# ANOTHER BLAST FROM THE PAST OR WHY THE LEFT SHOULD EMBRACE STRICT LEGALISM: A REPLY TO FRANK CARRIGAN

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*[This article argues that Carrigan's criticism of Sir Owen Dixon's strict legalism provides a clear example of the preconceptions and misconceptions that blind most opponents of Dixon's method. It argues that Carrigan's examination of a series of labour law cases does not support his contention that Dixon was a covert judicial activist; that, in contrast to the close relationship between strict legalism and popular democracy, opponents of strict legalism seem far more comfortable with the politics of the reactionary past; and that strict legalism is a necessary preconditon if the common law is to act as an institutional counterweight to an unbridled market. Rather than viewing strict legalism as a misleading and misconceived way of understanding the judicial role, it should be understood as an essential precondition for the operation of the rule of law and the continued independence of the common law in an era of impoverished institutional life.]*

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## I INTRODUCTION

Frank Carrigan's 'A Blast from the Past: The Resurgence of Legal Formalism'[1] is a provocative and welcome addition to the growing debate on the role of judges, especially those of the High Court. While his criticism of strict legalism and its supporters does not persuade me, his arguments do provide an opportunity to examine why strict legalism seems such a strange, even ludicrous, concept to its many critics.

Using a recent article of mine[2] as a springboard from which to launch his attack on formalism (his terminology for Sir Owen Dixon's notion of strict legalism), Carrigan argues in some detail that Dixon's own words betray the falsity of the claims for strict legalism.[3] Since he has read Dixon and other proponents of legalism[4] — including my attempt to distill Dixon's words and

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1 Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163.

2 John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26 *Melbourne University Law Review* 560.

3 Carrigan, above n 1, 165–7.

4 Among whom he includes Professor John Smillie, Chief Justice Gleeson of the High Court, and also Justices Hayne, Callinan, and now Heydon: see, eg, John Smillie, 'Formalism, Fairness and

method — it is unlikely that another recitation of what legalism means and how it operates, however lengthy and detailed, will convince him (and, presumably, other sceptics as well). Since I think that strict legalism is not a facade, but a workable, indeed indispensable, method for judges, I am forced to rethink how I can persuade someone who has read such masters of the method as Dixon and yet remains unconvinced. In essence, I will have to try to overcome the incredulity that many in academia and the legal profession have towards the notion of strict legalism. This can only be done by challenging the preconceptions that these sceptics bring to bear in their response to claims such as mine. It is only then that those sceptical of strict legalism will be able to reconsider their views.

## II WHY DOES STRICT LEGALISM SEEM SO UNBELIEVABLE?

A revealing example of the way in which preconceptions about the nature of law can blind one to alternatives is Carrigan's view that 'legal ideology is a product of material circumstances.'[5] Given this belief, it is unsurprising that where Carrigan sees duplicity in Sir Owen's essays on strict legalism, I see Dixon as merely summarising what he actually did in deciding cases. After all, if legal ideology follows the material world then claims to strict legalism *must* be false. Those who argue the virtues, indeed even the possibility, of strict legalism face an uphill battle if those listening already *know* that strict legalism is a myth. What does one do in these circumstances? Readers can be reassured that I will not attempt a detailed argument showing that law does not closely follow material conditions. However, Carrigan and others who share this belief might want to consider whether the work that has been done actually supports the notion that law inevitably and closely follows changes in the wider society. For example, in contract law, attempts to track changes in doctrine to changing economic and social circumstances have been less than convincing. Morton Horwitz's claim to this effect has been the subject of a devastating attack by Brian Simpson.[6] Even Richard Danzig's justly celebrated analysis of *Hadley v Baxendale*,[7] while enlightening on many fronts, fails to impress on this very point.[8]

On a wider front, supporters of a close link between material conditions in society and the law have the imposing arguments of Alan Watson to overcome. As Watson demonstrates, legal culture, sheer laziness and the allure of legal refinement are much better and more persuasive explanations for the shape of

Efficiency: Civil Adjudication in New Zealand' [1996] *New Zealand Law Review* 254; Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4.

5 Carrigan, above n 1, 176.

6 A W B Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 533; Morton Horwitz, 'The Historical Foundations of Modern Contract Law' (1974) 87 *Harvard Law Review* 917. This article was incorporated, with some additions, into Morton Horwitz, *The Transformation of American Law 1780–1860* (1977).

7 (1854) 9 Ex 341; 155 ER 145.

8 Richard Danzig, '*Hadley v Baxendale*: A Study in the Industrialization of the Law' (1975) 4 *Journal of Legal Studies* 249. See the analysis of Danzig's claim in Simpson, above n 6, 591. The derivation of the rule in *Hadley v Baxendale* from its civilian antecedents is given in some detail in A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 273–7.

legal systems and doctrines, than the view that systems of law follow social and economic practice or, more precisely, the sources of power in society, economics and politics.[9]

I readily accept that strict legalism cannot be understood as a binding and bounded method of reasoning in the way that syllogistic logic can be understood. Once one has been immersed in the cases, it is easy to see that if the judges want to import their own values into their decisions, it is relatively easy for them to do so. If Dixon's strict legalism was a claim that this method was a foolproof means of ensuring that judges would not be able to import their policy preferences into their decisions, then he was the fool, or charlatan, that Carrigan takes him to be. However, neither Dixon nor the writers cited by Carrigan as supporters of strict legalism have ever made such a claim.

Strict legalism is primarily a state of mind. It is an institutional mindset rather than a binding manual outlining standard operating procedures that can and ought to be followed to the letter. If judges *want* to be strict legalists they will be. Of course, they may not be particularly good strict legalists, but this should surely not be surprising: judges *do* differ in their abilities and in their mastery of the vast bulk of learning that makes up the common law, and even the best judges have off days. And, of course, humans are not infallible: there is no doubt that even the most faithful adherents to strict legalism have unconsciously — and consciously, for that matter — decided cases more in accordance with their political, social or economic preferences than in a genuine attempt to keep faith with the existing body of law and the general principles underlying it.

Given this potential for human flaws to mar the consistency of legal thought, what matters is whether there are enough good lawyers to 'correct' the mistakes that are made and that such 'cheating' is kept to a minimum. Strict legalism does not mandate one uniquely right answer, but it does rely on the collective wisdom of the judges and the bar to ensure that decisions conform, within an inevitable but limited range of choices, to the existing law and principles. At the same time, strict legalism's only real defence against 'cheating' is an institutional belief in the importance of deciding cases and developing the law, not in the way that any particular judge wants, but in a way that comports with the law. Of course, strict legalism is more than a mindset; the skill and learning of a Dixon are not picked up easily or quickly. But without such a mindset, such skill and learning become tools for manipulation of rules and the deployment of personal power, instead of an exercise in legitimate authority.

We should be aware that every judge has the potential to be a strict legalist, a judicial activist or a mixture of both. All judges, or perhaps more accurately, the overwhelming majority of judges in Australia, have been appointed because of their learning in the law. It is the mindset that they bring to the judging which is important. As I have argued elsewhere, there are examples of judges who display

[9] Alan Watson, 'Legal Change: Sources of Law and Legal Culture' in Alan Watson (ed), *Legal Origins and Legal Change* (1991) 69. I have dealt with Watson's argument in greater depth in John Gava, 'Is Privity Worth Defending?' in Peter Kincaid (ed), *Privity: Private Justice or Public Regulation* (2001) 199.

both mindsets with radically different results in their judging.[10] Indeed, in the heyday of judicial activism in the Mason Court, it was clear that even the most activist judges often decided cases with a strict legalist bent. What was really disturbing about that episode in Australian judicial history was not so much the activism that occurred, but the trajectory of change in judicial attitudes that became evident during the late 1980s. It was during this period that fidelity to strict legalism among members of the High Court (among others) shrank in direct proportion to the attraction of judicial activism. Had this continued, the mindset that accepted strict legalism, one which is now seen to be a myth by most academics, would have become a minority viewpoint among judges as well.

Carrigan will have none of this, of course, and he cites a series of cases where the High Court considered the question of what constitutes an employee as distinct from an independent contractor to show how Dixon J was as activist as the next judge.[11] In particular, he claims that in this series of cases Dixon J openly displayed hostility to a firmly established rule and quite blatantly changed it in fundamental ways that suited a transformed industrial sector and the interests of corporate employers.[12] However, since Carrigan did not intend to suggest that these cases, by themselves, constituted all the proof that was needed to show that Dixon J was an activist judge, I will not, in turn, claim that my response to Carrigan's interpretation of these cases constitutes proof that Dixon J invariably followed the path and method of strict legalism. Nevertheless, I will devote some space to an analysis of these cases because they illustrate well the point that preconceptions can and *do* blind. To be blunt, Carrigan is so blinded by his belief about what the nature of law is and what judges do that he has misread and misconstrued the cases.

## III A CASE STUDY: THE CONTROL TEST OF EMPLOYMENT

The first case mentioned by Carrigan is *Humberstone v Northern Timber Mills*.[13] The High Court unanimously agreed that Humberstone — who carted timber and materials for the respondent mills — did not fit within the definition of an employee. Whether this was correct, or even fair, is of course open to debate. But the reasoning adopted by Dixon J does not appear to support the interpretation that Carrigan imposes on it. In the words of Dixon J:

> For a case like the present, the test of the existence of the relation of master and servant is still whether the contract placed the supposed servant subject to the command of the employer in the course of executing the work not only as to what he shall do but to how he shall do it. The regulation of industrial conditions and other laws have in many respects made the classical tests difficult of

[10] John Gava, 'The Perils of Judicial Activism: The Contracts Jurisprudence of Justice Michael Kirby' (1999) 15 *Journal of Contract Law* 156.
[11] Carrigan, above n 1, 167–70.
[12] Ibid.
[13] (1949) 79 CLR 389 ('*Humberstone*').

> application and it may be that ultimately they will be re-stated in some modified form … But the present case is free from such difficulties.[14]

How this can be understood as backsliding from the 'continuing deference to the authority embodied in the control test'[15] is not immediately apparent to me. To be fair to Carrigan, Dixon J acknowledged that the test did not only include cases where the work was in fact subject to direction and control from the employer, but also cases where the 'ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.'[16] Does this help Carrigan? I don't think so. It would seem to be a commonsense application of the control test and not one that fundamentally changes its nature. If, however, it does amount to a substantive change to the test, it does not appear that Dixon J's formulation illustrates anything other than strict legalism at work. In this scenario, we have a judge acknowledging that changed circumstances make the application of an existing rule difficult, inappropriate or maybe even unfair. In such a circumstance, as Dixon J and other strict legalists have argued, the proper path for a judge to follow is to use analogy and the underlying principle behind the rule to develop it in a fashion that is consistent with the aims and effects of that rule. Has anything more been done here (ignoring, again, that Dixon J explicitly denies that this was necessary or that he was going down that path)? In any event, we should remember that if Dixon J, despite his protests, *did* widen the scope of the control test, this resulted in more 'workers' being labelled as employees. As we shall see, this provides no comfort for Carrigan.

The next case discussed by Carrigan is *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*,[17] in which the question was whether payment to a drover for services rendered constituted wages paid to an employee for the purpose of payroll tax. While it is true that Dixon J stated that, in determining whether a worker is an employee or not, 'it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled',[18] this statement was made in the context of an appraisal of a long line of cases, mostly 19th century, to show that a drover was normally not an employee.[19] Thus, rather than abandoning the test, as Carrigan asserts,[20] Dixon J merely illustrated how that test was a shorthand version of what judges had been doing and ought to do when determining the status of workers by deciding whether a particular relationship was one of employment or not.

Clearly, the test for identifying an employee cannot be stated in two or three words. To be as generous as possible to Carrigan, I am happy to admit that the judges have acknowledged that, to give full effect to the test in contemporary

14 Ibid 404.
15 Carrigan, above n 1, 168.
16 *Humberstone* (1949) 79 CLR 389, 404.
17 (1945) 70 CLR 539 ('*Queensland Stations*'). *Queensland Stations* was actually decided before *Humberstone* but I will follow the order in which Carrigan considers the cases.
18 Ibid 552.
19 Ibid 551–2 (Dixon J).
20 Carrigan, above n 1, 168.

conditions, it had to be reformulated. But even if the judges *have* somehow changed the rule, it is difficult to see that this was done in any way that would be foreign or inconsistent with strict legalism. No supporter of strict legalism has ever suggested that only stasis is possible: the judges clearly tried to give effect to the essence or principle underlying the rule in circumstances where a simple-minded application of it would have resulted in a genuine employee not being legally regarded as one. As with *Humberstone*, it also pays to remember that if the rule was actually extended, its operation resulted in more, not fewer, workers being identified as employees.

The next case mentioned by Carrigan is *Stevens v Brodribb Sawmilling Co Pty Ltd*,[21] which concerned the status of two workers involved in sawmilling, who were ultimately held to be employees despite the attenuated relationship between them and their 'employer'. Mason J, Brennan and Deane JJ agreeing on this point,[22] discussed the control and direction test at some length. But what he said provides little comfort to Carrigan:

> The traditional formulation, though attended with some complications in its application to a diverse range of factual circumstances … nevertheless has had a long history of judicial acceptance. True it is that criticisms have been made of it. It is said that a test which places emphasis on control is more suited to the social conditions of earlier times in which a person engaging another to perform work could and did exercise closer and more direct supervision than is possible today. And it is said that in modern post-industrial society, technological developments have meant that a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it … Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.[23]

Wilson and Dawson JJ expressed similar sentiments.[24]

What is one to make of this? Clearly, the judges are not disenchanted with the existing control test, nor do they believe that they have fundamentally altered it. Indeed, they expressly deny this. If, as Carrigan asserts, Dixon J was unhappy with the existing authority and had significantly changed the nature of the test used to determine whether a person was an employee or an independent contractor, it appears that the judges in *Brodribb* were not aware of it. Indeed, in this case — as in the previous two cases discussed — the judges went out of their way to state their satisfaction with the rule and its capacity to operate even in a modern economy.

Carrigan might respond by accepting that the judges did not expressly admit to changing the rule in a fundamental way — rather, they acknowledged that, in the

[21] (1986) 160 CLR 16 ('*Brodribb*').
[22] Ibid 47 (Brennan J), 49 (Deane J).
[23] Ibid 28–9.
[24] Ibid 36–7.

words of Mason J, the 'totality of the relationship between the parties'[25] was the central concern — they had achieved substantial change through the written equivalent of a sleight of hand. However, on the contrary, the impression given by the judges in *Brodribb* in their analysis of the relevant cases suggests that, whilst the verbal formulations may have changed over time and between judges, the overall effect of the test and its results have not. In other words, the judges seem to be saying that the traditional formulation works in most cases. Where it is not appropriate, an overall examination of the relationship between the parties should lead to the sort of result that would otherwise have been achieved had it been possible to use the traditional formulation. This seems far removed from the notion of an activist judiciary radically changing an important test in labour law because it was no longer applicable to contemporary conditions. In any event, *Brodribb* does not have the effect of narrowing the scope of those who will be seen as employees, at least in comparison to the cases that I have discussed so far.

The final case mentioned by Carrigan is *Hollis v Vabu Pty Ltd*.[26] Here the appellant was injured by a bicycle courier working for Vabu and the issue before the Court was whether the respondent was liable for the courier's negligence. A majority of the High Court held that the courier *was* an employee. In doing so, they made comments that, superficially at least, seem to give some support to Carrigan's claims. They cite the cases discussed above and state that in *Brodribb*, 'the court was adjusting the notion of "control" to circumstances of contemporary life and, in doing so, continued the developments in [earlier cases]'.[27] Indeed, they also cite at length an extract from a legal text which points out the difficulty of applying the control test in modern conditions.[28] Yet the judges then go on to cite the very extract from Mason J in *Brodribb* which I have quoted above, where Mason J pointed to the flexibility of the control rule and its adaptability in the face of changing employment conditions.[29] When the majority lists the reasons that are determinative in deciding the status of the courier, it appears that *control* is far and away the most important.[30]

The Court was also clear that it was not, to use Carrigan's words, 'transform[ing] the legal status of a fundamental social relationship'.[31] In responding to claims that the Court should defer to the legislative inactivity in this area — and thus delay reformulating the test — the Court said the following:

> this proposition might have some attraction if this court were contemplating the reformulation of basic doctrine … However, *no such reformulation is proposed*. This decision applies existing principle in a way that is informed by a recognition of the fundamental purposes of vicarious liability and the operation

25 Ibid 29.
26 (2001) 207 CLR 21.
27 Ibid 40 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
28 Ibid, citing Harold Glass, Michael McHugh and Francis Douglas, *The Liability of Employers in Damages for Personal Injury* (1979) 72–3.
29 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 41 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
30 Ibid 40–6.
31 Carrigan, above n 1, 168.

> of that principle in the context of one of the many particular relationships that has developed in contemporary Australian society.[32]

It is difficult to see how this case supports Carrigan's contention that the area of law under consideration was a site of judicial disenchantment with both existing authorities and a longstanding rule, with the result that the judges radically transformed the rule to suit, or even to help bring about, changed workplace conditions. Carrigan may see this in the cases, but I do not.

For Carrigan, it seems that any change in the common law is a smoking gun indicating the presence of covert judicial activists. Yet, if we view the control test from a wider perspective, what appears to him to be evidence of fundamental transformation is, rather, commonsense legal development. Surely a test which was formulated in the 19th century to differentiate employees from independent contractors could extend beyond the types of employment that existed at that time. And, just as surely, this test would have to take into account changes in the nature of work and of new occupations. This, in fact, is what has happened. The judges have reformulated the rule to take these changes into account, but there is no evidence that this was done either to covertly change the nature of the rule, or to help initiate or accelerate changes in the nature of workplace relationships. If the latter was the goal, and Carrigan hints as much when he suggests that the change which he identifies was necessary for the recognition of new types of jobs at the commanding heights of the new economy,[33] one is forced to ask why the cases involved truck drivers, a drover, some timber workers and a bicycle courier. It makes much more sense to see these cases as reactive: they certainly did not involve or represent a push to change the law by employers in the new economy who were unhappy with the existing legal regime.

In fact, Carrigan seems to have misread the relationship between the judges and changes in the nature of workplace relations. Changes there have been, especially in the increased use of independent contractors in the place of traditional employees. One does not have to be a labour lawyer to see this. But the cases that Carrigan cites all had the effect of maintaining or even widening the definition of an employee. To that extent, they hindered, not helped, the transformation of the nature of paid work in Australia. If Carrigan is correct in his claim that Dixon J did initiate a fundamental reformulation of the legal test of what constituted an employee, it was not a formulation that betrayed any preference for contract over governmental regulation of workplace relations. If Carrigan is right, the covert activism of the judges has been in favour of old-fashioned governmental regulation of the workplace, not what many would view as the tougher new world of industrial relations of the New Right.

[32] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 46 (emphasis added).
[33] Carrigan, above n 1, 168.

## IV THE REACTIONARY ESSENCE OF JUDICIAL ACTIVISM

Another way of trying to understand why writers such as Carrigan can only perceive strict legalism as a myth is to examine the constitutional consequences of strict legalism as compared with judicial activism. In this part, I will argue that, despite common belief, strict legalism sits far more comfortably with electoral democracy than does judicial activism. Indeed, I hope to show that judicial activists are actually reactionary in political terms, having more in common with the politics of landed wealth in the 19th century than popular democracy in the 21st.

Carrigan is not entirely clear when he discusses the constitutional role of judges. He provides two differing statements about their role without ever discussing the relationship between the two. One conceives of judges as tribunes of the people, defending their interests against the overwhelming political power of elites in our society.[34] The other sees them as part and parcel of the state, although Carrigan seems unclear whether this is a positive[35] or a negative[36] development.

Displaying a distrust of electoral democracy that seems worryingly prevalent today, Carrigan sees the legislature in public choice terms. For Carrigan, the electoral process has been taken over by the organised and powerful in society, and the legislature has become a conduit for these elites to transform their desires into law. Activist judges, presumably, would be able to counterbalance this takeover of legislative power with their own law-making capacity in a way that favours the interests of those who have effectively become disenfranchised.

Underlying this vision is a disturbing assumption. If judges are to assume the role of tribunes of the people, it will amount to constitutional amendment by stealth. This is disturbing because the history of constitutional rule in the world is not one that should inspire poorly considered and untested ideas. There are not many examples of long-lived, successful constitutional democracies and one should think very carefully before substantive changes are made to Australia's present structure. One certainly wonders whether judges, who are supposed to embody even-minded fairness and punctiliousness with respect to the meaning of words and legal rights, would ever have the capacity, either individually or in institutional terms, to discern what is in the public interest, to determine whether the public is being disadvantaged by the legislature, and to design appropriate law to give effect to the desired policy.

The same sorts of concerns arise when a common variant of Carrigan's proposal is considered. In this view, activist judges have become a barrier *against* the perceived excesses of the people, restraining the unenlightened majority. Refugee policy and the vote on the republic seem to be the touchstones of this distrust of the majority. I have heard numerous legal academics argue that since the Australian people have shown an inhumane and racist attitude to refugees and have supported (and will, it is assumed, continue to support) such policies,

[34] Ibid 178–9.
[35] Ibid 174–5.
[36] Ibid 178.

activist judges are necessary to ameliorate or even reverse such government policies. Unlike Carrigan, such people view judges not as tribunes of the people, but rather as protection from the people and their alleged policy excesses.[37]

Nevertheless, both views see judges as having a significant constitutional role, one that has no formal existence, and one which has not been a matter of serious political and popular debate. Both views, the activist judge as a tribune *of the people* and as a defender of human rights *against the people*, rest on a reactionary political base. The former is essentially a modern rehashing of early responses to universal franchises. The people are seen as incapable of looking after their interests and a favoured class — formerly the landed aristocracy, now judges and their elite supporters — is seen as the necessary champion for an otherwise incompetent mass. Those who want judges to restrain the excesses of the mob have attitudes that are clearly reminiscent of reactionary political views in the 19th century. Then, those fearful of the great unwashed tried to confine the threats posed by the newly enfranchised people by insisting on appointed or hereditary upper houses. On this understanding, the judges are seen as a necessary and, by definition, undemocratic muzzle on the unruly and unwise mob. Both stances are reactionary. Proponents of judicial activism who seem incredulous that anyone could publicly proclaim their faith in the virtues of strict legalism might want to consider their political bedfellows.

As indicated at the beginning of this section, Carrigan offers another understanding of the role of the judiciary, this time as a working member of the state. This need not be inconsistent with either of the two variants considered above: judges as tribunes and judges as overseers. It is not uncommon for component parts of the state to be at odds with each other — especially given Australia's federal structure. Despite this, they can all be considered to be parts of the state in pursuing national objectives, whether they are acting together or in opposition. Carrigan gives the example of Higgins J in the early part of the 20th century and his use of judicial power in a deliberate attempt to yoke the judiciary into active policy development, and even operational control of politics at a day-to-day level.[38] I think that Carrigan is correct in seeing this as an inevitable consequence of the sort of judicial activism that took place during the last 20 years in Australia.

On the other hand, strict legalism is the public expression of an attitude towards the role of judges that is antithetical to the view that judges are instruments of the state. It stands in stark contrast to what I have elsewhere called the rise of the 'hero judge'.[39] These judges see their role as reducing the legal shackles on government, thus increasing the capacity of government to manage the economy and accelerate the pace of economic growth. In fact, these hero judges acted as partners with government to assume nation-building roles, both

[37] John McMillan's recent study of Federal Court decisions in immigration matters suggests that this view of the role of judges seems to have some adherents on the Federal Court bench: see John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335.

[38] Carrigan, above n 1, 174–5.

[39] John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747.

in public and private law.[40] They seem to view the law as open for reconsideration to satisfy this nation-building goal.

It is this attitude that will be examined in the final section of this article.

## V Is Strict Legalism a Conservative Creed?

Without a doubt, strict legalism is conservative in practice. It fits almost hand-in-glove with Edmund Burke's conception of conservatism in the way in which it places emphasis on the past and the cautions that it holds for those who advocate change.[41] But does support for strict legalism mean that one is conservative in political terms? Before considering this question I note that, while Carrigan seems to use the term 'conservative' to refer to both classical conservatives[42] as well as those on the right who give primacy to economic market forces,[43] I will focus my analysis on this latter group.

We can all agree that we live in a capitalist society. I would also contend that capitalism has brought much good to our society and that, overall, it has been a force for good. In any event, the capitalist market will certainly be a central feature of our society for the foreseeable future. To accept this, however, is not to deny the need for analysis or understanding, especially of the dangers presented by an unrestrained free market. Left to itself, capitalism is a restless beast, and while the free market is necessary to produce the goods and services that we want, *some* limitations are nevertheless required to restrain the excesses that unbridled market forces can unleash. For sake of illustration one might compare capitalism to the sun. Clearly we need both to survive in modern Australia. However, just as we cannot live forever in the sun, we also need protection against the ravages of an unbridled market. To protect ourselves against too much sun we wear sunscreen and hats, live under shelter and ensure that the life-giving aspects of sunlight do not turn into cancer-producing death. Similarly, I would argue, just as the market may be necessary to produce the goods and services that we want, we also need to make sure than an excess does not destroy us or our society. An uncontrolled market produces a social cancer analogous to the physical cancer caused by too much sunlight on our skins.

It is my contention that by becoming part of the state, activist judges have become embroiled in the market and the state's close links with it. Such judges become complicit in the market's excesses. By contrast, proponents of strict legalism can argue that, by refusing to see judges as just another instrument through which to enhance the economic potential of the nation, strict legalists in fact offer a potential control over the untrammelled market.[44] Stated briefly, the

[40] For public law see, eg, *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561; *Cole v Whitfield* (1988) 165 CLR 360; *Commonwealth v Tasmania* (1983) 158 CLR 1. For private law see, eg, *Breavington v Godleman* (1988) 169 CLR 41 and Gava, 'Is Privity Worth Defending?', above n 9.

[41] See Edmund Burke, *Reflections on the Revolution in France* (1790).

[42] Carrigan, above n 1, 181.

[43] Ibid 171, 172–3.

[44] This section develops an argument originally made in Gava, 'Is Privity Worth Defending?', above n 9.

common law may have a role as an institutional constraint against what Edward Luttwak has called 'turbo-capitalism'.[45]

Faced with a market that is now as virulent, untrammelled and deregulated as it has ever been in the last 100 years,[46] independent institutions, which once acted as bulwarks against the unrestrained commercial marketplace, are now under threat. Professions, organised religions, law, sport and universities are institutions that have, in the past, maintained values and practices that are not derived from the market. It is unlikely that these institutions were designed with this purpose in mind but they do seem to have acted as counterweights or barriers to an uncontrolled encroachment upon society by the market. The incorporation of these institutions into the economic market has seriously weakened our safeguards against the commodification of all aspects of life, a weakening which has been exacerbated by the deregulatory and privatisation episodes of the late 20th century.[47] The economic lessons of the 20th century have shown that centralised control of the market in whatever form was a failure.

Institutions cannot be created overnight. They need time to grow and they need the reinforcing power of tradition to gain strength. The common law has shown a capacity for survival and, despite the fact that it is essentially a medieval institution with all the flaws and weaknesses that flow from this, it is an institution that merits preservation. The common law promotes the values of the rule of law and legal equality. Most importantly, these values and the rules and principles that have been developed to give effect to them do not owe their existence or their relevance to the capitalist market. Judicial activism threatens the existence of the common law by corroding its attraction to the general population and by transforming it into another instrumentalist tool of the state.

The survival of the common law may also be a catalyst for other, perhaps even more important, institutions to resist the corrosive embrace of the market. As argued above, universities, the professions, organised religion and sport are all being transformed according to the dictates of the market. Were the law to survive in the face of resurgent market forces, it might well encourage a similar attitude of defiance among its companion institutions.

The common law deserves to survive because it may help protect us from an unholy alliance between the market and bureaucratic government that has unleashed the destructive forces of 'turbo-capitalism'; an unholy alliance that worships at the altars of perpetual economic growth and relentless social change. Proponents of judicial activism should realise that their actions would hasten the destruction of an institutional counterweight to the menace of an out-of-control market.

The preconception that opponents of strict legalism carry when it comes to the political impact of this judicial method amounts to a double blinker. Not only does it seem to prevent them from seeing that strict legalism is consistent with left wing thought, it also blinds them to the unwanted results that their own beliefs might engender.

45 Edward Luttwak, *Turbo-Capitalism: Winners and Losers in the Global Economy* (1999) 27.
46 Ibid 36–40.
47 Ibid 37–8, 181–6.

## VI CONCLUSION

Dixonian strict legalism will only get a fair run in the halls of academia and in the courts when its opponents consider the preconceptions that blind them to its virtues. If they remove these blinkers and consider what Sir Owen Dixon and other judges were trying to do, and if they ask themselves whether these preconceptions mask some rather unpleasant truths about their own political and jurisprudential standpoints, they might be able to treat calls for strict legalism fairly.

What is most puzzling is that the opponents of strict legalism so often come from the left or progressive side of politics. Why do such people show such antipathy to strict legalism, especially given its close connection with the rule of law?[48] Why do they ignore the potential of the common law, as traditionally understood and practised, to act as an institutional counterweight to an otherwise untrammelled market? Perhaps this is just another example of the left fighting the wrong battle with the wrong enemy in the wrong place at the wrong time.

[48] Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110.