Constituting the Enemy: A Response to Carl Schmitt

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DAVID DYZENHAUS

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History, and not only ancient history, shows that in countries where
democratic institutions have been unconstitutionally superseded, it has been
done not seldom by those holding the executive power. Forms of government
may need protection from dangers likely to arise from within the institutions
to be protected. In point of constitutional theory the power to legislate for the
protection of an existing form of government ought not to be based on a
conception, if otherwise adequate, adequate only to assist those holding power
to resist or suppress obstruction or opposition or attempts to displace them or
the form of government they defend.  

Today many states are grappling with the elusive enemy of international
terrorism. Some also face the emergence of political parties that operate
within the law, but whose appeal rests on an anti-democratic program to be
implemented once the parties have won power. The democratic states among
these must confront the question of the limits of their authority to combat
their enemies. How far can a democracy go in protecting itself without
compromising its democratic nature? As the Supreme Court of Canada put
things in a decision in the wake of 11 September 2001,

[it would be a] Pyrrhic victory if terrorism were defeated at the cost of
sacrificing our commitment to values that are fundamental to our democratic
society—liberty, the rule of law, and the principles of fundamental

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1 I thank A. Glass, D. Myerson, R. Thwaites, G. Williams, and G. Winterton for comments
on a draft of this essay. I also benefited greatly from comments during the discussion at the
Central European University’s conference on Militant Democracy, particularly those of G.
Frankenberg. Most of all I thank E. Hammond for both superb research assistance and a very
challenging set of comments on that draft.

2 Australian Communist Party v. Commonwealth, 83 CLR 1(1951), at 187–188 (Judge
Dixon).

A. SAJÓ (ED.), Militant Democracy, 15–45.
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justice—values that lie at the heart of our Canadian constitutional order and
the international instruments that Canada has signed.³

In this chapter, I will focus mainly on one aspect of this question—the legal
limits placed on government by its commitment to the rule of law. More
precisely, I will ask what limits the rule of law in a common law legal order
sets on both parliament and the executive when it comes to naming the
enemy. In the cases I discuss we encounter a legislative device of crucial
importance in a debate about the legal limits on defining and combating the
enemy. The legislature explicitly names some group or association as the
enemy and/or it delegates such authority to the executive. Usually, the
statute also requires or permits certain consequences to follow such naming.
The association is banned, as are affiliates, members, and associated
individuals; assets are confiscated; non-citizens are deported; those
continuing to support the now illegal association are imprisoned, and so on.
As I just suggested, I will focus mainly on the issue of the authority of
parliament and the executive to determine who is an enemy. However, it is
important to see right at the outset that the rule of law concerns arise out of
the consequences attached to naming the enemy in order that certain legal
consequences must or may follow. The concerns are about the fact that the
legislature and the executive have usurped a judicial role, both to make
findings of guilt and to punish those found guilty.

The received⁴ view is that when the legislature names the enemy, the
legal question about limits is a constitutional one, answered by checking
whether there exists a constitutional text that explicitly limits the authority of
the legislature. If there is no written constitution, or if the written
constitution does not speak to this issue, or if in speaking to it the
constitution does not state any limits on the authority, but simply says that
the legislature has such authority, then the powers of the legislature in
respect of this issue are plenary—it is omnipotent. The second legal question
is whether, if the legislature delegated authority to the executive, it
articulated in the text of the statute specific limits beyond any constitutional
limits of the sort relevant to answering the first kind of question. The
received view holds that, absent constitutional limits, the executive may not
step outside the explicit limits of its delegated powers—the ultra vires
doctrine—but within those limits it is a law unto itself. My argument is that
in substance the questions raised by these claims to authority are the same

³ Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (2002). For
highly critical discussion of this decision, see many of the chapters in D. Dyzenhaus (Ed.),
The Unity of Public Law (2004).
⁴ I will not call this view the traditional one, since, as we will see, the question of the content
of the tradition is at stake in this debate.
and should receive the same answer, one given by the unwritten constitution of legality.

It might seem both strange and parochial to focus on these issues: strange because many democratic countries have entrenched legal protection of rights and liberties, parochial because common law legal orders are only one member of the family of democratic states. In addition, the common law antedates democracy, and many of the former colonies to which England exported the common law have retained it without becoming democratic.

I hope, however, to show that the common law exposes the constitutional resources of the rule of law in an area about which bills of rights rarely speak—the legal constitution of both legislative and executive authority. It is important to be aware of these resources even in an era of entrenched bills of rights because of the judicial tendency to find that rights protections have no or only very limited application in emergency situations. Indeed, the decision of Canada’s Supreme Court from which I quoted is one in which the Court, at the same time as it affirmed its role as guardian of the rule of law, retreated significantly from its recent jurisprudence on the demands of that role, with the events of 11 September 2001 looming large in its reasoning.5

I will also claim that the legal limits that arise out of the unwritten constitution are not confined to the legal orders of the common law world or of liberal democracies. By ‘legal limits’ I mean the limits of legality or the rule of law that are inherent in a government’s commitment to govern in accordance with the rule of law. Such a commitment should be even stronger in democratic polities, because the values which inhere in the constitution of legality are values that are also intrinsic to democratic government. Moreover, these resources are exposed even where it has often been thought inappropriate to suppose that judges should enforce controls on government. When at issue is who is an enemy of the state, government is confronted by the existential question of politics, a question that many have claimed judges are completely unsuited to answer.

The most forceful articulation of this claim is to be found in the work of C. Schmitt. It is his idea that the existential question of politics, or ‘the political’ as he preferred to put it, is the decision as to who is an enemy and that the guardian of the constitution must make that decision and also decide on the means to combat the enemy.6 Much of his work in legal and political theory is devoted to showing why the judiciary cannot be the guardian of the constitution because existential decisions are by nature unconstrained by

law. But though Schmitt figures in the title of my chapter, he is for the most part a silent interlocutor. I take up his challenge by showing that there is evidence of the power of his thesis in that it articulates the structure of a style of legal thought that many judges embrace and that even those who are minded to work within a different structure find difficult to escape.

We will also see that when legislatures seek to deal with the enemy, or give powers to the executive to deal with the enemy, they will sometimes involve the judiciary in the process of certifying the validity of at least some aspects of the decisions. Indeed, even if judges are not explicitly involved, they will assume that they have some role in determining whether there has been a valid exercise of authority, whether legislative or executive. It might seem then that legislatures often, and judges generally, accept my argument that there are legal limits on legislative and executive authority to define the enemy and so Schmitt is wrong. But Schmitt is not so easily dismissed. If it can be shown that the limits judges assert amount only to a claim that they have a constitutional place in the legal order that requires them to rubber stamp the validity of statutes or of executive acts, Schmitt’s thesis is proved. For it will seem that it has been shown that in substance the decisions in these existential situations are and ought to be made by political actors other than judges. Only if the limits affect substance, thus constraining the way in which the enemy can be constituted, is there anything to the idea that there are legal limits.8

I will start with the famous decision from which the epigraph to this chapter is drawn, in which the High Court of Australia confronted the federal Parliament or Commonwealth’s attempt to deal with the great postwar enemy of communism. The majority of the Court invalidated the Communist Party Dissolution Act 1950 (Cth). However, I will show that the majority was unwilling to accept anything like the full implications of its reasoning.9 I will tease out these implications in a discussion of judgments elsewhere in the common law world that dealt with situations like that presented by the Communist Party Dissolution Act.

7 C. Schmitt, Der Hüter der Verfassung (1985).
8 Note that Schmitt appeared for the federal government in the Preussenschlag, the 1932 case in which German judges had to decide on the constitutional validity of the federal government’s invocation of emergency powers to justify its seizure of control of Prussia, the last bastion of socialist resistance to the march of the authoritarian right to absolute power. There Schmitt argued that no court could second guess the executive when the issue was the political one about who constitutes an enemy. The court asserted its authority to review the executive acts but in substance upheld Schmitt’s argument since the authority it asserted was entirely formal. For discussion, see D. Dyzenhaus, Legal Theory in the Collapse of Weimar: Contemporary Lessons?, 91 APSR 121 (1997).
1 The Communist Party Case

In 1949, a government was elected in Australia that had as part of its platform a ban on the Australian Communist Party. In 1950 it secured passage of the Communist Party Dissolution Act, which declared the Australian Communist Party to be dissolved and forfeited its property to the Commonwealth (Section 4). The Act also made other bodies of persons who were (or had been in the period since the establishment of the Australian Communist Party) likely to be under the influence of communists liable to be dissolved and their property forfeited to the Commonwealth, upon the Governor-General’s being satisfied that they fell within the legislation (Sections 5–8). The Act also made persons who were (or had been since the establishment of the Party) communists liable to being banned from Commonwealth public service employment, or holding offices in Commonwealth corporate bodies or unions that were declared to have substantial membership in vital industries, also upon the Governor-General’s being satisfied that they fell within the legislation (Sections 10–11). The only safeguards were, first, that the Governor-General could not make a declaration before an executive committee had considered the evidence, but his declaration did not depend on its approval. Second, judicial review was available on the question of whether a body was affiliated. But the body had the onus of proving that it was not affiliated and the declaration that the body was prejudicial to defense and security was not open to review. Finally, the Act made it an offense, punishable by five years imprisonment, for a person knowingly to be an officer or a member of an unlawful association (Section 7).

The Act commenced with nine recitals, indicating ‘facts’ that purported to bring the Communist Party within the reach of Commonwealth legislative power, and specifically its power to legislate with respect to matters incidental to national defense (Section 51(xxxix) of the Constitution in its operation on Section 51(vi)) and the execution or maintenance of the Constitution and Commonwealth laws (Section 51(xxxix) of the Constitution in its operation on Section 61). Draconian as the substantive provisions of the statute were, its most remarkable feature consisted in these lengthy preambular recitals. For besides enumerating the provisions of the Constitution that were claimed to be the basis of the statute, the recitals also deemed certain facts to be true. Thus the preamble stated that the Communist Party aimed to seize power and was engaged in activities, including

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10 Throughout this section, I rely very heavily on G. Winterton, The Communist Party Case, in H. P. Lee & G. Winterton (Eds.), Australian Constitutional Landmarks 108 (2003). This is a revised version of his The Significance of the Communist Party Case, 18 MULR 630 (1992).
espionage, sabotage, and treason, to achieve that end. It also asserted that the statute was necessary for Australia’s defense and security and the execution and maintenance of its Constitution and laws. In other words, the recitals were a kind of legislative fiat, providing the constitutional basis for the statute at the same time as the evidence that the objectives of the statute were not only consistent with the Constitution, but indeed required if the legislature and government were to fulfill their constitutional responsibilities. In addition, as we have seen, the statute gave to the executive the authority to make the same kind of fiats in respect of other associations and individuals.

Governments had advocated banning the Party before. Indeed, it had been banned from 1940 until 1942 in terms of wartime regulations. On the day of the Communist Party Dissolution Act’s enactment, the Australian Communist Party, ten unions, and several union officials challenged the constitutional validity of the statute, asking the High Court for an injunction to restrain the government from enforcing the Act. Justice Dixon refused to issue such an injunction. Instead, he stated two questions for the High Court: first, did the validity of the Act depend upon proof in court of the facts recited in the Act’s preamble, facts that the plaintiffs could contest? If not, was the Act invalid?

The case was politically charged, to say the least. The majority of Australians, as many as 80 percent according to one poll, supported the ban, and at the time Australia was participating in the Korean War. As a bill, the measure had been bitterly contested in Parliament by the Opposition Labor Party and had drawn the unfavorable attention of the international press. The Chief Justice, Sir J. Latham, had been Attorney-General in one of the earlier governments that supported such a ban, a fact that would have supported a demand that he recuse himself, though the plaintiffs decided against making that demand. Finally, prominent among the plaintiffs’ lawyers was H.V. Evatt, Deputy Leader of the Labor Party, who had been vociferous in his opposition to the bill. When his participation in the case was announced, he was immediately subjected to a government smear that he was a communist sympathizer.

Nevertheless, in what is regarded as a significant victory for constitutionalism and the rule of law, five of the seven judges, while answering ‘no’ to the first question, answered ‘yes’ to the second, thus invalidating the statute. Of the remaining two, one—the Chief Justice—answered ‘no’ to both questions. The remaining judge answered ‘yes’ to both.

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11 These were held invalid in 1943 in Adelaide Company of Jehovah’s Witnesses Inc v. Commonwealth, 67 CLR 116 (1943), two judges, including Chief Justice Latham, dissenting.
Australia, then as now, has no entrenched bill of rights, but a constitutional division of authority between the federal government and the governments of the Australian states as well as provisions for the separation of federal judicial power.\footnote{In addition, there are some limited specific constitutional rights: \textit{e.g.}, to vote (Sec. 41), acquisition of property by Commonwealth only on just terms (Sec. 51(XXXI)), trial by jury (Sec. 80), freedom of interstate trade and commerce (Sec. 92), freedom of religion (Sec. 116), and non-discrimination between residents of different states (Sec. 117).} We will soon see that for the six judges who answered ‘yes’ to the second question, that answer was put on the basis that the federal legislature had no authority to enact this particular statute. For them, the main question was framed in the following way: federal legislative powers are enumerated in the Australian Constitution, so federal legislation must be grounded by a positive source of authority for an enactment, and, where it regulates matters that are incidental to the main power, the legislation must be reasonably incidental to that power. That requirement, together with the constitutional provisions that give the High Court jurisdiction to determine constitutional questions, is the textual peg on which the reasoning is hung.

Thus, while the case did not turn on an interpretation of an entrenched bill of rights and freedoms, it did turn on the existence of a written constitution. Hence, it might well seem that the case is hardly fertile ground for the argument I have advertised about the common law constitution of the legislature and the executive. To see why the case is, in fact, fertile ground, it is helpful to distinguish between three kinds of constitutions. I will refer to the first as a bill of rights, by which I mean an entrenched set of rights and freedoms. The second I will refer to as a federal constitution—a constitution that confines itself to dividing power between the federal and the other, state or provincial, authorities and does not explicitly protect any rights and freedoms. The third is the common law constitution: the fundamental values of legal order, values that are inherent to legal order whether or not they have been set out in some text.

My argument in a nutshell is that judges who are minded to uphold the common law constitution often find that a federal constitution offers them convenient pegs on which to hang their reasoning. They can read into the text of the federal constitution the normative controls they think are required by a rather substantive conception of the rule of law. As I will show by contrasting Chief Justice Latham’s somewhat neglected dissent with the majority judgments, if judges take the pegs too seriously, regarding these as the necessary elements of their reasoning, they weaken their reasoning and undermine their conception of the rule of law. The real basis of their reasoning is not the text, but the values for which they take the text to be evidence.
None of the majority judges disputed the authority of the Commonwealth to legislate against subversion, whether they derived this authority from the explicit powers of the Commonwealth or reasoned, as Justice Dixon did in the same paragraph from which the epigraph is taken, that it is an authority that inheres in every polity—the existential necessity for self-protection. Rather, they trained their fire on the preambular recital of powers, which they regarded as an illegitimate exercise in constitutional bootstrapping. As Dixon put it,

The difficulty which exists in referring the leading provisions of the Act to the defense power and the power to make laws against subversive action evidently did not escape the notice of the legislature. For that and perhaps other reasons the Act is prefaced with an elaborate preamble.  

At one level, the majority’s objection to the preamble is a formal one—the claim that judges almost always make that it is an axiom of the rule of law that legal authority is constituted by law, hence it must be exercised within the limits of the law, which requires that the body purporting to have authority cannot itself decide what those limits are. As Justice Dixon said, government is government under the Constitution,

[...] an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think it might fairly be said that the rule of law forms an assumption.

A corollary is that some other body must have the task of policing the limits. And judges understand their role as interpreters of the law independent of other branches of government in constitutional terms as vesting in them the authority to decide on the limits. Indeed, in the Australian Constitution, Section 71 entrenches the separation of federal judicial power and Sections 75(iii) and (v) entrench the original jurisdiction of the High Court in all matters in which “the Commonwealth, or a person [...] being sued on behalf of the Commonwealth, is a party” and “a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.”

On the basis of this assumption, the majority judges constructed a doctrine of constitutional fact analogous to the jurisdictional fact doctrine developed by courts in the common law world to justify review of administrative bodies. Whether the Commonwealth had authority to enact the statute depended on whether as a matter of fact the Constitution gave it authority and this fact could not be brought into existence by the very law that required such authority to be valid. As Justice Fullagar put it, it is “an

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13 See Communist Party case, supra note 2, at 189.
14 Id., at 190.
elementary rule of constitutional law [...] that a stream cannot rise higher than its source,” and, he went on to say, “Parliament cannot recite itself into a field the gates of which are locked against it by superior law.”15

There is, however, an important ambiguity in the idea of ‘superior law.’ Does it mean simply the explicit text of the federal constitution or does it mean the text read against a backdrop of the fundamental values of the common law constitution? The majority judges preferred for the most part to style their reasoning as if all that they had to do was interpret explicit text. With the exception of the claim that the Court has a role as guardian of constitutional validity, they suggest that the explicit terms of the Constitution gave them the entire basis for the conclusion that the statute was invalid.

Their option for a kind of constitutional positivism is understandable because their constitution could be understood as a mere federal constitution—one that protected no substantive values—and still deliver that conclusion. And in the charged political climate in which they were deciding the case, they could claim that they were simply doing their job and not presuming to second guess Parliament’s judgment about political policy. Their task was made easy in this regard by the fact that the Australian Constitution allocated to the states the power to legislate over areas which were not reserved to the Commonwealth, which meant that the states, but not the federal Parliament, had power to regulate voluntary associations. Some of the majority judges thus reasoned that the states had authority to do what the Commonwealth could not.16

This suggestion created some serious tensions in the majority’s reasoning. One was that the majority was committed to accepting that had the states enacted legislation banning the Communist Party, that legislation would have been perfectly valid, and thus the constitutional validity of the statute depended on the contingent fact of where particular powers had been distributed. At least two of the majority judges explicitly, and the other more or less implicitly, subscribed to the positivist view that the difference between a common law legal order without a federal constitution and one with such a constitution is the following: where there is no federal constitution, there is no legal limit on the power of the unitary legislature other than the limits of manner and form—the procedures the legislature has to follow to enact valid law. Where there is a federal constitution, there is the further set of limits because of the explicit distribution of power. But this

15 Id., at 258.
16 Justices Fullagar and Kitto (id., at 262 and 271, respectively) expressly said that the states would be able to legislate in the form the Commonwealth had. Justice Dixon said the legislation was within the prima facie competence of the states (id., at 200). Justices Williams and Webb confined themselves to saying that the power to legislate on the matter of voluntary associations is reserved to the states (id., at 226 and 243, respectively). Justice McTiernan made no reference to the states’ capacity to legislate on the matter.
further set of limits is to be understood much like the limits of manner and form. It does not impose any moral or substantive limit on what the legislatures of the federation may do, but simply adds a question to the list of questions that the courts are entitled to answer about the technical validity of statutes. Courts might ask not only whether the legislature followed the prescribed steps in enacting legislation, but also whether that kind of legislation fell within its constitutionally prescribed jurisdiction. It follows that whether and to what extent the rule of law controls either the legislature or the executive depends on the contingencies of history, in the case of the legislature whether there exists an entrenched constitution and in the case of the executive whether the authority it wields is subject to explicit controls, whether statutory or constitutional. This understanding of federal constitutionalism is then the *ultra vires* rule of administrative law writ large.

So the conception of the rule of law entailed by constitutional positivism is one where the content of the rule of law is accidental, in that how the rule of law applies depends on the particular history of a legal order, as manifested in its positive law. That the law delegates virtually uncontrolled or arbitrary power to an official to ban a political party, or in itself is an exercise of such power, is not considered problematic from constitutional positivism’s perspective on the rule of law, since that exercise is, on its terms, according to law.

But of the judges, the only consistent constitutional positivist was Chief Justice Latham. He reasoned that the defense power of the Constitution included the power to protect against subversion, because the defense power is the power to protect the state against enemies and enemies are found not only outside a country’s borders, a claim he seemed to think was recognized in the fact that the defense power was not limited by the Constitution to dealing with the external enemy. As he put things:

The exercise of these powers to protect the community and to preserve the government of the country under the Constitution is a matter of the greatest moment. Their exercise from time to time must necessarily depend upon the circumstances of the time as viewed by some authority. The question is—‘By what authority—by Parliament or by a court?’

His answer was that just as the decision as to who is an external enemy and by what legal means that enemy is to be combated is a quintessentially political decision to be made by government and the legislature, so should be made the decision as to who is an internal enemy and how he is to be combated. Moreover, the actual combating of the enemy is a task that government is best suited to perform unhindered by judges, though he indignantly rejected the proposition to which the majority seemed

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17 *Id.*, at 142.
committed—that in times of war the legislature could give to government the power to act outside of the law. According to him,

[…] they can act within the law to meet the crisis without being subject to the risk of being told by a court that they were acting illegally. In such a case, the Government and Parliament are not left by the Constitution to action under a cloud of legal doubt.18

Influential in his reasoning here were wartime decisions of both his own Court and the House of Lords that upheld what these courts understood as unreviewable delegations of authority to the executive.19

In Chief Justice Latham’s view, there was no middle ground on this question, so that it was the case that:

[…] all the arguments for the plaintiffs upon this question depended upon the acceptance of a principle that it was for a court and not for a Government or a Parliament to determine whether interference with, resistance to, and undermining of a defense policy approved by a Government and by the Parliament to which it was responsible was proved to exist by admissible evidence of actual happenings and whether it was sufficiently dangerous to the community to justify an exercise of the defense power for the purpose of destroying what the Government and Parliament regarded as a hostile and traitorous organization.20

He suggested that the majority, since they found the statute invalid, accepted the same principle, whether or not they answered ‘no’ to the question whether the validity of the Act depended upon proof in court of the facts recited in the Act’s preamble.

Chief Justice Latham was, in my opinion, right about this last claim, though not about the basis he thought supported it. The claim follows, that is, from the thought that there is no middle ground between a parliament and government having the power to make the final determination whether there is an emergency and a court having that same power. But there is middle ground—the ground of legality, which requires that when parliament and government make such a determination they make it in a way that respects the requirements of the rule of law or legality. Hence courts must ask what the legal limits are on the power of parliament and government, whatever the nature of the emergency.

We have already seen one answer to that question—that the power to ban the Communist Party belonged to the states, not the Commonwealth. But that is an odd answer since it seems to attribute unlimited or arbitrary power to another part of the federation, an issue I will come back to below. A

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18 Id., at 164.
19 Lloyd v. Wallach 20 CLR 299 (1915); Ex Parte Walsh ALR 359 (1942); R v. Halliday AC 260 (1917). See Communist Party case, supra note 2, at 158-165.
20 Id., at 146.
second answer offered by the majority was that while it was acceptable for the legislature and the executive to be unconstrained by law when the country is on a war footing because it faces an external enemy, this is unacceptable when the threat comes during peacetime from within. But as we saw Chief Justice Latham point out, this conclusion required them to take judicial notice of the nature of the emergency that the Commonwealth had said was confronting the nation. And to take such notice required the judges to second guess the government and the legislature about the judgment that there was an emergency. In addition, it seemed to commit them to the proposition, which we saw Chief Justice Latham reject, that if there were a genuine emergency, one occasioned by an external enemy, then the legislature had a free hand or could give the executive a free hand, that is, the freedom to act arbitrarily or outside of the law.

The majority was, however, uneasy with the thought that the executive might be given this arbitrary power. In a fascinating study of the transcript of the trial, G. Williams shows that much of the action in Court was taken up with exchanges between the leading counsel for the Commonwealth, Garfield Barwick, and the majority judges on the topic of the power the statute granted the executive. Williams suggests that the concern of the majority that the statute, if upheld, gave the Governor-General an unreviewable discretion was crucial to the Court’s conclusion that the statute was invalid. As he points out, Evatt argued that the discretion was in fact unreviewable, an argument that had its risks. For if the High Court had gone on to find that the statute was nevertheless valid, the result would have been that Evatt and the other lawyers for the plaintiffs would seem to have conceded that the statute validly delegated an unfettered discretion to the executive.

This line of reasoning creates the second major tension for the majority. While uneasy with the thought that the executive might wield arbitrary power, they are nevertheless committed to the proposition that a constitutionally uncontrolled or plenary legislature is entitled to delegate

21 Id., at 142-147.
22 See id., Justice McTiernan at 206 and Justice Fullagar at 258. Justice Dixon pointed to examples of war-time legislation that were held by the Court to be not incidental to defense, at 185, and remarked on the differences between the National Defense legislation and the statute at 186. Justice Webb insisted that the actual exercise of the power (legislative or executive) was reviewable on constitutional grounds in any particular case, at 239-242, and Justice Kitto seemed to hold the same view, at 281-282.
24 See, Communist Party case, supra note 2, at 11-14.
25 Id., at 21-22. Justice Fullagar expressed doubts about whether the executive could have such an unfettered discretion even in wartime, though he held that he did not have to decide this issue. See id., at 258-259.
such power to the executive. Thus, since they adopt the premise that in a
genuine wartime emergency the legislature is uncontrolled, they reason that
the delegations of power to the executive to deal with the emergency are
subject only to the explicit controls stated by the legislature. The problem, in
my view, lies again in their unwillingness to embrace the thought that there
are at all times symmetrical, rule of law controls on both legislature and
executive. Indeed, it is a striking feature of the case that two of the most
famous quotations from the majority’s judgments—Justice Dixon’s
discourse on history in the epigraph to this chapter and Justice Fullagar’s
assertion that the constitutional stream cannot rise higher than its
source—occur within passages in which these two judges accepted Evatt’s
argument that the Communist Party Dissolution Act delegated virtually
unreviewable authority to the executive to deal with the enemy.

The fact that the determination would be unreviewable is relied on, by
Evatt and the majority judges (except for Justice Webb), to demonstrate that
those sections of the Act that are made to depend on the Governor-General’s
say-so share the same flaw as those sections that operate directly by force of
the Act, and therefore the delegation is invalid. That is, the flaw stems from
the fact that the Constitution did not provide the Commonwealth Parliament
with authority to enact the statute in order to achieve certain results, and
thus, a fortiori, such authority could not be validly delegated to the executive
by such a statute. But that, as I pointed out, requires the assumption that
under conditions when the Parliament is not controlled by explicit
constitutional text, it can validly both legislate these results and delegate
authority to the executive to achieve such results. Indeed, Justice Fullagar’s
assertion follows hard on the heels of his perhaps reluctant acceptance of the
Australian authority on this point as well as of the English authority,
exemplified for him in the notorious House of Lord’s decision during World
War II, Liversidge v. Anderson.26 As Winterton has pointed out, one has to
appreciate that Justice Dixon’s discourse and Justice Fullagar’s assertion are
meant to make the point that if one is to derive a legislative power to protect
the Constitution against its enemies, that power should be derived not from
claims about the power of the executive in such situations but from the
Constitution directly.27

The judges assume, that is, that under a different constitution in different
circumstances (wartime emergency), it is consistent with the rule of law for
the executive to be validly delegated an authority to deal with an emergency
that is close to unlimited, so that it has an unfettered discretion. And they
assume further that once the executive has such authority, decisions about

26 Liversidge v. Anderson, AC 206 (1942), cited in Communist Party case, supra note 2, at
258-261.
27 See Winterton, supra note 10, at 132.
whether a person or an organization is an enemy and thus vulnerable to
certain sanctions are decisions that judges may not review, so that these facts
are facts that are constituted by the say-so of the executive. However, they
want to claim that one should not reason from this possibility to the
conclusion that the delegation of authority was valid, nor to the conclusion
that the legislature itself is entitled directly to exercise such an authority.
Validity here is a different sort of fact, a constitutional fact that cannot
depend on the say-so of either the legislature or the executive.

This line of reasoning is presupposed in the thought to which we saw
Chief Justice Latham object—that Parliament can give the executive
authority to act outside of the law. Only a consistent constitutional positivist
like Chief Justice Latham is driven to the conclusion that the fact that there
can be technically valid delegations of authority to the executive to make
unreviewable decisions entails that those decisions are in accordance with
the law, where law is understood as the principles of legality or of the rule
of law. The fact that there has been a technically valid delegation of authority
does not, however, mean that the exercise of that authority is according to
law, if one also holds the view that the rule of law means more than the rule
of text-based controls. So, against Chief Justice Latham, it is very important
to hold onto the thought that the constitution may leave both government and
parliament to act ‘under a cloud of legal doubt.’ This may lead to a situation
where government has the power to achieve the ends set out in the statute
but it seems, at the same time, that that power is not subject to law.

Where Justices Dixon and Fullagar go astray is not then in articulating
that thought, but in their subscription to the view that in the Communist
Party case the constitutional invalidity of the statute had its entire basis in
the explicit text of the Constitution. Rather, its basis was in the text of the
Constitution understood in the light of a highly normative understanding of
the importance of the separation of powers. Their invocation of the
constitutional fact doctrine is not the formal argument that delegated
authority, whether parliamentary or administrative, is an authority that is
inherently limited by the explicit text of the delegation. Rather, they rely on
the substantive argument that the delegates are bound by both the formal
limits and by a commitment to the rule of law, which does not have to be
explicitly stated.

In this regard one can glean from William’s account of the trial that Evatt
thought that the attack on the legislation and the attack on the power given to
the executive by the legislation were one and the same. Both were premised
on the assumption that the government could not usurp powers that properly
belonged to the judiciary, whether this was by government-initiated
legislative fiat or by giving the power to make such fiats to the executive.28

28 See the quotations from Evatt’s argument in Williams, supra note 23.
And prior to the enactment of the statute, he had argued in public debate that it was in the nature of an Act of Attainder since it imposed, or authorized the executive to impose, penalties on individuals without those individuals being able to protest their innocence to a court of law. He thus regarded the statute as a denial of basic principles of British justice, that is, the justice of the common law.29

As the author of the famous Note in the 1962 *Yale Law Journal* explains, the term Act or Bill of Attainder comes from the practice in sixteenth, seventeenth, and eighteenth century England of using statutes to sentence “to death, without a conviction in the ordinary course of judicial trial, named or described persons or groups.”30 In addition, the term came to be used for ‘Bills of Pains and Penalties,’ statutes that imposed sanctions less than capital.31 Both sorts of statute were aimed at revolutionaries and were considered contrary to the spirit of the common law because they attempted to bypass the courts by establishing a system of either legislative or administrative conviction and punishment. The offence was therefore to an idea of the separation of powers, where the role of the judiciary in determining both guilt and appropriate punishment in an open trial is considered a constitutional fundamental. Thus the framers of the American Constitution, in reaction to the use of similar instruments during the revolutionary era, inserted into the Constitution, Article I, Section 9: “No Bill of Attainder or ex post facto law shall be passed.”

Chief Justice Latham alone of the judges was required to confront directly what I will refer to as the attainder argument. The others could avoid it—or at least pretend to avoid it—since they rested their reasoning on the text (positivistically construed) of the Constitution. But Chief Justice Latham denied that an attainder argument had either purchase or application in the Australian context. He said that the argument had no purchase because protection against such statutes had not been elevated to the constitutional level, as they had in the US. And he alleged that it had no application because the Communist Party Dissolution Act did not have the effects of either an Act of Attainder or of Pains and Penalties. In his view, the statute did not convict or purport to convict any person of any act,

[nor did it] subject him to any penalty. He may be convicted of an offence against the Act if he is prosecuted before a court, but the Act itself does not produce any of the results of an Act of Attainder or of an Act of Pains and Penalties.32

29 As reported by Winterton, *supra* note 10, at 118.
31 *Id.*, at 331.
32 *See* Communist Party case, *supra* note 2, at 172-173.
This last claim is technical and formal to the point of absurdity. It relies on a distinction between preventive and punitive measures that says that legislation is not punitive even when it permits detention, imprisonment, and other measures that have severe impact on the rights and liberties of individuals as long as the measures are not the point of the administrative scheme but incidental to it. For example, if controlling immigration is the scheme, the fact that detaining those awaiting refugee status is incidental to controlling immigration makes a provision permitting such detention not punitive in the context of an immigration statute. Similarly, if the objective of the scheme is national security, the fact that the executive is given authority to ban or detain people is incidental to that objective.

This version of the theological doctrine of double effect is no more convincing here than it is elsewhere. It is a form of double speak, which is completely exposed by the preambular recitals of the statute, since these revealed that the government had decided that the Communist Party was guilty of treason and subversion and the statute implemented its judgment on this issue. Further, the statute gave to the executive the authority to make similar determinations about “affiliated” individuals and groups and thus made the executive the effective judge of the guilt of the groups and individuals. Finally, the statute created an offence, punishable by imprisonment, of knowingly being an officer or a member of an unlawful association.

This absurdity is, in my view, evidence of a significant moment of dissonance for Chief Justice Latham. He could have rested his case on the no purchase basis—the thought, consistent with the rest of his judgment, that even if the statute were a Bill of Attainder or of Pains and Penalties a judge needed explicit constitutional authority before he could find that such a statute is invalid. His problems at this point surely arise from the fact that he knew that there was something awry with the statute from the perspective of the rule of law and that it had to do with the substantive issue addressed by the common law tradition’s aversion to these bills. As he said, although he tried to put things as impersonally as possible: “Such legislation is always unpopular with those against whom it is directed and in general is detested.” It is then part of his attempt to minimize the dissonance caused by his awareness of the substance of the argument that he alleges that the statute was not in fact an Act of Attainder or of Pains and Penalties.

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33 This distinction is explored in detail by Justice Webb, who supported it (see, especially, id., at 240). He found that the Court was entitled to test the factual basis of the preambular recitals and that the facts did not support the recitals. He did seem to suggest that if the statute were punitive in nature, it would constitute an usurpation of judicial power.

34 Latham failed to mention this penalty in his summary of the statute’s provisions at the beginning of his judgment.

35 See Communist Party case, supra note 2, at 172.
It might seem that the majority judges should not be subject to the same kind of dissonance. Not only did they find the statute invalid; they were able to do so on a basis that allowed them to stop short of confronting squarely the attainder argument, although Justice Fullagar did address some remarks to this issue. That is, they upheld the rule of law through striking down the statute on a different ground. But they did not avoid dissonance since their articulation of that ground meant that no less than Chief Justice Latham they accepted that claims about the separation of powers cannot in the absence of an explicit constitutional text be used against either a unitary or a federal legislature to defeat legislation that usurps the judicial function. As we have seen, they explicitly or implicitly accepted that the Australian states could enact the Communist Party Dissolution Act, indeed enact it without taking the trouble to recite themselves into power, since the states by definition had residual powers—powers left over from the specific allocations to the Commonwealth. Moreover, they also accepted that as long as any power fell within the explicit jurisdiction of the Commonwealth, the federal Parliament could enact a statute that had exactly the effects of the Communist Party Dissolution Act. Finally, several among them seemed to accept that the statute was preventive rather than punitive in nature.

Here I want to quote at some length from Justice Fullagar’s judgment, since he spoke very fully to some of these points. He said:

I come now to the Act itself. The most conspicuous feature of the Act is s. 4, and the most conspicuous feature of s. 4 is that it does not purport to impose duties or confer rights or prohibit acts or omissions, but purports simply to declare a particular unincorporated voluntary association unlawful and to dissolve it. It is, one supposes, to be classed as a public enactment as distinct from a private enactment, but it is, or at least is extremely like, what the Romans would have called a privilegium. Such a law (for I would not deny to it the character of a law) may well be within the competence of the Commonwealth legislative power, which is, within its constitutional limits, plenary […]. It would be impossible, I should think, to challenge s. 4 if the Parliament had power to make laws with respect to voluntary associations or with respect to communists. It would be a law ‘with respect to’ each of those ‘matters.’ So an Act of the Parliament dissolving the marriage of A with B would be a law with respect to divorce. It would be a privilegium, but what the Act actually did would be a thing which fell within a class of subject matter on which the Parliament was authorized to legislate. The Parliament has power to make laws with respect to divorce, and the Act is a law which affects a divorce. It is a privilegium, but it is a good law.36

And he went on:

It should be observed at this stage that nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is

36 *Id.*, at 261.
clear, its merits and demerits are alike beside the point. It is the law, and that is all. Such a law as the Communist Party Dissolution Act could clearly be passed by the Parliament of the United Kingdom or of any of the Australian States. It is only because the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority that it arises in the case of the Commonwealth Parliament. If the great case of *Marbury v. Madison* (1803) […] had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; and there are those, even to-day, who disapprove of the doctrine of *Marbury v. Madison* […], and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v. Madison* […] is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.37

These passages are rife with dissonance. Justice Fullagar expresses both doubt and certainty about the legal character of such a law and his remarks about the *privilegium* indicate his concern that the legislature is using a public power to bring about some goal that does not belong properly in the public domain. In addition, he wishes both to assert that there is unquestionable authority for the majority’s division of powers argument—the text of the Constitution—and that there is an alternative view of legality in which courts are not the final judges of the limits of legality, exactly the view that we saw Chief Justice Latham express when he chided his colleagues for thinking that the state may act outside of the law when it confronts an external enemy. Moreover, Justice Fullagar’s reference to *Marbury v. Madison* is of a piece with Justice Dixon’s claim about the role of the court as arbiter of constitutional validity. These judicial references are to something extra-textual, in that they find the basis for their constitutional review authority in an understanding of the proper place of the judiciary as guardians of a constitutional conception of the rule of law.38

For Justice Fullagar, like the other majority judges, dissonance arises because the resource offered them by the text of the federal Constitution enabled them to avoid confronting the real basis of their argument. They thus

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37 *Id.*, at 262-263.

38 See further Justice Dixon’s recognition of the manner in which the statute denied due process (*id.*, at 198) as well as his sense that the “substantial nature and effect” of the statute posed problems from the perspective of the separation of powers (*id.*, at 200). He also observes that even if the Parliament has power over the direct subject matter, it is required to legislate consistently with Chapter III and express constitutional rights (*id.*, at 193). Justice Fullagar refers to the role of the court as arbiter of constitutional validity, although he clearly does not buy the argument that the Act defeats due process (*id.*, at 262-263). So they both look to extra-textual norms, although arguably Justice Dixon draws on more norms than Justice Fullagar allows are relevant in assessing the Act. See also Justice McTiernan’s opening statement (*id.*, at 206).
avoided the basis for the only solid answer to the question of the legal limits on the power of both Parliament and the executive, which is that the source of these limits is to be found in the common law, which supports both a constitutional doctrine of judicial independence and a sense of the fundamental values that that independence is supposed to serve. More accurately, they were willing to accept one part of that basis, the claim about independence, but were not prepared to articulate the values to which it is instrumental. Moreover, even that claim could be put, as the High Court later put it, on a textual basis, on those parts of the Constitution that protected the High Court’s jurisdiction.39 But, as I have shown, in avoiding that other part, they adopted significant chunks of Chief Justice Latham’s positivist view and moreover showed themselves to be inconsistent in a way that he was not.

The difficulty in asserting this basis is illustrated by the fact that in the classic article about the case, G. Winterton’s 1992 essay in the Melbourne Law Review, Winterton, while hailing the case as a significant victory for the rule of law and constitutionalism, also cautioned against reading too much into the decision. He even suggested that the case “fits squarely within this tradition of judicial self-preservation.” It was not “primarily about civil liberties, but about the limits of legislative and executive power and the supremacy of the judiciary in deciding such questions.”40 But Winterton also argued that that the “fundamental constitutional flaw of the legislation proved to be its nature as an Act of Pains and Penalties (or ‘bill of attainder’ in its generic sense)[…].”41

The source of the difficulty that both judges and lawyers face here is the assumption that the unitary Parliament of the United Kingdom, and thus of the legal order in which their common law tradition was developed, is not subject to the constraints of any fundamental or constitutional values, because such a parliament can always override these values by explicit statutory statement. I do not wish to contest the claim that such a parliament can explicitly override the values. Rather my argument is that this claim fails to prove the assumption that such a parliament is not subject to the constraints of these values. As I will now show in a discussion of two cases from other common law jurisdictions, what matters most fundamentally is not the presence of a written constitution, whether in the form of a bill of rights or a federal constitution, but a judicial understanding of the unwritten constitution of legality. We will also see that it is important in cases where at issue are the limits of law that judges be prepared to assert this understanding, in particular because that understanding is most vulnerable

40 See Winterton, supra note 10, at 133, quoting from B. Galligan, Politics of the High Court 203 (1967).
41 Id., at 127.
and therefore most needed in cases where the question of the limits of law arises because of the allegedly existential nature of the problem. That is, if the understanding is not openly asserted, it becomes all too easy to assert that these existential cases are not amenable to judicial review.

2 The Common Law Constitution

In the 1950s, the same era in which the Communist Party case was decided, Canada’s Supreme Court delivered a string of judgments that are often regarded as articulating a theory of implied rights in Canada’s federal Constitution, the British North America Act of 1867, that is, as judgments in which judges read into the terms of the federal Constitution rights such as the right to free speech. But these cases are, in my view, better understood as being about the common law constitution in the sense explored in this essay. For our purposes, the most significant of this string of cases is the 1957 decision in Switzman v. Elbling.

The Province of Quebec had enacted an Act to Protect the Province against Communist Propaganda. This statute was known colloquially as the Padlock Act, since it made it illegal to use any “house” to “propagate communism or bolshevism by any means whatsoever” and gave to the Attorney-General the authority to place a padlock order on such a house of up to one year. While the Attorney-General had to have “satisfactory proof” that the house was being used in this way, he was the sole judge of that issue. The majority of the Supreme Court held that the Act was invalid because under Canada’s federal Constitution the federal Parliament had sole authority to criminalize activity, although the province had tried to argue that its authority stemmed from its power to regulate property.

The lone dissenter, Justice Taschereau, held that the impact of the statute on individuals was incidental to a scheme of regulating property and such schemes fell within the authority of provinces. Chief Justice Kerwin, for the majority of the majority, said that “in cases where constitutional issues are involved, it is important that nothing be said that is unnecessary,” and he stuck resolutely to the division of powers basis, a stance in which he was joined by Justices Locke, Nolan, and Cartwright. However, Justices Rand

42 Also known as the Constitution Act of 1867.
43 Switzman v. Elbling, SCR 285 (1957). The best discussion of these cases is to be found in D. Mullan, The Role for Underlying Constitutional Principles in a Bill of Rights World, NZLR (forthcoming).
44 RSQ 1941, c. 52.
45 See Switzman case, supra note 43, at 299.
46 Id., at 288.
and Abbott gave much fuller reasons and Justice Kellock concurred in Justice Rand’s judgment.

Both Justices Abbott and Rand stressed that the British North America Act had to be seen as part of a constitutional tradition, something expressly recognized in its Preamble, which stated that the four provinces desired to be united in a federal union with a constitution “similar in principle to that of the United Kingdom.” Justice Rand took that statement to embody the “political theory […] of parliamentary government […]”. This means ultimately government by the free public opinion of an open society […].”

“But,” he went on, “public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas.” And this led to what he termed a “constitutional fact” that freedom of expression “has a unity of interest and significance extending to every part of the Dominion.” This fact, he said, is the “political expression of the primary condition of social life, thought and its communication by language. […] As such an inherence in the individual it is embodied in his status of citizenship.”

On this basis, he denied that any province had the authority to regulate free speech using the mechanisms of the criminal law, though he declined to comment on whether the federal Parliament would have such authority.

Justice Abbott, however, ran with this argument. He said that while it was not necessary to determine the question, his view was that under the Constitution as it stood, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit is […] restricted to such powers as may be exercisable under its exclusive jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

As we can see, the premise of both Rand’s and Abbott’s judgments is not that the federal Constitution is a text into which judges may read or imply rights. Rather, they start from the premise that their federal Constitution is a continuation of a constitutional tradition in which Parliament is seen as the guardian of these rights and so can be called to account by judges when it seems to stray from this role. It is fairly remarkable in this era to find judges prepared to articulate this premise so openly. But the importance of its full articulation is illustrated by the famous decision of the Privy Council in Liyanage v. R.

This case arose from an attempted coup in Ceylon (later Sri Lanka) in 1962. The Parliament of Ceylon enacted a statute that did not purport to try

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47 Id., at 306.

48 Id., at 306-307.

49 Id., at 307.

50 Id., at 328.

51 Liyanage v. R., 1 AC 259 (1967).
and convict those responsible, but did create a new offence with retroactive effect. Further, it made convictions considerably more likely by authorizing after the fact the detention of those awaiting trial and by amending criminal law and procedure in order to facilitate their conviction at trial.

Despite the fact that the trials would still take place in the ordinary courts of law, the Privy Council struck down the legislation on the basis that the Constitution of Ceylon contained provisions that explicitly secured the place of judges in the constitutional order. The Privy Council inferred from the constitutional provisions, in the words of Lord Pearce, “an intention to secure in the judiciary a freedom from political, legislative and executive control”52 and it accepted the argument put by Liyanage’s lawyers that the statutes were “a grave and deliberate incursion into the judicial sphere.”53 But Lord Pearce also said that he was not relying on any analogy with the British Constitution as this was unwritten while the Court had to “interpret a written document from which alone the legislature derives its legislative power.”54

While this judgment is often regarded, with the Communist Party case, as one of the high-water marks of common law constitutionalism, it is not often noted that the Privy Council went further than rejecting the analogy with the British Constitution; it also rejected the main argument put by Liyanage’s lawyers. While the lawyers had adverted to the fact that the Ceylon Parliament was limited by the constitutional provisions, including those protecting the judicial function, these provisions were taken as evidence of the fact that the powers of the Parliament of Ceylon were inherited from the Crown’s powers to enact law for its colonies and, according to ancient authority, a judgment of Lord Mansfield, those powers were limited by the requirement that “no law contrary to fundamental principles could survive the conquest.”55 The lawyers stated the fundamental principle as follows:

Legislation directed against selected individuals or against one individual is not law at all, but an exercise of judicial power, which is equally invalid. The legislature has purported to direct the judges by the terms of the impugned legislation to ignore the general law applicable to the kinds of cases similar to the case of the appellants, and to substitute rules as to the admissibility of evidence which deprived the appellants of the protection given by the general law to other subjects.56

Moreover, one of the lawyers said that the legislature’s disability in this regard arose from the judicial oath,

52 Id., at 287.
53 Id., at 290.
54 Id., at 288.
55 Id., at 265, referring to Lord Campbell’s decision in Campbell v. Hall, 1 Cowp. 204, 98 ER 1045 (1774).
56 See Liyanage case, supra note 51, at 267.
which every judge takes and to the protection which he recognises as essential under the constitution, his duty in exercising his judicial function is to dispense justice to all men according to the law of the country. From that it follows that in the exercise of what is merely a legislative power parliament cannot under the guise of what is called legislation either usurp the judicial function of the judges or interfere with them. That is the fundamental distinction which flows from the constitutional position which arises when there is expressly or by necessary implication a complete separation of judicial functions.57

Lord Pearce responded that when the British Parliament enacted the statute that gave Ceylon its independence and removed the requirement that any law of the Ceylon Parliament would be invalid because of its repugnancy to English law, it could not be thought to have left in place “a fetter of repugnancy to some vague unspecified law of natural justice.” Further, he said, their Lordships doubted “whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test for the former.”58

But what Lord Pearce fails to see is that such fundamental principles can be seen as part of English law, as the constitutional basis of English law, and thus exported along with the unwritten British Constitution, even though positive laws might exist in England that were inconsistent with the values. Moreover, those values can be claimed to be a test for what the positive law is even though such positive law might override the values.

Notice in this regard that we do not consider that someone is free from the requirements of morality merely because he can and does act immorally. The response to this point might seem obvious: the normative constraints of a legal regime are different from those of a moral regime in that the former by nature have to be enforceable if they are to count as constraints. But, as I will now argue, there is a sufficient element of enforcement in the fact that parliament has explicitly to override the values if it does not wish to be subject to them. What I will call the requirement of explicit override is then sufficient to prove false the assumption that a unitary parliament is unconstrained.

3 The Requirement of Explicit Override

Take, for example, the situation where there is a unitary parliament that is not subject to any written constitution and that delegates a very wide discretion to the executive to detain perceived enemies. In a common law

57 EFN Gratiaen QC, responding to the lawyers who appeared for the Crown, id., at 276.
58 Id., at 284-285.
legal order, judges who are asked to review the executive’s decisions are faced with a clear choice. They can either adopt the stance of constitutional positivism and say that because the legislature did not stipulate any controls on the exercise of discretion there are none. And they can call in aid of their argument the existential nature of the situation. Or they can adopt the stance of common law constitutionalism and say that it is their duty to interpret the grant of discretion in the light of the fundamental values of legal order, values that are never more important than at a time when the legal order is under severe political stress. If they take the latter course, the legislature may respond by reenacting the statute and making it clear that the legislative intention is that the executive is permitted to violate such values. Such a reaction raises the stakes to the point where judges must consider whether they will take literally Coke’s thought in *Dr. Bonham’s* case:

> the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for 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.59

But the claim that there is a common law constitution that controls parliament does not depend on whether judges will in fact decide they have the authority to resist such an explicit override. The fact that parliament has explicitly to declare that it does not want the executive to be bound by fundamental legal values comes with a political cost. The people to whom the government is accountable will be able to judge whether they want a government that it is not committed to the rule of law. This cost is exactly analogous to that associated with the Section 33 override of Canada’s Charter of Rights and Freedoms, which permits the federal and provincial legislatures to override certain judicial determinations of constitutional invalidity.60

59 *Dr. Bonham’s* case, 8 Co Rep 114 (1610). For relevant discussion, see M. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 University of Toronto Law Journal 91 (2001). I part company from Walters in my understanding of the common law constitution in that I do not set much store on the claim that a robust understanding of the common law constitution requires that judges regard themselves as entitled to declare statutes void on the ground that the statutes violate the constitution.

60 In other work, I have started to explore the distinction between formal and substantive privative clauses. See, e.g., D. Dyzenhaus, *The Unwritten Constitution and the Rule of Law*, in G. Huscroft (Ed.), *Constitutionalism in the Charter Era* (forthcoming). A privative clause is a provision in a statute that says that the courts shall not review the decisions of a tribunal. In the common law world, courts have come to accept the position that a general privative clause is largely redundant, since a legislature cannot seriously intend that a tribunal be delegated legally unlimited authority, and so judges will hold that they are constitutionally entitled to review decisions that trench on those limits. The difference between this kind of general privative clause and the substantive one is that the substantive one ousts review only on particular grounds. What is suspect about the general privative clause is that it seems to oust
The difference a federal constitution makes is then that, like a statute that delegates authority to the executive, it supplies text that delegates authority to legislatures. Judges who adopt the stance of common law constitutionalism will find that the text is evidence of the fundamental values of their legal order, in so far as it can be rendered consistent with such values. That there is such a text makes a difference. Judges do not have to assert an authority against the legislature, since the legislature has authority only in virtue of the federal constitution. The only override available in these circumstances is likely the process of constitutional amendment set out in the constitution. But even if the government of the day successfully procures such an amendment, one should not from that fact conclude that the legislature was unconstrained by the constitution. As before, the government minded to break free of constitutional constraints has to be willing to do so in a way that makes public its unwillingness to be constrained by the fundamental values of its legal order.

It is, in my view, significant that one can interpret the reaction of the Australian people to the decision as in tune with this argument. The government, buoyed by the knowledge that the Communist Party Dissolution Act had enjoyed popular support, sought in the wake of the Court’s decision to amend the Constitution in order to give the Commonwealth the explicit authority to reenact the statute. Such an amendment required the approval of the electorate in a referendum, and they rejected the government’s attempt. But if all the Australian people cared about was that formal legal limits are respected, then, given their initial support for getting rid of communism, they should have supported the amendment to the Constitution. Thus, one can attribute to them a sense that there was more wrong with the statute than that it had transgressed the formal limits of the Constitution.

What constitutional positivists fail to see, but what one can interpret Australians as having seen, is that a federal constitution is not merely a blueprint for dividing powers. In order to divide the powers, its drafters will be forced to confront the question of how to articulate some of the constitutional presuppositions of legal order in general, whether in a unitary or a federal system. What can be left unsaid over the centuries might have to be said as politicians and lawyers struggle to articulate their own understanding of how to take the project of legal order forward in their particular federal context.
There is a political necessity in the design of a federal state to divide powers between the federal power and the states or provinces, and that necessity requires an explicit attempt to designate which powers will reside in the federal entity and which in the others. It also requires that the drafters of the constitution put their mind to the question of the unity of the legal order—the extent to which a unitary legal order is required—and that involves answering explicitly the question of how to secure the place of the highest court in the general court structure. As long as some significant degree of unity is required, a unity that will be overseen by the highest federal court, text will exist that permits judges to read into the actual words used an intention to provide the normative safeguards often associated with a doctrine of the separation of powers. But while the text provides comfort to judges, it cannot provide the basis for the claim that these normative safeguards exist. The thought that there should be a unity to legal order, tailored to the particular circumstances of politics that make a federal structure appropriate, and that independent judges should preside over that unity, is the bequest of a constitutional tradition that provides the assumptions, albeit unwritten, of that legal order.61

So in a federal constitution, it is likely that the basis will be laid for judges to assert a constitutional guarantee of their independence. But independence, whatever the nature of the constitution, is not an intrinsic value. Rather, it is instrumental in that it secures a place for judges in the constitutional order in order to serve other values, for example, the right to have determinations of guilt decided in an open court. The very distinction between the claim that judges are entitled to read or imply rights into a federal constitution and the claim that all they are entitled to do is find that there are procedural protections based in the inherent powers of the judiciary is suspect.62 Their duty as judges is to the rule of law or legality, and the


procedural values of the rule of law are deeply connected to substantive values, such as equality before the law.

Thus as T. R. S. Allan argues in the leading theoretical treatment of the rule of law, the substance of the attainder argument pertains to the fact that the statute in issue offends against a constitutional fundamental, the constitutionally guaranteed role of an independent judiciary in presiding in open court over determinations of guilt and punishment. A bill of attainder is just “the paradigmatic example of legislation whose violation of the principles of equality and due process contravenes the rule of law.” The repugnance of the common law tradition to such statutes is born of the idea that while the legislature can enact into law its understandings of subversion and other offences, the rule of law requires both that that offence be framed generally and that anyone accused of such an offence be tried in a court of law. In other words, the argument is a deeply normative one about the separation of powers, in this context one about the importance of preserving the constitutional role of an independent judiciary to see that the rule of law and the limits of delegated legal authority are observed. And it is normative in that the constitutional role of the judges is to guard the civil rights of the individual, here both the right to a fair trial and the right to be treated as equal before the law.

Put differently, the idea of the separation of powers is itself instrumental to securing certain values. I want then to suggest that the separation of powers is not so much about checks and balances as about the realization of, in Kantian terms, a republican ideal. In H. Bielefeldt’s translation of the well-known passage from Kant’s *Perpetual Peace*,

> Republicanism is the political principle of separation of the executive power (government) from the legislative power; despotism is that of the high-handed management of the state by laws the regent has himself given, inasmuch as he handles the public will as his private will.

As Bielefeldt explains, the republican ideal seeks to prevent the general will from getting “lost in the problems of everyday power politics.”

> [It is then not an] external imposition on a republic of self-legislating citizens, but instead makes up the inner quality of a polity that proceeds in accordance with the underlying normative principle of republican self-legislation—that is, the united lawgiving will of the people.

In this way, the separation of powers is not, or not only, the idea put forward by Montesquieu and others of an external means of moderating legislation.

63 See Allan, supra note 9, at 148.
65 *Id.*, Bielefeldt, at 112 (emphasis removed).
Rather, it is an internal means of institutionalizing republican self-control and self-criticism “with regard to the basic normative principle of the legal order in general—namely, the ‘innate right’ of every human being, which is to be spelled out in republican legislation.”

4 Back To Schmitt

It is not my argument, however, that judges who work within a tradition in which the premise of common law constitutionalism has been clearly articulated will always maintain that tradition. Thus in Canada in the 1970s, Canadian courts failed to rise to the challenge posed by the federal government’s response to the resort to violence by members of a group involved in the struggle by Quebec nationalists to secede from Canada. The government invoked the War Measures Act which in Section 3(1) gave the Governor-General the power in case of an insurrection to “authorize such acts and things, and make from time to time regulations” as he deemed “necessary or advisable” for the “security, defence, peace, order and welfare of Canada.”

Regulations were issued that included a preamble declaring the group to be involved in illegal activities, including murder and kidnapping “as a means or aid in accomplishing a governmental change”; declaring the group unlawful; making membership of the group punishable by a term of imprisonment not exceeding five years; permitting the arrest without warrant of suspected members; and authorizing detention without bail while awaiting trial and detention for up to 21 days if no charge was laid. In addition, the regulations stipulated that proof of membership in the body would be constituted by the fact that a person had attended a meeting of the unlawful group, with the onus on the individual to rebut that proof. Parliament subsequently enacted a Public Order Act that approved of action carried out to enforce the regulations and gave them the force of law.

In *Gagnon and Vallieres v. The Queen*, the Quebec Court of Appeal heard a challenge to the constitutional validity of the Act, as part of a writ issued for *habeas corpus*. N. Lyon, a professor of constitutional law, submitted a brief to the Court that contained a combination of the attainder argument of *Liyanage* with the common law constitution cases of the 1950s such as *Switzman*, where he relied in particular on Justice Abbott’s *obiter*

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66 Id., at 113-114.
68 Gagnon and Vallieres v. The Queen, 14 CRNS 321 (1971).
dictum about the right of discussion and debate being protected even against the federal Parliament.69

This argument was particularly powerful because Lyon could rely both on the fact that the British North America Act of 1867 protected the constitutional place of the Canadian judiciary in much the same way as did the Constitution of Ceylon and on the Supreme Court’s articulation in Switzman of the idea of the common law constitution.70 In Lyon’s summary, the Privy Council had inferred from Part VI of the Ceylon Constitution “an established constitutional value in having the rights and obligations of citizens, including criminal guilt, determined according to established procedures in courts of law by judges secured from political pressure.”71 Lyon also pointed out that Canada’s Criminal Code dealt with the crime of sedition, leaving it to the courts of law to enforce that crime. The regulations, in contrast, declared the group guilty of the crime of sedition and then, as he put it, “reduced” the judiciary “to the role of timekeeper, keeping track of who attended what meetings and spoke or communicated what statements on behalf of an association. Criminal guilt was determined by executive decree.”72 The statute merely elevated this scheme to the status of legislation.

Only one judge, Justice Montgomery, confronted this argument and he distinguished Liyanage on the ground that the Ceylon legislation was aimed at a “known and identifiable group of individuals” while “no individual” was “named in the Public Order Act.”73 He also claimed, somewhat like Chief Justice Latham in the Communist Party case, that unlike the Ceylon law, the Public Order Act did not have a “punitive and vindictive character.” Finally, he claimed that the Act did not usurp the functions of a court since it simply created a new offense.74

The rest of the judges simply ignored the argument, with the exception of Justice Brossard who mentioned it only to dismiss it by saying it was a mere academic opinion about what the law should be and that, in his view, the fact that the retroactive provisions of the statute were so clear meant that it could not be unconstitutional. By this he seemed to mean that the federal Parliament was entitled, to use Justice Fullagar’s phrase, to recite itself into power as long as it did so clearly.75 But the fact that these judges either ignored or dismissed the argument, or pretended the character of the

70 See Gagnon, supra note 68, at 141.
71 Id.
72 Id., at 139.
73 Id., at 328.
74 Id., at 328-329.
75 Id., at 336-367.
impugned statute was other than it in fact was, indicates its power. As we have seen, even as consistent a constitutional positivist as Latham found it necessary to pretend that the Communist Party Dissolution Act was not punitive in character, in an attempt to raise his level of comfort as he found himself lending legitimacy to governmental arbitrariness.

In other words, all that such judgments prove is that the siren song of the executive in times of emergency or alleged emergency is always seductive. As I suggested in the introduction, Canada’s Supreme Court has retreated from its stance of rights protection in the wake of 9/11 and this retreat is happening after more than twenty years of judicial experience of an entrenched Bill of Rights, and, moreover, a resurgence of the ideas of common law constitutionalism articulated in the 1950s. The Supreme Court seems willing to reduce itself to the role of a rubber stamp in reviewing security decisions. In the United Kingdom the House of Lords and Court of Appeal seem set on the same path.76

For those who regard this path as inherently dangerous, it is, I believe, important to hold onto the republican ideal sketched earlier that regards the separation of powers as premised on a claim about the innate right of every human being. If the right is cast as one of citizens of the democracy it becomes all too easy to reserve the rule of law for the citizenry, consigning the others to the legal ‘black holes’ that have been devised in recent years, the Guantanamo Bays of the new world order.77 Citizens might not be too concerned, as those caught in the net cast by terrorism statutes are more often than not the ‘other’ or the ‘alien’—the illegal immigrants, the refugees who had opposed the political regime of their native land, people with a different skin color, homegrown political dissidents, or anyone else who is already marginal or whom powerful groups would prefer to be marginal.

But those who take comfort in their homogeneity, in the fact that they are not other or alien, when terrorist legislation is enacted should note what A. Macklin has termed “law’s role in producing the alien within.”78 Such legislation shifts the category of alien enemy out of the legal arena in which it often goes unnoticed because we do not care much about those who have fragile legal status in our societies—refugee claimants and people subject to deportation because they are not yet citizens—or even want them out as soon

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76 Most notably in Secretary of State for the Home Department v. Rehman, 1 All ER 123 (2002). For discussion see D. Dyzenhaus, Intimations of Legality Amid the Clash of Arms, 2 I-CON 244 (April 2004).
77 See Abbasi v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department, All ER (D) 70 (CA 2002), which in Intimations of Legality Amid the Clash of Arms (id.) I describe as a potential ray of light in the current rule of law gloom.
as possible. It shifts the category of the ‘alien’ into the ordinary law of the land, where the ineliminably vague and political understandings of ‘terrorist’ and ‘national security’ give to the executive a wide scope for dealing conveniently with those it considers to be its enemy.79

However, my argument in this chapter is not about the dangers of that path. It is the more limited argument that when governments are tempted to step onto this path judges can require that they live up to this republican ideal and, moreover, it is the judicial duty to do so because that ideal is embedded in the rule of law. That a government can break free of the constraints of the rule of law and that in a democratic political order the government can do so with the blessing of the majority does not show that these constraints are illusory. Nor does the fact that in times of crisis judges might tend to ease the way for governments minded to walk this path, even giving them the imprimatur of the rule of law, undermine this argument. The lesson of the Communist Party case is that the Schmittian choice that Latham constructed in his judgment—either the parliament/executive or the judges—is a false one. There is the middle ground of legality—the constitutional values of the rule of law—which the majority relied on despite their own pull towards constitutional positivism.80 And so for present purposes my argument is simply that the Schmittian account choice distorts our understanding of the options and that judges can and should assist us to be clear about what the real options are.81

79 For further discussion, see D. Dyzenhaus, The Deep Structure of Roncarelli v. Duplessis, UNBLJ (forthcoming).

80 I am comforted in my conclusion by the fact that it is consistent with the argument put by as knowledgeable and as astute an observer of twentieth-century politics as one can find, in a still classic work. See O. Kirchheimer, Political Justice, at Chapter 4 (1961). At 149-150, he discusses the Australian Communist Party case as well as the distinction between punitive and preventive justice.

81 Schmitt wrote little about Kant, but in the essay in which he deals quite extensively with Kant, he seems less sure than usual about his claim that a liberal state is incapable of defending its values against its enemies—see my translation of C. Schmitt, Ethic of State and Pluralistic State, in Ch. Mouffe (Ed.), The Challenge of Carl Schmitt, (D. Dyzenhaus (trans.)), 195 (1999).