THE RISE OF THE HERO JUDGE

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I INTRODUCTION

The last 30 years have seen the emergence of the 'hero judge' in Australia. It will be argued that these judges, having emancipated themselves as they see it from the straightjacket of law as authority, see law, instead, as a matter of technique for the managerialist state. Freed from the tyranny of the past and tradition, they boldly discover rights, refuse to be bound by 'out of date' precedents, and replace strict rules with flexible standards based on their own notions of reasonableness, fairness and efficiency. This judicial activism is given jurisprudential respectability by emphasising the elements of choice and creativity available in almost all decisions, especially those of appellate tribunals such as the High Court of Australia ('High Court').

It is hardly surprising that those within academia and the media who see themselves as politically progressive view these judges in heroic terms. After all, the discovery of rights and a suspicious attitude to the past is appealing to the progressive mind. However, there has been little recognition given to the counter-argument that such judges undermine values that should be central to progressive politics. The appeal of hero judges to legal academics is much simpler. The decisions of hero judges – such as in the free speech cases[1] – provide a wealth of material for academic comment and analysis.

And yet, it will be argued that the heroic style of judging is a catastrophic development. It signals the reversal of time honoured beliefs about the role of judges, transforming them from guardians of liberty with a healthy suspicion of governments into the partners of politicians, working to strengthen rather than limit the role of government. It asks judges to participate in economic, social and political governance and sets tasks for which they are ill-suited. Hero-judging is profoundly anti-democratic because it allows unelected and politically unaccountable judges to participate in government. This in turn acts as a

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1 *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106 ('*Electoral Advertising Bans Case*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Industrial Relations Commission Case*').

disincentive for good politics by allowing elected politicians to avoid dealing with politically sensitive issues and by transforming political issues best decided through the 'give and take' of the political process into legal questions of right and wrong. This transformation will also threaten the public's respect for judges' traditional role as impartial enforcers of the law and adjudicators of disputes.

The rise of the hero style of judging is not irreversible or inevitable, however. Not all judges subscribe to it and it affects others in varying degrees of intensity. Indeed, it can be argued that the High Court as presently constituted represents a reaction against this type of judging.[2] But in the long term, this reaction may be seen as a temporary reversal rather than as a permanent reorientation. In stock market terms, the heroic style for judges is a growth stock. Nor is it entirely new – to a degree, it reflects tendencies that have affected judges in the past. What is new is the extent and impact of the hero judge. Unless something is done, unless judges and the rest of the legal profession reflect upon what is happening, hero-judging will be the way of the future.

II JUDGING TO LIMIT GOVERNMENT OR TO ENHANCE ITS POWERS?

Perhaps the most significant manifestation of the heroic style is the transformation it represents in the attitude displayed towards constitutional law. In the common law tradition, especially since judges were given security of tenure but even before, judges have seen themselves as giving effect to laws which limited the government. The unwritten British constitution, and its later written offspring in the various colonies, were seen as controls on governments – as limits on their capacity to affect the people. It is undoubtedly true that at different times, particular judges may have displayed more or less courage in carrying out this task in the face of government threats or blandishments. Corruption and cowardice will affect any institution. But the underlying assumption about the relationship between the constitution and the government was clear.

In 2001, this is no longer the case. Rather than limiting government, our judges have fashioned a constitutional law that has had the effect of enhancing the capacity of governments, especially the federal government, to further the goals of state development and economic growth. Recent decisions on excise, the meaning of s 92 of the *Australian Constitution* ('Constitution'), the corporations power (s 51(xx)), and the external affairs power (s 51(xxix)),[3] for example, all show judges openly giving pride of place to the capacity of the central government to govern Australia in economically and politically convenient ways.

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2 See, eg, *Re Wakim; Ex parte McNally* (1999) 163 ALR 270. Tort law provides a particularly fertile example of this reaction: see, eg, *Jones v Bartlett* (2000) 176 ALR 137; *Rosenberg v Percival* (2001) 178 ALR 577; *Brodie v Singleton Shire Council* (2001) 180 ALR 145.

3 See, eg, *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 (*'ACT Porn Video Case'*); *Cole v Whitfield* (1988) 165 CLR 360 (*'Tasmanian Lobster Case'*); *Commonwealth v Tasmania* (1983) 158 CLR 1 (*'Tasmanian Dams Case'*).

Of course, not all contemporary decisions of the High Court can be described as fitting this model. One only has to think of the recent decision invalidating the cross-vesting scheme for State and federal courts to see that vestiges of the old way of thinking surface from time to time.[4] There the judges ignored pressure from the government, business and the media to decide on grounds of commercial and political expediency, preferring to concentrate instead on answering the constitutional issue with reference to established understandings of the Constitution. But such decisions are becoming increasingly the exception and less the norm.

Viewed from a historical perspective, this is a perverse development. Constitutional government used to mean limited government. One of the main roles of judges was to police these limits. Today, the role of judges is, increasingly, to shrink these limits in order to enhance the capacity of governments to manage the economy, in order to stoke up the pace of economic growth. Today's judges seem to see themselves as partners with government in achieving nation-building goals.[5] It is true, of course, that the trajectory of constitutional interpretation in Australia since *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*'Engineers' Case'*)[6] has been to enhance the powers of the central government and to limit that of the States. To that extent, the modern hero judge is merely building on what has gone before. But when this is added to the tremendous powers given to the federal Parliament through the expansion of the external affairs power, and the intense instrumentalist focus given to private law development,[7] it is clear that we have a change of intensity. For hero judges, it seems that *all* of the law is now open for reconsideration in light of the needs of the managerialist state.

The irony behind today's hero judges is that their activism, including the recent discovery of a series of rights by the High Court, is not designed primarily to limit governments or strengthen the hands of citizens. If this had been the case, the judicial discovery of a right to free political speech, for example, would have seen the judges declaring unconstitutional the legislative scheme that allows Australia to have the most concentrated media ownership in the world. The oligopolistic nature of the Australian media, with all the potential for control of editorial comment and slanting of news reporting which arise from it, was not challenged in these cases. The right discovered in the political free speech cases did absolutely nothing to further free speech for individual Australians or provide an increased potential for a greater variety of public comment or a wider source of news reportage in Australia. It certainly did nothing to increase the public participation in political discussion that Mason CJ saw as central to

4 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270.

5 Quite clearly some of the judges in *Beavington v Godleman* (1988) 169 CLR 41 and *McKain v RW Miller & Company (South Australia) Pty Ltd* (1991) 174 CLR 1 saw themselves as part of a national judiciary with a role to create a modern, national law.

6 (1920) 28 CLR 129.

7 For detailed examples, see John Gava, 'Is Privity Worth Defending?' in Peter Kincaid (ed), *Privity: Private Justice or Public Regulation* (2001) 199-232.

representative government.[8] Australia is not a police state infiltrated by informers. Ordinary Australians have always been able to say whatever they want about politics, at home, at work or in public. Instead, the political free speech cases seem to have enhanced the ability of commentators, 'spin doctors' and the media generally, as presently constituted, to comment and influence opinion. This judicially discovered right helped media corporations; it did not empower citizens.

The impact of hero-judging is not limited to public law. In private law, too, there has been a transformation in the attitude of judges. Across areas such as contract, tort, property and equity judges can be seen as refashioning the law to give effect to judicial perceptions of what is required of a modern, national law and towards developing a national conscience on standards of behaviour in commerce and life more generally.[9] Rather than being faithful to the underlying principles of the law and developing it with an eye to the past, today's judges are concentrating on the future. The emphasis now appears to be on technique; how can the law be changed to suit the economic and social demands that the judges have identified?

The changes to contract law provide a fine example. Throughout its history in the common law, judges have treated contract law as the legal enforcement of reciprocal obligations entered into by adults of sound mind. Contract allowed people to assume legally binding obligations free from the concern that judges would interfere with them. In jurisprudential terms, the history of contract can be seen as a never-ending attempt by judges to polish and refine the rules that had been developed to give legal effect to such self-imposed obligations. Change there was – and had to be – to these rules, but the change was essentially Burkean. Judges saw themselves as working within a tradition that set the ground rules, requiring changes to be faithful to the underlying premises that made up common law contract.

Today, this understanding of contract law is seen to be a jurisprudential myth, ripe for deconstructing. It now appears unfashionable to argue that contract law has a doctrinal integrity that is worth conserving.[10] Rather, the existing rules are seen as the reflection of the power structures of society, changing in response to the needs of those in power. According to this view, given the inherent

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8 *Electoral Advertising Bans Case* (1992) 177 CLR 106, 139 (Mason CJ).

9 A few examples will have to suffice: in relation to contract, see, eg, *Taylor v Johnson* (1983) 151 CLR 422, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; in relation to property and equity, see, eg, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, *Grain Pool of Western Australia v Commonwealth* (1999-2000) 170 ALR 111; in relation to conflicts of law, see, eg, *Beavington v Godleman* (1988) 169 CLR 41, *McKain v RW Miller &Company (South Australia) Pty Ltd* (1991) 174 CLR 1, *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625; in relation to tort, the very width of the negligence notion has allowed judges to envelop ever increasing parts of social, political and economic life into the standards broadly described in the rules associated with the neighbour principle in *Donoghue v Stevenson* [1932] AC 562. See, however, the cases listed in above n 2 for examples of a halt being called by the present High Court.

10 See the cavalier disregard for established rules in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991) 1 QB 1 (followed here in *Musumici v Winadell Pty Ltd* (1994) 34 NSWLR 723); *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231.

contingency of the rules, arguments based on notions of intellectual integrity assume the guise of special pleading, disguising the true role and effect of contract law. In an environment where the mainstream left and right of politics focus their attention on the market, seeing in economic growth the solution to what they both perceive to be the ultimate problem facing humans – material satisfaction – it is not surprising that the allure of a market-enhancing contract law has proved irresistible. Modern day discussion of contract doctrine is being increasingly taken over by overtly instrumentalist reasoning, where judges weigh the supposed economic benefits of developing or overcoming particular rules.[11]

This obsession with designing an economically efficient contract law has even survived two decades of empirical work showing that contract law plays a relatively minor role in the market.[12] It has become clear that market players rely on trust and non-legal sanctions to protect their investments and transactions, relegating contract to the role of a clumsy tool of last resort; clumsy, that is, from the market's perspective. Law's main role for the market seems to be as a predictable default mechanism for the parties to bargain around if things don't work out as intended or hoped. This does not mean that contract is or need be unimportant; far from it. The law of contract is society's formalised elaboration of the values that apply when contracting parties come before the courts seeking justice according to the law. There is no requirement or necessity that they do so. Transactors have their own tools for settling disputes. But when they decide to come before the courts, they should have to accept that the rules that will be applied are those of the common law, as modified by democratically elected legislatures.

At a practical level, this obsession with instrumentalism poses difficulties. Judges, if they are to remain recognisably common law judges, will never have the knowledge, experience or expertise to devise a contract law that suits the needs and expectations of market players. In institutional terms, the courts do not have the armoury of techniques or the financial resources to carry out such a task. Indeed, it is likely that the market would find such attempts obstructive rather than facilitative of market transacting. The irony is that courts simply cannot turn themselves into market savvy, commercial tribunals; but, if they try, they will destroy their capacity to be common law courts.

This move inevitably treats the parties before the courts as tools for the instrumental development of appropriate rules for the market. Law as authority operates on the understanding that these parties' rights are at issue and that these rights, as either already established or implicit within the general architecture of the law, are the major concern of judges. Law as technique, by comparison, treats these parties as of secondary importance, as merely the catalysts for legal development. The parties' rights take second place to the instrumental desire of judges to create what they believe to be the best rules for the future.

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11 See, eg, *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 123-4 (Mason CJ and Wilson J); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 267-8 (Priestley JA).

12 For an accessible synthesis of this work, see Hugh Collins, *Regulating Contracts* (1999).

From a jurisprudential perspective, the move to instrumentalism may well be considered sinister. It is an open admission that judges' fidelity is to be transferred from the law to the market. It would seem that the traditional understanding that judges were masters of the 'artificial reason' of the law, with all that that entailed, is no longer operative. Instead of seeing themselves as governed and limited by the body of rules and principles developed over centuries, judges now prefer to see their role as one of manipulating these rules and principles according to perceived notions of market utility.[13] However, it is uncertain whether this change in allegiance will have the desired effect – the adoption of a market-based perspective will not necessarily benefit the market, but may well diminish the integrity of the law.

III DEMOCRACY AND THE HERO JUDGE

A naïve observer of the modern judiciary might comment that the heroic style of judging is anti-democratic because it amounts to the 'hijacking' of politics by unelected judges. Of course, this naïve observer would, in fact, be right. Hero-judging is arguably a sneaky way of changing the law for political or market-oriented reasons without going through the rigours demanded of those who wish to become a politician. Why take the risk of standing for Parliament, of having one's views challenged, and of having to convince others of the rightness of one's views, when it can all be done in the peace and quiet of one's chambers and the bench? Lionel Murphy, for example, clearly saw that the Whitlam Government's days were numbered and moved to the High Court to continue his political program unhampered by an obstructive Senate. In the High Court, he was able to promote longstanding political aims in the areas of human rights, constitutional reform, criminal law, and general law reform.

Murphy failed, however, to become the model for the contemporary hero judge because he did not respond to the deep-seated need of judges and the legal profession for judgments that displayed detailed arguments based on cases and statutes. Even those sympathetic to his views noted that Murphy failed to clothe his judgments in a legally appropriate manner – from his judgments it was all too clear that his 'reasoning' was a thin veneer to give some legal respectability to his political aims in particular cases.[14] Today's hero judges come from within the profession and are much more able and inclined to engage in legal reasoning that is more institutionally and jurisprudentially satisfying. But this does not change the anti-democratic nature of what they are doing.

To argue against hero-judging is not to accept that judges are engaged in mechanical jurisprudence. It goes without saying, or it should, that the judicial role is inherently creative. If the law were entirely clear, so clear that in any dispute there was an undoubted clear answer, there probably wouldn't be many cases before the court – there would be no point in questioning the obvious.

13 See generally the cases cited in above nn 10 and 11.

14 See, eg, M J Detmold, 'Original Intentions and the Race Power' (1997) 8 *Public Law Review* 244, 251.

Unfortunately, however, the law is rarely so clear and incontestable. There are often two or more perfectly sound interpretations of a statute or of a previous decision. This forces judges to make choices and means that they cannot avoid being creative. And novel questions do arise. As the highest court in the land, the High Court, in particular, will often be faced with important, controversial and sometimes unpalatable choices.

But this potential for creativity and choice for judges does not and should not lead to hero-judging. What matters is how one exercises this creative function and what attitude is brought to bear by a judge. When law is understood as a matter of authority, the attitude to choice is likely to be one which limits itself to incremental changes, tries to be faithful to earlier decisions and appreciates that caution and restraint should be foremost in a judge's mind. Understanding law as authority means appreciating the integrity of the common law and the role of judges within it. According to this understanding of law, one becomes a judge because one has mastered the learning that is the law – both in matters of substance and style. It is this learning that judges should deploy when faced with a choice. This is undoubtedly a conservative approach to law. Law as authority cannot be understood in any other way. Of course, this conservative approach carries with it all the negative baggage that conservatism inevitably entails. Traditional common law judges are always going to seem to be behind the times and they are never going to be exciting. This is why judges are different from politicians.

This understanding of the law may seem naïve in light of today's sophisticated jurisprudential discussion on law generally and judges in particular. But it is important to remember that the 'artificial reason' of the law is a craft tradition, one that is internal to the legal profession. It is not an intellectual tradition that has to conform to the traditions of intellectual disciplines in the universities, for example. History shows that one does not have to be able to intellectualise about judging and the law to be a good common law judge. Over many centuries, judges, barristers and solicitors have happily developed the law in accordance with the traditions of their craft; the intellectual standards that they applied to their work were internally generated from within that craft. These traditions may not satisfy outside tests of intellectual rigour, and the limits operating from within the tradition may seem artificial from an outside perspective. This, however, misses the point that for the insiders, the craft has been intellectually and institutionally workable and satisfying.

On the other hand, if one sees law as a matter of technique, one is led, perhaps inevitably, to see judging as an opportunity to act as a surrogate or superior legislature. If there were no tradition to bind and much power to wield, why wouldn't one grasp the opportunity to mould the law to give effect to one's political and constitutional ideals? It is suggested that this glorious opportunity has blinded hero judges, obscuring the wisdom that the freedom to choose does not have to be – and should not be – exercised in a freewheeling fashion.

It is not as if the juridification of politics leads to good political choices. When political issues are resolved before the courts this, inevitably, is done in a stark 'I win, you lose' fashion. Political resolution of controversial issues, on the

other hand, is characterised by rough and ready compromises, not clear, dogmatic victories. The structure of our political system, with countervailing sources of political power in the Senate, the various States, and indirect political controls provided by a free press and the seemingly ever-present prospect of an election, makes complete victories rare. 'Rough and ready' these compromises may be, but they do allow for the perception and the reality that all sides have had an input. Judicial treatment of such issues is essentially 'black and white' and clearly demarcates the winners from the losers and sharply circumscribes involvement by outsiders.

Neither are judges in an institution which allows them to garner the information and views necessary for political decision-making. Judges don't have research facilities and the opportunities to hold hearings; neither do they benefit from the advice of expert lobbyists and the scrutiny of the press. They are also severely constrained in their ability to take part in and learn from the robust public debate that characterises normal politics. It should not be surprising, then, that hero judges make poor politicians.

IV HERO-JUDGING AND GENUINE POLITICS

The other side of hero-judging and the juridification of politics is the atrophy of the real thing. One of the motivations behind the rise of hero-judging is likely to have been impatience with the political leadership of Australia. Conversely, it probably has been very tempting for politicians to foist unpopular or difficult decision-making onto judges, especially decisions which could cost votes. The land rights question was one area where many commentators argued that the courts would have to take the lead because politicians seemed incapable of resolving this issue – at least to the satisfaction of the commentators.

Whatever one thinks of what judges have done with the land rights issue, it is difficult to imagine that the abdication of political responsibility by politically responsible politicians was a good thing, either for the political question in debate or for the long-term future. Of course, to the extent that *Mabo v Queensland [No 2]* ('*Mabo*')[15] and subsequent related decisions were genuinely constitutional in the broadest sense – an attempt to show that the common law was not incapable of recognising Indigenous land rights – we are not dealing with inappropriate decision-making. One can disagree, of course, that the courts could glean from the common law a genuine potential for recognising a form of land tenure that seemed to have questionable historical antecedents in the common law. But the attempt itself is not inconsistent with or against the spirit of the common law. However, if *Mabo* represents the efforts of a judiciary impatient with what were seen as the failings of national and State legislatures to recognise land rights, we have a different matter entirely. It is difficult to escape the conclusion that, for most of the judges who found in favour of native title to

15 (1992) 175 CLR 1.

land, the case presented an opportunity to right what they saw as an historical wrong.

By not resisting this temptation, the majority of judges in *Mabo* made an unwise and naïve move into politics. Although advocates of the recognition of Indigenous land rights were impatient with what they saw as an unconscionable delay by various governments, might it not have been better in the long run, both for proponents and opponents of land rights, for this matter to have been 'thrashed out' through the ordinary political process? The recognition of native title may not have raised the ire of many Australians had it been discussed, argued and dealt with as a political issue, much as was the case with equally controversial questions such as the Goods and Services Tax ('GST'), gun control measures and the republic debate. Instead, for many Australians, Indigenous land rights will always be tainted by the belief that they were the creature of unelected and unaccountable judges.

It is illuminating to compare the political debate over the republic, settled by popular vote after a vigorous and widespread public debate, with *Mabo*. The latter was essentially a creature of the courts, with input from academics and media commentators. Because several governments, State and federal, had attempted to pass comprehensive land rights legislation but had shied away because of political concerns, it came to be believed by promoters of land rights that this was a failure of politics. Of course, the alternative explanation, that the majority of Australians, for whatever reasons, had not yet been convinced in favour of land rights, was totally ignored. It might be useful for some judges and their supporters to reflect upon the fact that the republic referendum failed because it was not *radical* enough. It was the self-appointed republicans who pushed the conservative view. If a proper political and popular debate had taken place over land rights, the Australian people may have been persuaded to support land rights and the rejection of *terra nullius*. But, since they were denied the opportunity, we will never know.

It is wrong to dismiss outright the possibility that after a proper debate the Australian people would not have considered very seriously the implementation of land rights, either passed as ordinary legislation or via a constitutional referendum. It underestimates ordinary Australians and amounts to a denial of the potential for ordinary politics as a means of the amelioration of Indigenous disadvantage. The 1967 referendum, after all, passed by a huge majority. Now, it is true that the referendum actually amounted to little more than recognition of Aboriginal people in the Constitution. But in the popular mind, it was much more. It was a vote that something should be done, that the inferior constitutional position of Aboriginal people was wrong. Of course, for academics, lawyers and others interested in land rights, it was far easier to lobby judges than to convince a majority of Australians in the 'hurly-burly' of open debate. But, as is often the case, the easy option was not necessarily the best one in the long run. Land rights accepted by the people through the ordinary processes of politics would have been a far better result than land rights seen to be imposed on them by impatient judges.

In broad constitutional terms, it is also apparent that hero judges believe that they are the fixers of a constitution that is failing contemporary Australia and which is too difficult to change. Both views are based on assumptions that deserve serious scrutiny. Judges are appointed to apply the Constitution, not to fix it. There will be occasions where it makes perfect sense for judges to adapt the Constitution. A prime example is when the High Court accepted that the federal government's power to legislate about postal and telegraphic services should be extended to include television.[16] After all, television did not exist in 1901 and the judges were sensible in including the new medium with the older ones. But when the High Court takes it upon itself to reform the Constitution so that it 'works' better for contemporary conditions, an important line has been crossed – it is not their job to do this. It is up to the politicians to work with what they have got in the knowledge that, potentially, this might be overturned by a change of government because the majority of Australians do not favour the scheme that has been adopted. The cross-vesting cases showed how this could work. The federal and State governments together created a political solution, one which took into account the concerns of the States and which was in accordance with the requirements of the Constitution. There is no reason to believe that the new regime, designed principally to regulate corporations, will not work as well as the unconstitutional one. By taking it upon themselves to 'fix' constitutional 'problems', the judges deny politicians the opportunity to create constitutionally appropriate political solutions that will probably be superior to those engineered by judges (because, as mentioned above, those solutions will be the product of wider consultation and debate).

Proponents of the heroic style of judging regularly cite in support of their position how difficult it is to change the Constitution. Because so few constitutional referendums have passed, they argue that it is up to judges to update the Constitution, as it is obvious that the people have shown their incapacity to do so. This ignores the possibility that the Australian people may have chosen wisely in rejecting most of the proposed changes made to the Constitution. The problem, if it is a problem, is that the changes that have been proposed have not been considered by the majority of Australians to be worthy of support. It would be nice to see arguments explaining why these choices have been wrong rather than the commonly articulated belief that the Australian people are stupidly and unthinkingly conservative. After all, when given the chance, the Australian people have twice rejected conscription in a war that was, arguably, none of our business. They also rejected an attempt to outlaw the Communist Party in the middle of the Cold War and, as noted above, were more than happy to recognise that a constitutional wrong had been done to Indigenous Australians in 1901. Hero judges and their supporters should consider the possibility that most constitutional referendums have been rejected because there were good reasons to do so. The record of the majority, when given the chance to participate in constitutional affairs, should discourage hero-judging rather than support it.

16 See, eg, *Jones v Commonwealth [No 2]* (1965) 112 CLR 206.

To argue in favour of popular involvement in politics does not entail that one believes in the inevitable wisdom of the people or that popular opinions cannot be unwise. Of course it would be foolish to assume that the majority will always get it right – who would believe otherwise? But accepting this truism should not blind us to the historical record – when given the chance to have a direct say in political and constitutional matters, the Australian people have a record that is pretty impressive. Nor should we ignore the desirability of ensuring that the mechanisms for such participation should be both increased in number and carefully structured. After all, as Aristotle told us a long time ago, democracy is good but it is at its best when it is incorporated in a system of checks and balances. Rather than lauding hero judges, our constitutional writers would do well to devote their energies to discussing the means of improving popular input in governance.

The much mooted desire for a judicially enforceable Bill of Rights, along the United States ('US') and Canadian models, would, if carried out, provide a wonderful opportunity for hero judges to 'strut their stuff'. They could move away from the relatively sterile debates about the nature of intergovernmental financial relationships in the Constitution. A Bill of Rights would allow hero judges to become involved in the much more exciting areas of identity politics and group rights, and give them the opportunity to 'set right' the people about matters such as abortion, sexual identity, the death penalty and so on. It should be noted, however, that the Australian people have seemingly accepted what might be considered to be progressive laws dealing with these issues. It should also be noted that much of the rights litigation in the US and Canada is dominated by the rich and powerful. Of course, as has been also shown in the US and Canada, a Bill of Rights carries the potential for a vast shift in political responsibility for individual rights away from the people and elected parliaments to judges. Proponents of hero-judging do not appear to have sufficiently addressed this potential problem, or the argument that the best protectors of rights are a vigorous political culture and involved citizens. The battle over the proposed Australia Card during the Hawke years is a fine example of mass political pressure, orchestrated from outside formal political structures, leading to what many saw as a protection of rights. While judges have a role in the protection of rights, it should not be a leading role. It should complement the vigorous defence of rights by both popular and formal politics by ensuring that governments do not, incrementally or otherwise, go beyond the powers given to them by law and by applying the traditional maxims of statutory interpretation so as to interpret laws with a presumption in favour of liberty.

Lest it be thought that this legalistic approach to protecting rights is lacking in substance, the following example will show the opposite. One only has to compare the way in which the High Court applied such techniques to declare unconstitutional the Menzies Government's attempt to outlaw the Communist Party *during the height of the Cold War and in the midst of the Korean War*, with the somewhat craven attitude displayed by the US Supreme Court when presented with a similar issue *during the 'swinging sixties' and when staffed by*

the most activist judges in its history and backed by a Bill of Rights, to see that legalism is more than a form of words; it also has teeth.[17]

The juridification of rights may give power to judges but it does so by asphyxiating popular and political defences of rights. As has been commented upon by Andrew Fraser, in his discussion of the political free speech cases, it is somewhat ironic that the judges who were so emphatic in describing the people and not the Crown as the source of political and constitutional legitimacy, were unwilling to give the same people an opportunity to have their say about the political advertising laws.[18]

V HERO-JUDGING AND THE PEOPLE

One only has to think about the position of judges and the parlous state of the rule of law in many countries in our neighbourhood to realise how lucky we are. The perception that Australia has an impartial judiciary deciding cases according to the law is, by any standards, well placed. It is not in every country that one can face a judge and not even have to be concerned with what his or her links with the government are or how often and how deeply one would have to visit one's pockets. Hero-judging may threaten this by changing the nature of judges and undermining popular perceptions about their role and independence.

Mabo, and a whole series of cases where judicial activism was at the fore, raised the spectre of a politically biased judiciary for many Australians. If enough people come to believe that the decision in *Mabo*, for example, was based on the personal opinion of several judges that a historical wrong needed to be changed, they may see law as a matter of the personal opinions of judges. If it were widely believed that judges decided as they did because they believed that a significant number of Australians, perhaps even a majority, believed that this needed to be done, law will be seen to be part and parcel of everyday politics. Neither understanding seems consistent with viewing judges as impartially deciding according to the law, and not according to individual conscience or prevailing political views. Both understandings seem to suggest that judicial independence and impartiality have been lost.

Mabo, of course, was politically charged. But even in areas of 'lawyers' law', as in the example of contract given above, this danger is equally alive. A corrosion of the legal profession's belief in the impartiality of judges through a shift in allegiance from the law to the market could ultimately undermine popular faith in our judges. Eventually, the general population would become aware of what was happening. If lawyers recognise that the judiciary is partial and detached from its historical ties to the common law, it cannot be long before the general population shares this view.

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17 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*'); *Dennis v United States*, 384 US 855 (1966).

18 Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 214, 224.

It is, of course, impossible to calculate precisely whether any short-term gains or advantages derived from hero-judging would be valuable enough to outweigh this loss of faith in the impartiality of our judges. But it seems good common sense to believe that the reputation of the judiciary for impartiality is so important that any changes that risk this reputation should be considered very carefully. Once lost it would not be easily regained. Do hero judges and their supporters in the media and law schools want a political culture in which judges are seen as part of the political regime and not as impartial referees whose decisions can and should be accepted as law?

VI CONCLUSION

In constitutional terms, Australia has indeed been the 'lucky country'. With all its faults, our constitutional heritage has given us a workable mixture of law, representative government and a potentially robust popular political culture that has protected political freedom as well as any other in history. One can believe this and still recognise the failings of representative government today. One can also recognise that the potential for an involved citizenry is largely that, a *possibility*, and one that requires careful institutional architecture to ensure that the involved citizenry does not become a mob or the tool of populist demagogues. And one should recognise that constitutional discussion that ignores the vast shift of governmental authority to the corporate sector will miss much of the action. Our political system is, indeed, far from perfect. But it is suggested that hero judges will not make it any better.

Hero judges and their supporters may believe that their actions are designed to improve the law and the Constitution. But they would not be the only groups in history to concentrate on motives and ignore results. Hero judges only threaten the working of our constitutional system and will do nothing to fix its problems.