benoit*, *supra* note 30 at 719 ("*pour déterminer le caractère de ces fonctions publiques, il suffit de se demander si l'acte accompli résulte du mandat confié à cet officier ou si ce dernier n'a fait qu'agir en une qualité* purement personnelle" [emphasis added]). The trial judge's distinction appears, however, in Ferland (*supra* note 11 at 484) and is cited in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (Factum of the Appellant) [*Roncarelli* FOA].

This elaboration of the complexities of article 88 invites reassessment of the judgments in *Roncarelli*.

II. Rereading the Judges

The richness of considerations engaged by article 88 might instigate criticism of the majority judges' treatment of that rule. It is arguable that the notice requirement called for more than Justice Rand's "almost cursory"[41] rejection of Duplessis's submissions on article 88 "as if the conclusion was obvious."[42] Justice Taschereau's dissenting view that it was plain on the face of the text that article 88 applied to Duplessis ought to have alerted Justice Rand against taking resolution of the procedural question in the plaintiff's favour as axiomatic. In any event, article 88 was not a tabula rasa to be interpreted by sole reference to its text. In the light of decades of jurisprudence by Quebec courts, Justice Rand's disposition of article 88 without citing a single authority, Justice Martland's citation of a nineteenth-century English case, and Justice Abbott's citation of Quebec judgments from 1902 and 1914 fall short of the standard of respectful adjudication. The majority judges did not engage with the legal texts made by others in the past that had a claim to be viewed as authoritative.[43] Yet rather than belabouring such criticisms, it is more fruitful to revise the received understanding of the means by which the majority judges upheld the rule of law.

Realization that the notice requirement was a close call complicates the prevailing view that the rule of law's vindication consisted chiefly in the majority judges' restoration of the disposition by the trial judge of the civil liability claim on the merits. A better appreciation of Justice Rand's reasons would no longer suppose that, the heavy rule of law lifting done, he dismissed article 88 in a single paragraph because it was easy. It would acknowledge that his advisedly choosing to say so little about that rule—to cite neither the cases pleaded by the parties, nor the companion

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41 Balcome, McBride & Russell, *supra* note 7 at 54.

42 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 72.

43 On this "interpretive and compositional," "radically literary" activity of placing texts "in patterns of what has been and what will be," see James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 91. While precedent is less authoritative in civil law than in common law jurisdictions, and the judgments of the Quebec Court of Appeal are not binding on the Supreme Court of Canada, a "*jurisprudence constante*" from Quebec has nevertheless a claim to be taken seriously by the Supreme Court of Canada: Albert Mayrand, "L'autorité du précédent au Québec" in *Mélanges Jean Beetz*, *supra* note 19, 259 at 268. The facta submitted to the Supreme Court of Canada show that counsel for Roncarelli and Duplessis, who pleaded numerous cases on art. 88 from the Quebec Superior Court and the Quebec Court of Appeal, viewed it as a live issue inviting vigorous argument: *Roncarelli* FOA, *supra* note 40 at 73-79; *Roncarelli* FOR, *supra* note 31 at 40-41.

case on Jehovah's Witnesses and another procedural rule decided the same day[44]—was itself integral to his upholding the rule of law. Brushing aside the notice requirement so as to allow judgment on the merits amounted to more judicial action than scholars recognize who have not traced article 88's history. Consequently, readers who applaud Justice Rand for his treatment of discretion and official liability while dismissing article 88 as easy underestimate the extent to which he defended the rule of law.[45]

If appreciating the seriousness of the procedural issue reveals Justice Rand's intervention to have been more robust than is usually acknowledged, it also tempers the praise lavished on it insofar as the reasons are less explicit than is generally supposed. Though eloquently transparent in the *obiter* discussion of discretion and the rule of law,[46] he was evasive in his treatment of article 88. The alternative courses available highlight Justice Rand's laconicism on the latter. He and the other majority judges might have explicitly overruled *Charland (C.A.)* and the other Quebec Court of Appeal judgments that had segregated the availability of article 88 from a public officer's good faith. Such an operation would presumably have needed to address the 1929 amendment requiring the determination of inscriptions in law, without evidence, before trial.

Alternatively, the majority judges might have articulated a narrower basis for denying Duplessis the benefit of article 88. This tack would have departed from forthright acknowledgement that, on the face of the rule's text and in the light of its prior judicial construction, Duplessis had at least a reasonable claim. Perhaps, in a determination that the "spirit of the rule of law demand[ed] that they place particularised justice ahead of systemic consistency,"[47] they would have justified their decision that, on balance, it was better to interpret article 88 as they did than to spare Du-

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44 *Lamb v. Benoit*, [1959] S.C.R. 321, 17 D.L.R. (2d) 369 [*Lamb*].

45 For recognition that Rand J.'s treatment of art. 88 was other than straightforward, see Peter H. Russell, "The Paradox of Judicial Power" (1987) 12 Queen's L.J. 421 at 428-29 (writing that the Court in *Roncarelli* granted a public law principle *precedence* over the rule of civil procedure). Talk of the public law principle's precedence over the procedural rule indicates Russell's awareness of an apparent conflict. On an appreciative reading, the companion case, *Lamb*, manifests "*l'ingénuosité des juges aux tendances libérales à contourner des technicalités de procédure et de prescription pour faire prévaloir la règle de droit sur l'exégèse excessive de la 'lettre de la loi'* ": B. Lacombe, Case Comment on *Lamb v. Benoît*, (1959) 6 McGill L.J. 53 at 53 [footnote omitted].

46 Given the conclusion that the liquor commission had not exercised its discretion at all, it is unquestionably correct to characterize all discussion of the exercise of discretion under enabling legislation as *obiter*: Sheppard, *supra* note 8 at 90.

47 Allan C. Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999) 196 at 217.

plessis from liability.[48] Such a balancing might, admittedly, have stood on tenuous authority: article 88's imperative language seemed to establish that it did not confer discretion on the courts to dismiss a claim on their assessment of the net effect on the rule of law.

Crucially, Justice Rand and his colleagues in the majority might have anchored a decision for the plaintiff on article 88 in a positive sense of that rule as "a purposive thing, serving some end or congeries of related ends."[49] Such a justification would have recognized article 88's connection to the right granted by the *Magistrate's Privilege Act* for a defendant public officer, having been given notice, to tender amends, either to the plaintiff or, if refused by the plaintiff, to the court. So regarded, article 88 had a role in encouraging expeditious, extrajudicial resolution of suits against public officers. Justice Rand might have recognized this legislative intention—one reconcilable with the instinct to interpret legislation consistently with rule of law values[50]—before proceeding to justify a conclusion that article 88 did not bar the claim. His justification might have been that matters of public record—such as Roncarelli's unsuccessful efforts to obtain authorization to sue the liquor commission or Commissioner—had already discharged the notice function of article 88. In substance, if not in form, Duplessis had been put on notice that, should he have wished to do so, he ought to have initiated negotiations with his intending plaintiff. That is, Duplessis unquestionably knew that, at least in Roncarelli's view, he had committed a wrong. Arguably, article 88's notice requirement had no further work to perform.

Given the substantial *non dit* in the majority judges' treatment of the procedural issue, it is fair to say that they "avoid[ed] making their commitments explicit"; those who oppose judicial minimalism contend, to the contrary, "that judges should reach their rule of law preserving conclusions by articulating fully the theory that sustains those conclusions."[51] On this view, if the judges reinterpreted article 88 "in the light of unwritten constitutional values,"[52] they ought to have said so. Meaningful en-

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48 Compare discussion of the "common sense approach" taken by courts in characterizing procedural rules for administrative tribunals as mandatory or directory, one that involves assessing prejudice to a party: Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 9-11.

49 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) at 146.

50 T.R.S. Allan, "Text, Context, and Constitution: The Common Law as Public Reason" in Douglas E. Edlin, ed., *Common Law Theory* (Cambridge: Cambridge University Press, 2007) 185.

51 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 67. See also *ibid.* at 15 [Dyzenhaus, *Constitution of Law*].

52 *Ibid*. at 91.

gagement with article 88 would have brought the majority judges into a richer engagement with the various dimensions of the rule of law. Such engagement might have led them to sketch the relationship between the need to sanction abuse of power and the institutional constraints on courts, among them procedural rules such as article 88, and respect for precedent. Justice Rand might have elaborated a sense that the rule of law includes a thick equitable component that mediates the power relations among the branches. This fuller articulation might have indicated how similar future facts would need to be so as to attract analogous creativity in departing from the established interpretations of other procedural rules. After all, he presumably did not intend implicitly to authorize an "absolute and untrammelled" discretion on the part of judges to blunt the effect of procedural rules in suits against the executive, but rather a constrained one.[53] Without announcing a principled basis for distinguishing the Quebec precedents in Duplessis's favour, the majority judges risked appearing biased.

Turning now to reread Justice Fauteux's dissent, the objective is not to persuade that he held correctly on article 88, all things considered (although arguably he did). Instead, more modestly, the intent is to rehabilitate his reasons as reflecting a credible understanding of the rule of law and the judicial role within it. His approach can be viewed as consistent with the understanding of limits on the judicial role in David Dyzenhaus's sophisticated contemporary scholarship on the rule of law.

Reassessment of Justice Fauteux's dissent departs from article 88's character as valid legislation, enacted under the province's exclusive power to legislate regarding civil procedure for its courts.[54] A notice requirement for public officers derogated from Dicey's idea that it is intrinsic to the rule of law that people of every rank be "subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[55] While article 88's effects were unwelcome to plaintiffs, its procedural protections fell far short of the substantive immunity of officials un-

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53 Might not the approving subsequent citation of the dissents by Quebec jurists reveal the sense that the majority judges' treatment of art. 88 reflected an inarticulate desire to do justice on unique facts rather than an advised intent to overturn established authority in this area? See *Hamel c. Richard*, [1967] R.L. 159 at 162 (C.Q.) (citing the interpretation of art. 88 C.C.P. by "*les savants juges Taschereau et Fauteux, dans la cause célèbre de* Roncarelli c. Duplessis"); *Landry c. Keable* (1959), [1960] R.P.Q. 241 at 247-48 (Sup. Ct.). See also Yves Ouellette & Gilles Pépin, *Précis de contentieux administratif*, 2d ed. (Montreal: Thémis, 1977) at 334, n. 4 (approving Fauteux J.'s dissent).

54 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(14), reprinted in R.S.C. 1985, App. II, No. 5.

55 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) at 193.

der the French *droit administratif* so repugnant to Dicey.[56] Its puzzle for the rule of law was less severe than that generated by privative clauses, which oppose the fundamental assumptions of parliamentary supremacy and that all delegated power is subject to reviewable legal limits.[57] However adept Duplessis might have been at maneuvering the legal resources at his disposal, article 88 was not a decree that he had issued in his own case. In one statutory form or another, it had predated the events in question by over a century, and in its orderly, public promulgation in the *Code of Civil Procedure*, it satisfied the "implicit laws of lawmaking."[58] Whether or not one agrees with Dyzenhaus that a law that explicitly overrides fundamental principles of the rule of law has "only a doubtful claim to legal authority,"[59] article 88 is distinguishable from such rules. Given its objectives in terms of extrajudicial dispute resolution and the ease with which a plaintiff could ordinarily satisfy its requirements, article 88 was far from "crazy, or at least close to being crazy."[60] Moreover, the language in article 88, read against the rule in article 429 on relocating a trial, was "very explicit language"[61] indicating that a public officer should enjoy procedural protections when sued for an alleged illegality.

Edward McWhinney saw Justice Fauteux's position as "a little like trying to have the best of both possible worlds."[62] He regarded him as relying on natural law to find a violation of a right, like the majority, but, unlike the majority, as "tak[ing] refuge in positivism" to deny a remedy.[63] McWhinney's is an impoverished view. It is possible to read Justice Fauteux as negotiating the competing demands to which he felt himself subject. He was faced with, on one hand, a public official's abuse of purported authority, and on the other, a validly enacted procedural rule limiting the court's jurisdiction. Arguably, he did his best to discharge his duty to uphold constitutional principles, a duty conditioned by "a political culture in

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56 *Ibid*. at 345-46 [footnote omitted].

57 David Dyzenhaus, "Disobeying Parliament? Privative Clauses and the Rule of Law" in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 499 at 499-500.

58 Lon L. Fuller, "The Implicit Laws of Lawmaking" in Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. (Oxford: Hart, 2001) 175.

59 Dyzenhaus, *Constitution of Law*, *supra* note 51 at 58.

60 Dyzenhaus, "Deep Structure", *supra* note 2 at 139 (discussing Australian migration legislation that explicitly precluded judicial review on the bases that a breach of the rules of natural justice had occurred in the making of the decision and that the decision involved an exercise of a power so unreasonable that no reasonable person could have so exercised that power).

61 *Ibid*. at 139.

62 Edward McWhinney, Case Comment on *Roncarelli v. Duplessis (S.C.C.)*, (1959) 37 Can. Bar Rev. 503 at 508.

63 *Ibid*.

which parliamentary judgment is given a great deal of respect, even when it puts a strain on fundamental principles."[64] His restraint "in the face of a clear legislative statement"[65] need not have negated the signal he sent by indicating that, had the procedural requirements been met, he would have found Duplessis liable. Unlike Justice Cartwright's and Justice Taschereau's dissents, Justice Fauteux's reasons sent a warning that officers of the executive were not above the law of civil liability: where procedural requirements were satisfied, such officers would be found liable for usurpation of authority occasioning harm. Like a British judge's declaration that a statute, although valid, is incompatible with the *Human Rights Act 1998*,[66] and a Canadian judge's acknowledgement that, but for invocation of the notwithstanding clause, a statute would be invalid for violating the *Canadian Charter of Rights and Freedoms*,[67] Justice Fauteux's *obiter* may be seen as having had a "political clout" distinct from its failure to sanction the rights-infringing government conduct in question.[68] From this perspective, the case can be made that his approach on article 88, combined with his *obiter* on the merits, makes a satisfactory approach for the rule of law. The choice in *Roncarelli* whether or not to dismiss the procedural argument was not one between performing and abdicating a rule of law duty. It was a difficult choice that engaged competing rule of law inclinations.

III. Scholarly Reading and the Rule of Law

Beyond reassessing the judges' reasons, it is also worth interrogating the practices of scholarly reading that have marginalized as irrelevant or uninteresting a rich debate on a procedural question. The rule of law issue presented by scholars and casebooks is the imperative for executive action to derive from statutory authorization and for officials to exercise discretion within implied boundaries. Although some scholars speak of the "rule of law project" as a co-operative effort by the judiciary, legislature, and executive, much of the time it appears that they understand the rule of law to be something that judges impose on the other branches.[69]

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64 Dyzenhaus, *Constitution of Law*, *supra* note 51 at 212.

65 *Ibid*. at 211.

66 (U.K.), 1998, c. 42.

67 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

68 Dyzenhaus, *Constitution of Law*, *supra* note 51 at 211, 217.

69 Dyzenhaus speaks of co-operation, but sees "limits of judicial competence" as requiring "imaginative exercises in institutional design to craft solutions to problems about *how to impose the rule of law on certain kinds of executive decisions*" (*ibid.* at 3 [emphasis added]). Quebec's leading constitutional text associates the rule of law primarily with the administration, entitling chapter 9 "Le statut juridique de l'administration: la pri-

Put otherwise, on a prevalent scholarly view, judges uphold the rule of law; it does not hold them. Thus the paradigmatic vindication of the rule of law seems to be judges' quashing of administrative action or invalidating a law on constitutional grounds. The scholarly focus on *Roncarelli* as elucidating the relationship between the judiciary and the executive, and not also, in virtue of article 88, that between the judiciary and the legislature, exemplifies this understanding. It hints that people read the judgment tendentiously—disposed to faith in judges and skepticism in the executive and legislature—rather than to enlarge or inform their understanding of the rule of law. While all reading is to some extent partial, the significance here is that such partiality occludes a relevant and important dimension of the judiciary: the sense that courts are themselves a power subjected to the rule of law, of which procedural rules are an instrument.[70]

The rule of law, in other words, "is not just a principle that, in a variety of ways, is enforced by courts. It controls the operation of courts themselves."[71] Indeed, it can be said that for courts to follow enacted procedural or substantive rules "*respecte la primauté du droit dans la mesure où la loi est l'expression première du droit*."[72] Conceptions of the rule of law must make space for judges who, sensing legitimate limits on their role as "hero figure",[73] reluctantly view themselves as constrained by legislation and articulate reasons for that view. This principle does not resolve *a priori* the interpretive questions raised by legislation establishing the contours of judicial power. But it underscores the appropriateness of regarding a judge's finding himself constrained by legislation on his best interpretation of it, as did Justice Fauteux, as an instance of upholding the rule of law.[74]

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mauté du droit": Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2008).

70 Contrast the sense occasionally discernible in administrative law by which strict enforcement of procedural rules is a paradigmatic instance of upholding the rule of law: *Costello and Dickhoff v. Calgary (City of)*, [1983] 1 S.C.R. 14, 143 D.L.R. (3d) 385.

71 Murray Gleeson, "Courts and the Rule of Law" in Cheryl Saunders & Katherine Le Roy, eds., *The Rule of Law* (Sydney: Federation Press, 2003) 178 at 188.

72 Brun, Tremblay & Brouillet, *supra* note 69 at 688. For courts, maintaining the rule of law "includ[es] in particular the conscientious interpretation and (to the extent possible) impartial application of the law": Jeremy Webber, "Democratic Decision Making as the First Principle of Contemporary Constitutionalism" in Bauman & Kahana, *supra* note 57, 411 at 414.

73 Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000" in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 19 at 65.

74 Scholars' impatience with the idea that a legislated procedural rule might impede a judge from awarding damages in *Roncarelli* may evoke Jeremy Waldron's recent concern about the hostility to legislation characteristic of many contemporary discussions of the rule of law: Jeremy Waldron, "Legislation and the Rule of Law" (2007) 1 Legis-

If the preceding two paragraphs imply sympathy for Justice Fauteux's dissent, it is important to return to the standpoint of those who applaud Justice Rand's judgment, and only louder once they appreciate the extent to which his dismissive treatment of article 88 reflected an advised, if unspoken, choice favouring the plaintiff. The scholarly failure to recognize Justice Rand's treatment of article 88 as a crucial part of his upholding the rule of law invites further comment. One explanation as to why the majority's discussion of article 88 has escaped celebration as a rule of law moment is less glib than it seems: in those passages, the judges did not use the talismanic phrase "rule of law".[75] It is ironic that scholars celebrate Justice Rand's judgment as an instance of common law or unwritten constitutionalism,[76] itself a practice of the implicit, while fastening on his explicit discussion of the "rule of law" in one passage of the judgment at the expense of his acting in another to uphold it, though not using those words. The point passes beyond glibness if taken as a hint that rule of law scholars might have approached the judgment with an unduly restrictive sense of the objects of interest to them.

Recognizing Justice Rand's disposition of article 88 as an instance of upholding the rule of law requires not only awareness of the provision's history, but also expansion of the class of rule of law conduct. In his lecture on *Roncarelli*, Dyzenhaus suggests the utility of conceiving of a continuum of situations of constitutional review, beginning at one end with judicial review of administrative decisions, and ending at the other with judicial invalidations of legislation for infringement of an entrenched constitutional norm.[77] The procedural issue in the judgment and its relative neglect by rule of law scholars indicate that such a continuum must begin still lower and more unremarkably. It should encompass judicial activity

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prudence 91. The suggestion is not that Rand J. showed hostility to legislation. It is that contemporary scholars, accustomed to championing the common law constitution, appear to bristle at the thought that legislated strictures should impede the realization of what they perceive as the rule of law's entailments.

75 The English translation in the D.L.R. refutes the uncharitable hypothesis that scholars working in English have neglected article 88 because Taschereau and Fauteux JJ. dissented in French.

76 Dyzenhaus, "Deep Structure", *supra* note 2; David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill L.J. 491; David Mullan, "The Role for Underlying Constitutional Principles in a Bill of Rights World" (2004) N.Z.L. Rev. 9; David J. Mullan, "Underlying Constitutional Principles: The Legacy of Justice Rand" (Rand Lecture, University of New Brunswick) [on file with author].

77 Dyzenhaus, "Deep Structure," *supra* note 2 at 142. See also Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 184. While aware that courts have ways of deferring to the elected branches "short of striking down" (*ibid*. at 213), Kavanagh restricts her discussion of judicial deference and defiance to "constitutional adjudication" (*ibid*. at 185).

that, while not formally or explicitly a quashing or invalidation, nevertheless represents an exercise of authority in what is effectively a review of state action. The continuum of constitutional review suitably includes creative or innovative interpretation of a procedural or substantive rule in order to avoid gross injustice in litigation opposing a citizen to the state or its representative.[78] Of course, any such interpretation should be fully justified in a way that takes into account the potential harm of seeming to override the legislature's clear intent. Admittedly, bringing into view such instances of rule of law action is laborious. Identifying them requires not only literacy in public law, but also detailed knowledge of procedure or substance in areas in which citizens sue the state. Still, the explicitness of Justice Fauteux's reasons makes *Roncarelli* a relatively easy case with which to begin.

Perhaps such an extension of the continuum of constitutional review suffices to correct what this paper posits to be an incomplete telling of the rule of law story in *Roncarelli*. It is also possible, however—and here space constraints allow only casual speculation—that the readings of this judgment exemplify a larger scholarly habit. Might not the readings of *Roncarelli*, which code pronouncements about the rule of law as much more important than brusque dismissal of a "technicality", reflect a tendency to distill the multilayered resolution of litigation into philosophical propositions? Might not the effort to conscript a judicial text into the service of a transnational—Commonwealth or global—common law constitution or rule of law project tend to efface the jurisdiction-specific, local law?[79] It may be from such a deracinated, universalistic stance that article 88 would matter so little.

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78 In more recent work, Dyzenhaus supports this idea. See his discussion of judges' interpretation of legislation in the light of human rights as amounting to strong or weak judicial review, depending on the society's human rights culture: David Dyzenhaus, "Are Legislatures Good at Morality? Or Better at it than the Courts?" (2009) 7 Int'l J. Const. L. 46 at 48-49. In the contemporary Canadian context, this new space on the continuum might accommodate the Supreme Court of Canada's elaboration of robust "interpretations" of laws challenged under the *Canadian Charter* (*supra* note 67) before concluding that, correctly interpreted, they are valid: *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4, [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257; *Montréal (City of) v. 2952–1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, 258 D.L.R. (4th) 595; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, 309 D.L.R. (4th) 581. Whether one approves the practice or not—arguably it shields constitutionally dubious laws from democratically salutary parliamentary debate—it is a relevant element of constitutional review. Compare *Human Rights Act 1998*, *supra* note 66, s. 3; Alec Samuels, "Human Rights Act 1998 Section 3: A New Dimension to Statutory Interpretation?" (2008) 29 Stat. L. Rev. 130.

79 It may be from such a universal vantage that the precedents of the Quebec Court of Appeal seem parochial and irrelevant. Yet, in significant ways, the conflicting reasons in *Roncarelli* exemplified different views as to the sources relevant to construing Quebec's rules of civil procedure, continuing the struggle over the autonomy of Quebec law, in-

This paper's thrust is not that the judgment's philosophical resonance is insignificant. It is, rather, that the enterprise of reading *Roncarelli* as a philosophical text on the rule of law cannot credibly be segregated from that of reading it as the resolution of a claim in a particular legal context, one including procedural rules. This is the best lesson to draw from the contention that Justice Rand's cursory disposition of the procedural question constitutes a core part—a performative, if not a fully verbalized one—of his reasons' meaning for the rule of law. In short, scanting the technicalities impoverishes not only the legal understanding of the judgment, but also the philosophical grasp. Indeed, *Roncarelli* and the similar cases surrounding it show so-called technicalities to have constituted a crucial site for rule of law contestation during Quebec's persecution of Jehovah's Witnesses.[80] In the present day, similarly, the interpretation of procedural rules has proven critical in efforts to sanction abuses of public power by means of novel claims in civil liability.[81] The unsatisfactoriness of the prevailing readings of *Roncarelli* gestures toward the perils, in our own day, of overlooking the technicalities,[82] the construal of which may entwine inextricably with legal philosophy.

Conclusion

This paper invites scholars to reread *Roncarelli v. Duplessis*, armed with a greater awareness of the weight of argument and authority on the defendant's side of the procedural question. A judgment largely flattened by scholars to a lopsided match between judges upholding the rule of law

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cluding public law, from English influence. McWhinney (*supra* note 62 at 507) read Fauteux J.'s dissent as resting on the basis of deference to provincial courts' interpretation of a provincial statute, a posture akin to Justice Felix Frankfurter's emphasis, in American constitutional jurisprudence, on federal courts' duty to defer to state courts' interpretations of state statutes. The ostensibly distinct character of Quebec's codified procedural law remains a live issue. In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743 at para. 35, 204 D.L.R. (4th) 331, LeBel J. held, "The rules of Quebec civil procedure, which originate from widely differing sources, make up a Code of Civil Procedure. As such, they are part of a legal tradition that is different from the common law."

80 *Chaput*, *supra* note 26; *Lamb*, *supra* note 44.

81 *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580 (Div. Ct.), leave to appeal refused (1991), 1 O.R. (3d) 416 (C.A.); *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, 233 D.L.R. (4th) 193 [*Odhavji*]. Both were motions to strike negligence claims against the police under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21.01(1)(b). The phrase "rule of law" appears nowhere in the former; in the latter, it appears just once, within a quotation (*Odhavji*, *supra* at para. 26).

82 Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities" (2005) 53 Buff. L. Rev. 973. For a rich recent case study, see Louise Merrett, "Costs as Damages" (2009) 125 Law Q. Rev. 468 (a call not to dismiss orders for costs as mere technicalities).

and ones too craven to sanction executive abuse is, in fact, more richly textured. *Roncarelli* warrants space in student casebooks, and on lawyers' reading lists, not simply as a case standing for courts' responsibility to hold the executive to the rule of law, but rather as exemplifying the "troublesome complexity"[83] of that ideal's competing demands, ones that may lead to understandings of the judgment that are less triumphal and more ambivalent.

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[83] Peter Read Teachout, "The Soul of the Fugue: An Essay on Reading Fuller" (1986) 70 Minn. L. Rev. 1073 at 1143.