Notes

Brown v The Classification Review Board: Robin Hood or Rebel Without a Cause?†

Some talk of lords, and some talk of lairds,
And some talk of barrons bold,
But I'll tell you a story of bold Robin Hood,
How he robbed the Bishop of his gold ...[1]

Disguised as a shepherd, Robin waits for the Bishop in the forest, aiming to taunt him with news that he has stolen and killed the King's deer. When the Bishop stops, Robin drops his disguise and with his band of outlaws, steals the Bishop's gold and forces him to sing a mass before sending him on his way. Robin Hood is remembered today as a thief with a just cause. He stole from the rich to give to the poor. A number of movies have been made and books, stories, ballads and poems have been published about his clever escapades. Most aim to reflect his skills at outwitting the authorities by both stealing from them and humiliating them. Robin Hood is a legend.

In 1998, whilst the legend lives on in some circles, the Full Court of the Federal Court had the opportunity to decide whether an article advocating theft published in a student newspaper fell within the ambit of 'political communication' so as to be protected by the implied constitutional freedom of communication necessary for the maintenance and reinforcement of a system of representative and responsible government.[2] The court held that the article was not so protected. This result, it will be shown, is both predictable and unexceptional. Yet, in its unexceptional way, the case represents a number of realities about the scope and future of the constitutional freedom today. Although 'discovered' just six years before,[3] the freedom has been both developed and restricted in unprecedented

† The four editors faced criminal charges after special leave to appeal was rejected by the High Court on 11 December 1998; *High Court of Australia Bulletin* No 12 (1998). However, on 24 March 1999, the criminal charges were dropped by the Victorian Director of Public Prosecutions; see Ackland R, 'A Triumph for Common Sense' *Sydney Morning Herald* (26 Mar 1999) at 19.

1 'Robin Hood and the Bishop of Hereford', a Child's Ballad in Knight S & Ohlgren T, *Robin Hood and Other Outlaw Tales* (1997).

2 *Brown and Ors v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67 (hereinafter *Brown*).

3 The freedom was first 'discovered' in *Nationwide News v Wills* (1992) 177 CLR 1 (hereinafter *NWN*), by a majority consisting of Brennan J (as he then was), Deane & Toohey JJ and Gaudron J who took the view that s299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth) which prohibited criticism of members of the Industrial Relations Commission was invalid because it infringed an implied constitutional freedom of political discussion. This was immediately followed by *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 (hereinafter *ACTV*), where, with the exception of Dawson J, six members of the High Court (Mason CJ, Brennan, Deane & Toohey, Gaudron, McHugh JJ) recognised the existence of an implied freedom of communication in political and government matters.

ways by the High Court.[4] Recently, the High Court appeared to settle previous questions about the scope and content of the freedom in *Lange v ABC*.[5] However, that apparent unanimity was short lived.[6] *Brown* shows that the complexities thought to have been resolved in *Lange* remain, but with the added disappointment of a result less favourable to the freedom of political communication. The case also highlights the difference between what the freedom was thought to be and what it has now become. Invoked as a protection against the unnecessary curtailment of political discussion and criticism of government, the freedom itself is now being curtailed, particularly when the subject matter in question may be politically or socially unpalatable or unpopular.

This case note is structured as follows. The first part sets up the background facts and findings to the case. The second part deals with the constitutional issues and questions raised in the judgments of the Full Court. This section includes an analysis of each judgment. Finally, the third part consists of an assessment of where the implied constitutional freedom stands in Australian law at present. Examples will be drawn from international jurisprudence and philosophical commentaries regarding the concept of freedom of expression in order to show that the introduction of the implied freedom to Australian constitutional law has produced and will continue to produce limited results whilst it remains constrained by the existing philosophical and legal framework.

1. Background Facts and Findings

A. The Facts

The appellants were editors of the La Trobe University Student Representative Council's monthly newspaper (*Rabelais*). An article entitled 'The Art of Shoplifting' (the 'shoplifting article') was published in the July 1995 edition of *Rabelais*. The shoplifting article began with some descriptions of those who may feel marginalised by the prevailing economic and social system. It then suggested a possible solution to this plight, namely, to steal, or in the words of the author, '*to take the distribution of wealth into our own hands*'. This was followed by a list of methods and observations, subdivided into 'steps', that would be helpful to the presently unsuccessful or pending thief.[7] The language employed was more

4 After *Theophanous v Herald Weekly Times (1994)* 182 CLR 104 (hereinafter *Theophanous*), and *Stephens v West Australian Newspapers* (1994) 182 CLR 211 (hereinafter *Stephens*), there was some concern about the nature of the freedom that was being conferred. For a discussion about the problems associated with the creation of a constitutional defence, see Lindell G, '*Theophanous* and *Stephens* Revisited' (1997) 20 *UNSWLJ* 195.

5 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 (hereinafter *Lange*).

6 In *Levy v The State of Victoria* (1997) 189 CLR 579, (hereinafter *Levy*), six separate judgments were delivered by Brennan CJ, Dawson J, Toohey & Gummow JJ, Gaudron J, McHugh J and Kirby J.

7 The full text of the article is contained in the Schedule to Heerey J's judgment, see Brown, n2 at 88–92. The 'steps' described include 'preparing oneself for the big haul', 'on entering the maze', 'blind spots and other lifting techniques', 'exchanging crap for more crap', 'leaving the store safely' and 'the end' followed by a postscript on what to do if caught.

colloquial than it was clever. As a result, the writing made its impact more by means of confrontational content than literary expertise. In the same edition, other articles were published on issues such as the prosecution of black activist Mumia Abu-Jamal, the industrial relations activities of CRA, marijuana, the Victorian government's attitude to homosexuality, the exploitation of outworkers and the operation of private prisons for profit.[8] It appears that the overall aim of the editors may have been to produce largely critical political commentary aimed at challenging prevailing political and social structures and practices by shocking or outrageous means.[9]

Following publication of the shoplifting article, the Retail Traders' Association of Victoria applied to have classification of the July 1995 edition refused.[10] The chief censor decided to refuse classification of that edition on the grounds that it instructed in matters of shoplifting and associated fraud.[11] At the same time, classification was also refused to the Royal Melbourne Institute of Technology Student Union newspaper (*Revolution Catalyst*) which contained the same shoplifting article.[12] These decisions had the effect of prohibiting distribution of both newspapers.

B. The Findings of the Classification Review Board

The editors of *Rabelais* appealed to the Classification Review Board against the findings of the chief censor.[13] Pursuant to s9 of the *Classification Act* 1995 (Cth), the Board made its decision by reference to the National Classification Code and the Classification Guidelines.[14] The Board confirmed the chief censor's decision to refuse classification.[15] The shoplifting article was said to lack literary or academic merit. Its tone was found to border on malicious. It was not intended to be satirical or ironic.[16] Whilst the importance of freedom of political communication, the right to challenge accepted notions and the right to express politically uncongenial views were taken into account, these rights were considered subject to the statutory proscription provided for in the Act. The Board declined to consider the effect of the implied constitutional freedom of political

8 *Brown*, n2 at 70 (French J).

9 Id at 83 (French J).

10 The application was made to the chief censor pursuant to the *Classification of Publications Ordinance* 1983 (ACT). The Ordinance governed the cooperative legislative scheme then in operation. It was given effect by complementary legislation enacted in each State. See n2 at 69–70 (French J) and 95 (Sundberg J).

11 This decision was taken pursuant to s19(4) of the Ordinance which provides that a publication may be refused classification if that publication 'promotes, incites or instructs in matters of crime and violence'.

12 Note 2 at 70 (French J).

13 This was done under a revised cooperative scheme governed by the *Classification (Publications, Films and Comput er Games) Act* 1995 (Cth) (hereinafter *Classification Act*).

14 The Board is required, under s9 of the new legislation, to consider applications in the same way that the Classification Board (in this case, the chief censor) would have done.

15 Note 2 at 71 (French J).

16 See the findings of the Classification Review Board extracted in Sundberg J's judgment, id at at 97–98.

speech on the legislation. However, the Board did take into account the retailers' concerns about the costs associated with shoplifting (around $1 billion a year).[17]

C. *The Findings at First Instance*

Several grounds for appeal were raised in the application to the Federal Court for judicial review of the Review Board's decision.[18] Two issues, relevant to this case note, are included for discussion. Firstly, Merkel J rejected the appellants' contention that the shoplifting article had been wrongly characterised. Although the overall content of the publication was found to be political in flavour, his Honour held that the shoplifting article was instructional in matters of crime.[19] Like the Board, his Honour was influenced by the fact that the shoplifting article was not satirical. The term 'instruct' was construed as meaning the imparting of information in a 'real and practical' sense.[20] Secondly, Merkel J discussed the implied constitutional freedom of political communication. His Honour held that the freedom was not absolute since it had always been subject to restrictions which recognised countervailing interests.[21]

D. *The Findings of the Full Court*

The Full Court of the Federal Court unanimously upheld the findings of the Classification Review Board.[22] Two issues were raised in the appeal. Firstly, the appellants submitted that the trial judge had erred in holding that it was open to the Review Board to find that the article in question fell within the terms of the National Classification Code. They argued that the article was a 'political discussion' rather than an instruction in matters of crime. Secondly, they submitted that when construing the Code, regard should be had to the implied constitutional freedom of political communication.[23] Accordingly, they asked the Court to construe the word 'instruct' in such a way as to ensure that it would not conflict with the constitutional freedom. All three judges discussed the scope and extent of the constitutional freedom. French J, whilst accepting that the concept of 'political communication' had been widely construed and was open to further extension, did not feel the need to characterise the article.[24] Instead, his Honour took the view that the freedom could be narrowed by laws which were reasonably appropriate

17 Id at 71–72 (French J) and 96 (Sundberg J).

18 Eighteen grounds of review were brought before the trial judge. These included administrative law issues such as whether the Board had discounted relevant considerations and considered irrelevant considerations, whether the decision by the Board was unreasonable in the *Wednesbury* sense, or, alternatively, whether the decision the Board came to was not open to it on the material before it.

19 Note 2 at 73 (French J) and 97 (Sundberg J).

20 Id at 72 (French J) and 96 (Sundberg J).

21 Ibid.

22 Special leave to appeal to the High Court was refused on 11 December 1998.

23 They also submitted that regard should be had to the common law recognition of freedom of speech and the provisions of the International Covenant on Civil and Political Rights. Only French J discussed (and dismissed) these issues, see *Brown*, n2 at 76–78.

24 Id at 80 (French J).

and adapted to fulfilling a legitimate end compatible with the system of representative democracy.[25] Heerey J held that the article was not 'political discussion' and therefore was not entitled to protection of the constitutional freedom.[26] Sundberg J first construed the Code, then held that this construction did not infringe the implied freedom because the article was not political discussion; even if it was, his Honour was of the view that the legislation was reasonably appropriate and adapted to achieving the legitimate object of protecting the community from conduct which is harmful.[27]

2. *The Constitutional Freedom of Political Communication*

A. The Source of the Freedom

(i) High Court Authority

Prior to *Lange*, there was some dispute amongst the members of the High Court as to the source of the freedom. Naturally, the extent of the freedom (or conversely, the limitations imposed upon it) depends on how closely the freedom is cleaved from the text and structure of the constitution.[28] In its infant stages, the freedom was described as necessary for sustaining the system of representative democracy inherent in the Constitution.[29] However, by the time *Theophanous* had come to the High Court, the freedom had been developed into a means for ensuring the *efficacious* workings of representative democracy.[30] This raised a number of criticisms, both from within and without the High Court. Whilst some academics brusquely pointed to what little the text of the Constitution said about efficacious democracies,[31] McHugh J painstakingly reminded the High Court of the dangers associated with deviating from the *Engineers*[32] path.[33]

It was in this context that *Lange* was decided[34] and the joint judgment handed down to settle many of the more controversial issues that had been raised by

25 Ibid.

26 Id at 87 (Heerey J).

27 Id at 98–99 (Sundberg J).

28 See Zines L, 'A Judicially Created Bill of Rights?' (1994) 16 *Syd LR* 166, who accurately predicts the problems associated with the techniques used by the High Court in interpreting the Constitution; also Gageler S, 'Implied Rights I' in Coper M & Williams G (eds), *The Cauldron of Constitutional Change* (1997) at 87.

29 *NWN*, n3 at 46 (Brennan J, as he was then).

30 *Theophanous*, n4 at 123 (Mason CJ, Toohey and Gaudron JJ).

31 See Aroney N, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *UQLJ* 249 at 259; Lane P, 'The Changing Role of High Court' (1996) 70 *ALJ* 246; Kennett G, 'Implied Rights II' in Coper M & Williams G (eds) n28 at 91–92.

32 This reference is to the High Court's decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 in which the High Court held that it was no longer legitimate to construe the Constitution by reference to political principles or theories that find no support in its text. The Court held that interpretations should be based on the plain text and structure of the Constitution. For a contrasting view, see Williams G, 'Civil Liberties and the Constitution – A Question of Interpretation' (1994) 5 *PLR* 82.

33 See McHugh J in *Theophanous*, n4 at 199 but also in *McGinty v Western Australia* (1995) 186 CLR 140 at 233–4 where his Honour calls for a reconsideration of *Theophanous* and *Stephens*.

34 See Lindell, n4 for a discussion on why *Theophanous* and Stephens must be reconsidered.

commentators.[35] While the Court returned to ss7 and 24 of the Constitution to show that the principles of representative government are contained within the text and structure of the document, there was also an in depth discussion about the principles of responsible government and their relationship with ss1, 6, 8, 13, 25, 28, 30, 62, 64 and 83 of the Constitution.[36] This is not to say, however, that by determining its source from the text and structure of the Constitution, the High Court sought to narrow the scope of the freedom. Although the freedom was not absolute, the Court held that it was only limited by reference to what was necessary for the effective operation of both *representative* and *responsible* government. It is arguable that this reference to 'responsible government' drew on similar notions articulated by Mason CJ in *ACTV* in describing a freedom less confined to the text and structure of the Constitution.[37] In that case, his Honour reasoned that as the Constitution displaced the English common law doctrines of general competence and unqualified parliamentary supremacy, ultimate sovereignty now resided in the Australian people. For the Australian people to exercise their choices in relation to this sovereignty, freedom of communication is essential.[38] At any rate, in *Levy*, decided immediately after *Lange,* McHugh J, who had been the most conservative member of the Court when it came to deriving the source of the implied freedom, reaffirmed that *Lange* had maintained the scope of the freedom adopted in *ACTV* and *Theophanous.*[39]

(ii) Brown's case, Representative Democracy, Civil Disobedience and Tolerance

By contrast, in *Brown*, every member of the Court assumed that, by confining its source to the text and structure of the Constitution, *Lange* reduced the scope of the freedom. The freedom was either limited to providing the necessary conditions for maintaining the system of representative government,[40] or limited to protecting that system[41] or limited to what was necessary to exercise free and informed electoral choice.[42] So much at least is uncontroversial and may be derived from the many High Court judgments that have been handed down so far.

What is controversial is that unspoken assumptions about the meanings of representative and responsible government underpinned the reasoning in each

35 Perhaps the most critical issue was whether the decision in *Theophanous* elevated the nature of the freedom into an individual 'right' in the form of a constitutional defence against common law actions in defamation (see Brennan J's powerful dissent in *Theophanous*, n4 at 147) or whether it remained an immunity from legislation which unduly infringed the freedom of political communication. These matters were discussed in Lindell, n4 and Twomey A, 'Dead Ducks and Endangered Political Communication – *Levy v State of Victoria* and *Lange v ABC*' (1997) 19 *Syd LR* 76 at 89. For a contrary view, see Zines L, *The High Court and the Constitution* (4th ed, 1997) at 386–7 who highlights the inconsistencies in McHugh J and Brennan CJ's arguments: if legislation is found to disproportionately affect the freedom, it would be invalidated on the principles expounded. Why should the constitutional position differ simply because the law which provides the civil right is *judge-made law*?

36 Note 5 at 557–559.

37 *ACTV*, n3 at 138 (Mason CJ).

38 See also the adoption of this view in n5 at 564; Williams, n32 at 96–97.

39 Note 6 at 622 fn 148 (McHugh J).

40 Note 2 at 79 (French J).

41 Id at 84 (Heerey J).

42 Id at 98 (Sundberg J).

judgment in the Full Federal Court. Every member of the court referred to this abstract concept of representative democracy. Yet what does this system of representative democracy, that needs to be maintained or protected, consist of? This issue was raised when the freedom was in its fledgling phase and is yet to be resolved by the courts.[43] It is widely understood, at least in Australia, that the system of representative democracy does not just entail majority rule; it also includes the protection of the minority and individuals against that majority rule.[44] If this were not the case, there would arguably be limited majority tolerance either for the independence of the judiciary which provides a 'check and balance' to majority rule[45] or for the imposition of racial vilification laws which protect minority groups.[46]

Of the three judges in *Brown*, only Heerey J provided some guidance as to which system he had in mind.[47] This system was one which would not tolerate writings which advocate breaking the law or anarchy:

> The appellants' counsel pointed out in their submissions that writers have from time to time advocated theft as an appropriate means of reallocation of resources, ... or of political dissent, ... or as a central tenet of Anarchist theory ...
>
> However, it should be noted that anarchist theory extended from non-violent writers and political leaders like Tolstoy, Thoreau and Ghandi to Proudhon ("property is theft") ... and the anarcho-syndicalists whose creed was that unions should become militant organisations dedicated to the destruction of capitalism and the State.
>
> All this may be in one sense politics, but the constitutional freedom of political communications assumes – indeed exists to support, foster and protect – representative democracy and the rule of law. *The advocacy of law breaking falls outside this protection and is antithetical to it.* [Emphasis added.][48]

This appears to miss the point being made by the appellant's counsel. All that his Honour knows of Tolstoy, Ghandi or Proudhon is due to the fact that none of these

43 Cass D, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *PLR* 229 at 237.

44 Blackshield A, 'The Implied Freedom of Communication' in Lindell G (ed), *Future Directions in Australian Constitutional Law* (1994) and Coper M, 'The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur? (1994) 16 *Syd LR* 185.

45 The independence of the judiciary is seen as essential for providing a 'check and balance' to majority rule: see Feldman D, 'Democracy, the Rule of Law and Judicial Review' (1990) 19 *FLR* 1.

46 As to the latter, see McNamara L & Solomon T, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?' (1996) 18 *Adel LR* 259 for a discussion of the sometimes ignorant and ill-conceived arguments that were put up in Parliament by those opposed to the Bill.

47 By contrast, both French J and Sundberg J simply assume the existence of some common system to which everyone ascribes. They focus instead on the validity of the law and the provision of due deference to the political will. This is arguably just another way of expressing democracy in terms of majority rule.

48 Note 2 at 87–88 (Heerey J).

writings have been refused classification. His Honour has had the opportunity to read and to reject such writing as apolitical or antithetical to the law. This freedom to write, read and discuss views antithetical to the rule of law has, arguably, more to do with the system of representative democracy than does a stifling of those views.

This brings us to the question of the role of tolerance in a representative democracy. Tolerance of civil disobedience is considered the hallmark of any mature system of representative democracy.[49] Indeed, the freedom to criticise the very system one accepts and even to counsel disobedience or revolt within that system is considered part of this hallmark of any free society.[50] In *Brown*, arguably both Heerey and Sundberg JJ failed to discern the significance of free political communication to the *enhancement* and *maintenance* of a system of democracy.[51] Although Heerey J does indicate an understanding of the importance of civil disobedience to a system of democracy, it is of a very limited kind:

> The article does not even advocate breaking one law as a means of securing the repeal of another law perceived as bad, as with draft card burning in protest against conscription for Vietnam. (I express no view ....)[52]

One can hardly ignore the generational gap displayed in this statement. His Honour was no doubt referring to the rich and varied American jurisprudence on the importance of political speech and the advocacy of lawless action to counter 'bad' laws.[53] However, in as much as some of these cases uphold a paramount right to free political speech challenging 'bad' laws, all of the American free speech cases represent attempts to silence 'radical' speech which challenged the rule of law, regardless of whether the laws were good or bad. With the benefit of hindsight, some of these views were later hailed as having effectively challenged 'bad' laws. For example, no one doubts today that the civil rights movement led by Martin Luther King, the Vietnam War protests or the British suffragette movement have

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49 Habermas J, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 *Berkeley J of Sociology* 95 at 97.

50 Allan T, 'Citizenship and Obligation: Civil Disobedience and Civil Dissent' (1996) 55 *Cambridge LJ* 89 at 89. Allan provides an excellent discussion of how disobedience and dissent can enhance a system of democracy.

51 Note 2 at 88 (Heerey J): 'Such conduct is not part of the system of representative and responsible government or of the political and democratic process'; and at 98 (Sundberg J): '... its true character is not political because it is overwhelmingly a manual about how successfully to steal'.

52 Note 2 at 87 (Heerey J).

53 See for example *Schenk v US* 249 US 47 (1919): the defendants were prosecuted for circulating leaflets urging opposition to the draft and to participation in the First World War amongst people called up for military service; *Cohen v California* 403 US 15 (1971): the defendant was wearing a jacket in the courtroom corridor which carried the epithet 'Fuck the Draft' on its back – this was held to be protected speech; *Tinker v Des Moines School District* 393 US 503 (1974): the wearing of arm-bands in protest against the Vietnam War was held to be constitutionally protected speech. Ironically, contrary to Heerey J's reasoning (quoted above, see n52), the US Supreme Court in *United States v O'Brien* 391 US 367 (1968) upheld the defendant's conviction for burning his draft card.

a legitimate place in the political cultures of their respective societies.[54] That which appeared to be civil disobedience in the past became the force for future democratic change against 'bad laws'.[55] Yet what appears to have been forgotten, particularly by those who stood by the rule of law, is the minimal tolerance displayed at such radical views at the time. Similar examples of this 'generational gap' and the limited tolerance displayed by majority perceptions of radical views are nicely summarised by Habermas in a more modern context concerning nuclear protesting:

> The press report the plans as if they were the war preparations of an aggressor that threatened national security. News regarding the protest scene is treated as if it were intelligence information about enemy troop movements. Peace camps assume the aspect of partisan strongholds. And, in the police headquarters, commando deployments are drilled according to familiar scenarios. Every new disturbance that occurs in conjunction with demonstrations ... strengthens the fatal impression amongst the public that the peace movement, of all things, offers new targets for those apparatuses which have been expanded and armed more heavily in recent years in the effort to control *terrorism*. [Emphasis added.][56]

Again, it can hardly be doubted that speech calling for a reduction in nuclear armaments and production has a legitimate role to play in modern political culture.

In the same way that the majority formed the impression that the peace movement was akin to terrorism in the example given above, Heerey and Sundberg JJ in *Brown* formed the impression that the shoplifting article was simply a manual on how to steal which lacked political content. It might well be said that in *Brown* little consideration was given to the importance of tolerance for civil disobedience to the system of representative democracy which forms the basis of the constitutional freedom of political communication. Instead, Heerey and Sundberg JJ succumbed to 'majority perceptions' which required censorship, rather than tolerance, of the shoplifting article.

B. The Meaning of Political Communication

(i) The High Court's Search for Meanings

The subject matter in all the cases concerning the implied freedom of communication before the High Court was, to a greater or lesser extent, subject matter that could be described as 'political communication'. For example, the facts in *NWN* concerned legislative provisions which prohibited criticism of members of the Australian Industrial Relations Commission.[57] *ACTV* concerned legislation aimed at regulating and prohibiting political advertising during election periods.[58]

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54 Dworkin R, 'Civil Disobedience and Nuclear Protest' in Dworkin R (ed), *A Matter of Principle* (1985), 104 at 105.

55 Habermas, n49 at 101; Dworkin R, *Taking Rights Seriously* (1978) at 206.

56 Habermas, n49 at 97.

57 See n3.

58 Ibid.

The subject matter in *Theophanous* also fell squarely within the ambit of 'political discussion' in that it concerned a defamation action against criticism levelled at a Minister of Parliament and his conduct in office. Nevertheless, the leading majority in that case went further, giving the concept a wide scope by citing with approval Barendt's definition of political speech: '... all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.[59]

The scope of such a definition need not be spelt out. In *Cunliffe v Commonwealth*,[60] there was some disagreement amongst the members of the High Court as to whether communications between solicitors and applicant immigrants or refugees were political discussions protected by the freedom. The majority, however, held that such communications were protected since political communications are not confined to that which takes place within the 'political process'.[61]

This does not mean that once the communication has been characterised as political, it will be protected under the freedom. The subject matter in *Langer v Australian Electoral Commission*[62] lay at the heart of political communication. In that case, the applicant wanted to distribute material advocating a method of voting contrary to the required method of consecutive numbering in the preferential voting system.[63] Even Dawson J who has consistently refused to accept the existence of an implied freedom of political communication, was prepared to hold that this communication, concerned with electoral choices during an election period, was protected by sections 7 and 24 of the Constitution.[64]

More recently, *Lange* concerned the question of whether comments made about the former New Zealand Prime Minister and his government on an Australian Broadcasting Corporation documentary were protected as 'political communications.'[65] Finally, in *Levy*, 'political communication' was said to encompass non-verbal conduct which was capable of sending a political message such as the retrieving of endangered duck species to challenge State government laws.[66]

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59 Barendt E, *Freedom of Speech* (1985) at 152.

60 *Cunliffe v The Commonwealth* (1994) 182 CLR 272.

61 Id at 298–9 (Mason CJ) and 340 (Deane J).

62 *Langer v Australian Electoral Commission* (1996) 186 CLR 302, (hereinafter *Langer*).

63 For example, instead of placing the numbers 1,2,3,4 ... (and so on as the case requires without repeating any numbers) in all the boxes provided on the ballot sheet, Langer was asking voters, contrary to s240 of the *Commonwealth Electoral Act* 1918, to use repeated consecutive numbers 1,2,3,3,3, ... so as to be able to place some candidates equal last; see Eastman K, '*Langer v The Commonwealth of Australia:* The High Court's Retreat on the Implied Guarantee on Freedom of Communication' (1996) 3 *Aust J of Human Rights* 152 at 154.

64 Note 62 at 324–5 (Dawson J in dissent).

65 See n5.

66 Note 6 at 595 (Brennan CJ), 613 (Toohey & Gummow JJ), 623 (McHugh J) and 641 (Kirby J). Gaudron J agreed in effect with this finding but approached the issue from a different angle. Her Honour took the view that she had adopted in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 128–9 that freedom of movement was an essential aspect of the freedom of political communication.

(ii) Brown's Case

In comparison to these matters previously considered by the High Court, the subject matter in *Brown* was less immediately identifiable as 'political discussion'. It was therefore necessary for the judgments in *Brown* to characterise the shoplifting article with reference to the concept of political discussion.

French J recognised that the categories defining political discussion may be open to further extension.[67] Further, his Honour recognised the potential for the shoplifting article to fall under these wider definitions:

> ... inelegant, awkward and unconvincing as is its attempt to justify its practical message about shoplifting by reference to the evils of capitalism, it is arguable that in some aspects it would fall within a broad understanding of political discussion.[68]

It became evident from the reasoning in French J's judgment, however, that his Honour was not going to explicitly decide on that issue. In light of difficulties he would have faced in making that decision, his Honour's approach is understandable. If French J had characterised the content of the shoplifting article as non-political, his Honour would have effectively dismissed discussions antithetical to his version of representative democracy, in much the same way as Heerey J. If he had accepted a political characterisation of the content, his Honour would then have faced the dilemma of having to construe the phrase '*instruct in matters of crime*'[69] so as to exclude publications which fall on or around the borderline of being both 'instructions' in crime and political in flavour. Instead, his Honour held that the shoplifting article, by going beyond the '*mere provision of information about crime*', fell within the meaning of the word 'instruct'[70] in the Code.[71] By adopting this exclusive focus on the criminal aspects of the shoplifting article, it is arguable that French J impliedly rejected any political characterisation of that article.

Heerey J and Sundberg J took the more direct approach. Both found, quite simply, that an article which neither discussed the conduct or policies of those in government, nor showed any concern about the actual laws of theft, nor addressed citizens in their capacity as voters, did not fall within the broader rubric of political communication.[72]

How legitimate is their Honours' approach in limiting the freedom to these listed categories? Even the High Court in *Lange* acknowledged the difficulties associated with defining the categories of political communication. In a discussion

67 Note 2 at 79–80 (French J).

68 Id at 80.

69 National Classification Code, Table, para 1(c), found in the Schedule to the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth).

70 For a more detailed discussion of the phrase 'to instruct in matters of crime', see the following section.

71 Note 2 at 80–81.

72 Id at 87 (Heerey J) and 99 (Sundberg J).

about developing the common law and construing legislation so as to not unduly restrict the constitutional freedom, the High Court highlighted the need to take into account the '*increasing integration of the social, economical and political life in Australia*'.[73] Should citizens have to wait for laws to be enacted or public action to be taken before any criticism levelled at the underlying policies will be classified as political and protected by the constitutional freedom? A few decades ago, discussions about tobacco manufacturing and the conduct of tobacco companies would have been considered private, commercial speech. Today, with the proven links between tobacco consumption, lung cancer and the obvious toll this has had on the public health purse, would the conduct of tobacco companies still be considered a purely private, commercial matter? Similarly (and more to the point, given the facts in *Brown*), poverty is not, to say the least, a private, apolitical issue. The welfare of those who struggle in the lower socio-economic ranks of society is a central platform of most government policy, particularly in relation to issues such as taxation and social benefits. Moreover, 'law and order' governments ensure that issues in relation to crime and violence remain in the public and political spotlight. All of these issues are capable of being public, political issues that fall within the broader rubric of political discussion.

C. *Construction of the Code in Light of the Freedom*

(i) *The Approach of the Full Court*

The construction of the word 'instruct' in the Code was integral to the findings of all three members of the Court in *Brown*. The appellants submitted that the appropriate construction of the word 'instruct' (bearing the existence of the constitutional freedom in mind) was to consider both the intent and likely effect of the article in question. In doing so, they drew the Court's attention to the decision of the United States Supreme Court in *Brandenburg v Ohio*[74]. In that case, the Supreme Court reassessed its previous approach to the proscription of inflammatory political speech, stating:

> ... decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and *is likely to incite or produce such action.*[75]

French J rejected this approach as practically unrealistic. His Honour did not see any justification for reading down the meaning of the word 'instruct' to that extent.[76] Heerey J and Sundberg J agreed. The 'plain English' purposive construction of the term was taken: to 'instruct' was to impart with knowledge,

73 *Lange*, n5 at 570 quoting McHugh J in *Stephens*, n3 at 264.

74 *Brandenburg v Ohio* 395 US 444 (1969).

75 Id at 447 (Unanimous Supreme Court).

76 Note 2 at 81 (French J).

skills and techniques of how the crime may be committed and to encourage the commission of that crime.[77] Hence, what is important is the mere advocacy of crime. The likely effect of the article and the subjective intent of the author was irrelevant to that construction.[78]

Heerey and Sundberg JJ adopted the purposive construction of the word 'instruct' whilst insisting that this construction would not affect the constitutional freedom. Given that their Honours had decided that the article was not 'political' in content (and therefore not worthy of any constitutional protection), it was open to them to take this approach.[79] This line of reasoning allowed the judges to dismiss the appellant's request that the Court look at the likely effect of the article as well as its intent. Both judges were influenced by Dawson J's judgment in *Langer*,[80] in which his Honour took the view that '*to impart information which can be used ... is necessarily to encourage its use if the recipient ... is so inclined.*'[81] It is not clear why their Honours relied upon the reasoning in Dawson J's judgment rather than the judgments of other members of the High Court. Not only was Dawson J in sole dissent in *Langer* over the validity of the impugned legislation, his Honour was also the only member of the High Court who, in the construction of the impugned legislation,[82] expressly rejected the distinction between 'mere advocacy' and 'encouragement in the recipient'.[83] Nevertheless, by adopting Dawson J's approach, Heerey and Sundberg JJ also approved of the 'mere advocacy' construction of the word 'instruct': by imparting information on how to steal, the editors were encouraging readers to steal, if they were so inclined.

(ii) Analogous Questions: Sedition and Abortion

It is interesting to compare the Federal Court's construction of the Code in terms of 'mere advocacy' with the constructions that have been given to provisions in the *Crimes Act* 1901 (Cth) dealing with the laws of sedition. Central to the definition of sedition both at common law and in statute[84] is the 'mere tendency' requirement: conduct will be seditious if it has even the mere tendency to excite disaffection against the Sovereign.[85] This requirement not only deflects from close analysis of the nature and magnitude of the actual threat, it also reinforces the belief that any advocacy of subversive or revolutionary ideas will prompt insurrection or damage the orderly processes of the state.[86]

77 Id at 81 (French J) , 83 (Heerey J) and 97 (Sundberg J).

78 Id at 83 (Heerey J).

79 For French J, this construction was essential to his finding that the article fell within the meaning of the Code and was consistent with the constitutional freedom.

80 Note 2 at 83 (Heerey J) and 99 (Sundberg J).

81 Note 62 at 326.

82 Section 329A(1) of the *Commonwealth Electoral Act* 1918 (Cth).

83 Note 62 at 326 (Dawson J); compare with 318–9 (Brennan CJ), 330 (Toohey & Gaudron JJ), 340 (McHugh J), 350 (Gummow J).

84 *Crimes Act* 1901 (Cth) s24A.

85 Id, s24A also proscribes sedition against various other incarnations of the state; See also the interpretation given to the phrase 'intention to excite disaffection' by the High Court in *Burns v Ransley* (1949) 79 CLR 101 (hereinafter *Burns*).

86 Head M, 'Sedition – Is the Star Chamber Dead?' (1979) 3 *Crim LJ* 89 and Maher L, 'The Use and Abuse of Sedition' (1992) 14 *Syd LR* 287.

Needlessly to say, this construction of the sedition laws created a very low threshold for their infringement and left them open to abuse. Indeed, these laws were abused by both Chifley and Menzies Governments during the Cold War era.[87] In two cases in 1949, the High Court applied the 'mere tendency' construction to s24A of the *Crimes Act* 1901 (Cth) in order to confirm the convictions of two Communist Party members for sedition.[88] By taking this construction of the term 'intention to excite disaffection', the emphasis was easily placed on the statements that were made rather than a consideration of their effects on the audience.[89] In accordance with this construction, the Court imprisoned Burns for doing no more than responding to persistent, aggressive questions put to him in an orderly public political debate[90] and convicted Sharkey for the carefully drafted statements he reluctantly provided a persistent journalist of the *Daily Telegraph*.[91] In effect, these defendants were imprisoned for presenting politically unpopular views.[92] In *Sharkey*, the fact that the statement was carefully drafted was used as evidence of an intention to excite disaffection.[93] At the time, Latham CJ cleared away any doubts that may have existed about the suppression of political speech:

> I agree that the Commonwealth Parliament has no power to pass a law to suppress or punish political criticism, but excitement to disaffection against a Government goes beyond political criticism.[94]

Similarly, in *Brown*, the adoption of the 'mere advocacy' construction set a very low threshold for infringement of the Code. The Court agreed with the Review Board's findings that words such as 'suss out', 'don't be put off' and 'make sure' were hortatory and instructional in its tone.[95] By applying the 'mere advocacy' construction and focusing on such phrases, it became easy for the Court to ignore the fact that the majority of the Review Board refused to consider the nature of the publication and its audience as mitigating considerations[96] as the minority did.[97]

The 'mere advocacy' construction taken by the Federal Court may affect the manner in which other borderline cases will be treated. For example, in Ireland, the dissemination of information about abortion facilities and available medical

87 Maher, n86 at 288.

88 *Burns*, n85; *R v Sharkey* (1949) 79 CLR 121 (hereinafter *Sharkey*).

89 Maher, n86 at 293.

90 Note 85.

91 *Sharkey*, n88.

92 Maher, n86 at 290.

93 See also Jones M, 'Free Speech Revisitied: The Implications of *Lange* and *Levy*' (1997) 4 *Aust J of Human Rights* 188 for a discussion on Australia's dubious past when it comes to respecting freedom of expression.

94 *Burns*, n85 at 110.

95 Note 2 at 82 (French J) and 99 (Sundberg J).

96 As the Board was required to do pursuant to s11(d) of the *Classification Act* 1995: matters to be taken into account in making a decision on the classification of a publication include ... the persons or class of persons amongst whom it is published or is intended or likely to be published.

97 See excerpts of the Review Board's findings in Sundberg J's judgment, n2 at 96.

procedures quickly went from being a criminal and blasphemous issue to a political one.[98] In NSW, pursuant to ss82 and 83 of the *Crimes Act* 1900 (NSW), abortion is still a crime.[99] Few women, however, would deny that it is at least a politically and legally contentious issue.[100] If the subject matter in question concerned advice and information about the procuring of terminations and the immense social and financial costs associated with motherhood, would the Court so readily apply the 'mere advocacy' construction of the term 'instruct'? Would it not be necessary to conduct at least some analysis of the likely effect of the communication before holding that a wide range of publicly available information amounted to instructions in matters of crime?

D. Applying the Lange Test

In *Brown*, the appellants asked the Court to construe the Code (in particular, the word 'instruct') so that it did not unduly infringe the freedom of political communication. In doing this, the appellants drew an analogy to the reasoning adopted by the High Court in *Lange* while discussing the symbiotic relationship between the common law and statute:

> The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution. Statutes which purport to define the law of defamation are construed, if possible, conformably with the Constitution. However, if their provisions are intractably inconsistent with the Constitution, they must yield to the constitutional norm.[101]

Rather than adopting this approach, both French J and Sundberg J applied the two part test set down by the High Court in *Lange* for determining the validity of laws said to infringe the implied constitutional freedom of political communication. The High Court expressed the test as follows:[102]

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ...[103]

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98 See *Open Door Counselling & Dublin Well Woman v Ireland* (1993) 15 EHRR 244; see also Barendt E, 'Free Speech in Australia: A Comparative Perspective' (1994) 16 *Syd LR* 149.

99 Subject to the limited exceptions determined in *CES & Anor v Superclinics (Australia) Pty Ltd and Ors* (1995) 38 NSWLR 47.

100 For a discussion on the *CES v Superclinics* case, see Graycar R & Morgan J, ' "Unnatural Rejection of Womanhood and Motherhood": Pregnancy, Damages and the Law. A Note of *CES v Superclinics (Aust) Pty Ltd*' (1996) 18 *Syd LR* 323; for a discussion on the legal and political importance of discussing abortion, see Graycar R & Morgan J, 'Legal Categories, Womens' Lives and the Law Curriculum OR: Making Gender Examinable' (1996) 18 *Syd LR* 431 at 434.

101 Note 5 at 566.

102 Heerey J felt that it was unnecessary to decide on the Code but expressed his agreement should it be necessary to do so, see n2 at 88.

103 Note 5 at 567 (footnotes omitted).

Both French and Sundberg JJ effectively held that the second limb of this test was satisfied and the Code was valid.[104]

Two points can be made about their Honours' approach. Firstly, is difficult to understand why the *Lange* validity test was applied at all. The submissions that were put before the Court were not a challenge to the *validity* of the legislation, but a plea for a construction of the Code having regard to the implied constitutional freedom.

Secondly, there seem to be tensions between their Honours' purposive constructions of the relevant provision of the Code and their application of the *Lange* test. While both judges insist that the Code should be read without regard to the likely effects of the communication, the *Lange* test ultimately requires some consideration of the effects of the article. For example, Sundberg J held that the Code is not invalid because it is reasonably appropriate and adapted to achieving the legitimate end of 'protecting the community'.[105] Such a conclusion can only be reached by considering the harm against which the community is to be protected, that is, by considering the effect of communications which are to be censored under the Code (such as the shoplifting article).

French J approached the issue differently. His Honour held that the word 'instruct' was to be construed by reference to the objective intentions of the shoplifting article, rather than its effects.[106] On that construction, his Honour insisted that the Code was reasonably appropriate and adapted to achieving a legitimate end.[107] In order to show that the appropriate balance has always been struck between the freedom and laws which qualify the freedom (when determining the validity of those laws), his Honour relied upon a statement by Deane and Toohey JJ in *NWN*.[108] In that case, their Honours said that laws prohibiting conduct traditionally seen as criminal, such as laws concerning the conspiracy to commit, or the incitement or procurement of serious crime, will not be seen to infringe the freedom even if they effectively prohibit political communications.[109] With respect, it may be argued that there is a material difference between *articles* which describe the techniques involved in committing a crime and the actual *procurement* of that crime. His Honour's analogy to the statement in *NWN* treats the article as if it is criminal in itself, that is, it assumes that it actually has the effect of procuring crime.

3. *Taking Stock of the Constitutional Freedom of Political Communication: Where to from Here?*

(i) Conceptions of Representative Government

Brown may be a gentle reminder that the implied constitutional freedom of political communication has finally come to a resting place in the heart of majority rule by virtue of judicial interpretations of notions of representative and

104 Note 2 at 80 (French J), 99 (Sundberg J).
105 Note 2 at 99 (Sundberg J).
106 Id at 81–2 (French J).
107 Id at 80 (French J).
108 Ibid.
109 *NWN*, n3 at 77 (Deane & Toohey JJ).

responsible government. As early as the decision in *ACTV*, commentators began to query the style of representative government envisaged by the High Court.[110] That question remains, to a large extent, unanswered. It is clear only that it is a system of representative and responsible government which must be cleaved from the text and structure of the Constitution.[111] However, as even the brief discussion in this paper reveals, there are both different versions of representative government and different views on what is necessary for its enhancement and maintenance. For as long as the Constitution remains essentially silent on the details of such a system, the scope and source of the freedom will be left to the courts to determine.[112] Hence, just as the members of the High Court imported their own assumptions about the meaning of 'representative government' into the freedom of political communication cases, the judges of the Full Federal Court in *Brown* attached their own assumptions to the term.[113] It has now become open to the courts not only to determine the scope of the political freedom which will govern the common law and statute but also to determine, at least in the context of that freedom, what *type* of democratic system Australians should live in. This approach has effectively allowed them to discount legislation purporting to minimise corruption in the electoral process[114], and to ignore the harsh penalties imposed on persons purporting to provide electoral information on '*all the available alternatives*'.[115]

The difficulty is not just limited to the possible inhibitive effect that such assumptions have on the democratic process. It is more that there has been a curtailment of the right of the Australian polity to debate and decide the scope and content of such a freedom. After all, even at the most platitudinous levels, few would agree on the content of any right let alone the details involved in determining fairness, justice and equality.[116] Yet, even fewer would agree that the courts have the answers.

(ii) Negative Liberty

In broad terms, the liberal model upon which western systems of jurisprudence are based emphasises the principles of negative liberty[117] and formal equality. These principles can be seen to underpin the High Court's interpretation of constitutional freedoms. For example, when dealing with the express freedom of interstate trade and commerce contained in section 92 of the Constitution, Dixon J (as he was then)

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110 Cass, n43 at 237.

111 Note 5 at 567.

112 See Kennett G, 'Individual Rights, The High Court and the Constitution' (1994) 19 *MULR* 581.

113 See Campbell T, 'Democracy, Human Rights and Positive Law' (1994) 16 *Syd LR* 195 at 204 who says that *ACTV* illustrates the way in which the courts permit their own unargued assumptions to fill the epistemological vacuum surrounding the discourse on human rights.

114 *ACTV*, n3; Id at 202.

115 *Langer*, n62. See also *Eastman*, n63 at 163.

116 See n113 at 200–1.

117 Mill J, *On Liberty* (1972) at Chp 1: '... [t]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'

held in *James v Commonwealth* that the plaintiff was not invoking a private right; he was merely establishing that the impugned legislation was invalid and was therefore entitled to an immunity along with everyone else.[118] More recently, in *Lange*, the High Court adopted the reasoning of Brennan J (as he then was) in *Cunliffe v Commonwealth* in relation to the implied freedom:[119] 'The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control'.[120]

This emphasis on negative liberty and its companion value of formal equality will not only limit the future developments of the freedom of political communication judicially, but also produce some unequal and, in some instances, unfair outcomes. For example, in a liberal society consisting of autonomous, rational individuals, every legal entity, be it person or institution, is treated as formally equal before the law.[121] From a constitutional point of view, the primary power to be contended with is the power of the state. The rights of the individual must be protected from the coercive elements of the state.[122] The substantive result of this approach is that legal entities are treated equally regardless of whether they are media magnates who control a significant portion of the broadcasting and publication agencies[123] or individuals protesting against duck-shooting regulations.[124] Similarly, there is no mechanism for addressing the imbalance, seen in *Brown*, between one of the largest industrial sectors in Australia and a group of volunteer editors for a student newspaper.[125] They stand equal before the law despite the fact that one wields massive social and economic power as a result of its active participation in the 'mainstream' of society.

(iii) United States Jurisprudence

It is worth noting the increasing importance of the American jurisprudence regarding freedom of political speech to the development of the implied constitutional freedom. Despite the High Court's insistence in *Lange* that caution must be exercised when referring to American case law on free speech,[126] there is little doubt that American jurisprudence has had some influence on the developments of the freedom in Australia.[127] For example, when expanding the scope of 'political communication' to include non-verbal conduct, three members of the High Court explicitly turned to American constitutional case law.[128] Also, the appellants in *Brown* tried to direct the Federal Court to the United States

118 *James v The Commonwealth* (1939) 62 CLR 339.
119 Note 5 at 560.
120 Note 60 at 327.
121 Sampford C, 'Law, Institutions and the Public/Private Divide' (1991) 20 *FLR* 185 at 186.
122 Anderson G, 'Corporations, Democracy and the Implied Freedom of Political Communication: Towards a Pluralistic Analysis of Constitutional Law' (1998) 22 *MULR* 1 at 6, 10–11.
123 *ACTV*, n3.
124 Levy, n6.
125 See n2.
126 Note 5 at 563.
127 *ACTV*, n3 at 240–1 (McHugh J). See also the speculations made by Barendt, n98.
128 Note 6 at 594–595 (Brennan CJ), 623 (McHugh J) and 631–642 (Kirby J).

Supreme Court's 'clear and present danger' test in *Brandenburg v Ohio*[129] where the subject matter concerned the advocacy of lawless action.[130] The aim of doing this was probably to highlight both the elevated status accorded to political speech (despite many years of judicial 'balancing') and the more modern tolerance accorded to the advocacy of law breaking for political purposes in the United States. As was shown before, the Federal Court rejected the broader construction. In doing so, they arguably rejected a more developed aspect of the American jurisprudence on free speech.[131]

4. Conclusion

On any view of the future of the constitutional freedom of political speech, *Brown* delivers little and promises nothing. An analysis of the judgments highlights the unspoken assumptions and conclusions underpinning the reasoning of the Court. From a legal perspective, the constructions and explanations applied by the Court were, at the very least, open to debate. At the most, they were questionable in that they revealed subjective perspectives about notions of representative government rather than a thorough understanding of the role and purpose of free political speech in a democratically free society. Further, little consideration was given to the importance of tolerating views antithetical to the rule of law in a democratic society.

It now seems to be left to the Australian community, largely through the legislature, to determine what is necessary for the maintenance of a system of representative democracy, to determine whether it is really necessary to silence the 'fringe dwellers' of our society whilst enhancing the powers of those who participate in the mainstream, and, indeed, to consider whether it is necessary to foster the development of a constitutional freedom that, at most, entrenches the status quo.

All in all, one cannot avoid the feeling that if the tales of Robin Hood had had to pass before our censorship boards and the Federal Court, we could all have been left very much the poorer.

BASHI KUMAR *

129 See n74.

130 The Supreme Court overturned the conviction of a Klu Klux Klan leader by rejecting the 'mere tendency' construction of the relevant statute, thus overturning a previous decision in *Whitney v California* 274 US 375 (1927), an earlier case concerning the conviction of a Communist Labor Party Convention member who adopted a platform urging revolutionary unionism at a meeting. See also Tribe L, *American Constitutional Law* (2nd ed, 1988) at Ch 12.

131 Barendt, n59 at 152–3.

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