THE STRUCTURE OF CONSTITUTIONAL REVOLUTIONS: ARE THE *LANGE*, *LEVY* AND *KRUGER* CASES A RETURN TO NORMAL SCIENCE?

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> [W]hen ... the profession can no longer evade anomalies that subvert the existing tradition of scientific practice — then begin the extraordinary investigations that lead the profession at last to a new set of commitments, a new basis for the practice of science. The extraordinary episodes in which that shift of professional commitments occurs are the ones known in this essay as scientific revolutions. They are the tradition-shattering complements to the tradition-bound activity of normal science. ... Such changes, together with the controversies that almost always accompany them, are the defining characteristics of scientific revolutions.
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> — Thomas Kuhn, The Structure of Scientific Revolutions[1]

I. INTRODUCTION

Legal commentators have of late been inclined to see legal revolutions and paradigm shifts in Australian constitutional law.[2] This derives largely from a perceived transformation in constitutional judicial decisionmaking at the highest

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1 T Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press (2nd ed, 1970) p 6.

2 See B Horrigan, "Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning" in C Sampford & K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions*, Federation Press (1996); G Williams, "*Engineers* is Dead, Long Live the Engineers!" (1995) 17 *Sydney Law Review* 62; AR Blackshield, "The Implied Freedom of Communication" in GJ Lindell (ed), *Future Directions in Australian Constitutional Law*, Federation Press (1994); L McDonald, "The Denizens of Democracy: The High Court and the "Free Speech" Cases" (1994) *PLR* 160. Compare G Winterton, "Popular Sovereignty and Constitutional Continuity" (1998) 26 *FLR* 1 and HGA Wright, "Sovereignty of the People – The New Constitutional *Grundnorm*?" (1998) 26 *FLR* 165.

level,[3] and also from a sense that the fundamental grounds of the Australian constitutional system have shifted.[4] The High Court's recent decisions in *Lange v Australian Broadcasting Corporation*,[5] *Levy v Victoria*[6] and *Kruger v Commonwealth*[7] provide us with an opportunity to consider the application of paradigmatic analysis to constitutional law.

This tendency to perceive paradigm shifts testifies to the widespread, though often tacit, influence of Thomas Kuhn's important essay, *The Structure of Scientific Revolutions*, first published in 1962.[8] It was Kuhn's thesis that the normal course of science is dominated by prevailing "paradigms" or "world-views" which structure and direct scientific research. The phenomena of nature studied by scientists are thus defined by the paradigm, rather than "apprehended directly". "Scientific progress" occurs within paradigms as scientists confront and seek to solve the "puzzles" that do not seem to be fully explained by the governing paradigm. A crisis point arises when the paradigm is challenged by an alternative which seems to provide a more satisfying account of what are now seen as "anomalies", no longer just "puzzles", which the original paradigm could not solve. The advance of science in a wider sense is then a story of "scientific revolutions" in which successive paradigms come to dominate particular fields of scientific research. Thus, Aristotelian physics was supplanted by Newtonian physics, only in turn to be supplanted by Einsteinian physics, and so on.

According to Kuhn, once a scientific revolution is resolved, the scientific community returns to the conventional activities of "normal science" under the terms of the new paradigm. A question for constitutional law, therefore, is whether the recent High Court decisions can be understood as the settlement of a new constitutional paradigm and a return to "normal science" in terms of that paradigm.[9]

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3 The cases most often discussed are *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*), *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*Nationwide News*), *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (*Theophanous*). These cases are collectively referred to hereinafter as the "*Freedom of Speech Cases*". See also *Leeth v Commonwealth* (1992) 174 CLR 455 (*Leeth*) and *Kable v DPP (NSW)* (1996) 138 ALR 577 (*Kable*).

4 The shift in fundamental grounds is perceived in the *Australia Acts* 1986, or perhaps even as early as the *Statute of Westminster Adoption Act* 1942. See *Kirmani v Captain Cook Cruises Pty Ltd (No. 1)* (1985) 159 CLR 351 at 410, per Brennan J. See also GJ Lindell, "Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *FLR* 29; RD Lumb, "The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change" (1988) 15 *UQLJ* 1; L Zines, 'The Sovereignty of the People', in M Coper and G Williams (eds), *Power, Parliament and the People*, Federation Press (1997).

5 (1997) 189 CLR 520 (*Lange*).

6 (1997) 189 CLR 579 (*Levy*).

7 (1997) 190 CLR 1 (*Kruger*).

8 For recent accounts of the place of Kuhn within the philosophy of science, compare JA Schuster, "Two Cases of the Kuhn/Post-Kuhn Dialectic: Method as Mythic Speech and Natural Philosophy as Field & Agon", invited paper presented at "The Heritage of Thomas S. Kuhn", Dibner Institute for the History of Science and Technology, Massachusetts Institute of Technology, 21-23 November 1997 and S Fuller, "Obituary: Thomas S. Kuhn" (1997) 27 *Social Studies of Science* 492.

9 This is not limited to Australian constitutional law. Commentators have also discerned paradigm shifts in American constitutional law. See for example, LH Tribe, "The curvature of constitutional space: What lawyers can learn from modern physics" (1989) 103 *HarvLR* 1; B Ackerman, *We the People: Foundations*, Belknap Press (1991) p 32.

Law is not a science,[10] but science and law do share some common characteristics. Kuhn compared law with science, and saw their processes as at least analogical, while at the same time admitting important discontinuities.[11] Kuhn's emphasis on paradigms, though criticised in various ways,[12] has a defensible application to law, especially since law is institutionally 'tradition-bound' in a way that science is not.[13] Indeed, "revolution" is an idea strongly associated with law and politics, and it seems that Kuhn consciously borrowed the idea from that field.[14]

The applicability of paradigmatic analysis to law is perhaps especially true of constitutional law and individual rights since, in the language of legal positivism, when we are concerned with the rule of recognition or *Grundnorm* of the legal system, the sense in which our ultimate moral commitments intersect with and inform the law is especially obvious.[15] At the same time, however, it is not easy to match Kuhn's theory directly with any of the dominant theories of law. On one hand, Kuhn held that science involves a commitment to the proposition that there is an inherent order in nature, so that apparent disorder always calls for a better theory.[16] For Kuhn, this operates both at the level of the discipline of science as a whole (that nature is orderly) and at the level of individual paradigms (that anomalous results from experiments are puzzles which *a fortiori*

10 The danger of "scientism" has long been noted: applying "scientific" methods or findings to the humanities and social sciences can import a covert set of value judgments, masked by a purportedly "value-free" science: H Sharlin, "Spencer, Scientism and American Constitutional Law" (1976) 33 *Annals of Science* 457. I would also adopt Tribe's caution: note 9 *supra* at 2: "metaphors and intuitions ... can enrich our comprehension of social and legal issues. I borrow metaphors from physics tentatively; my purpose is to explore the heuristic ramifications for the law ...'.

11 Note 1 *supra*, p 23: "In science ... a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions." See also note 1 *supra*, pp 19, 92-4, 160, 208.

12 See K Popper, "Normal Science and its Dangers" in I Lakatos and AE Musgrave (eds), *Criticism and the Growth of Knowledge*, Cambridge University Press (1970) 51 at 52-3; P Feyerabend, *Against Method: An Outline of an Anarchist Theory of Knowledge*, Verso (1978) pp 207-8; B Barnes, *TS Kuhn and Social Science*, MacMillan (1982); I Hacking (ed) *Scientific Revolutions*, Oxford University Press (1981); and recently, P Galison, *Image and Logic: A Material Culture of Microphysics*, University of Chicago Press (1997). See also S Fuller, "Being There with Thomas Kuhn: A Parable for Postmodern Times" (1992) 31 *History and Theory* 241.

13 The continuities and discontinuities between science and law are manifold. Law is institutionally adversarial in method, which distinguishes it from science. Nevertheless, the law is the preserve of the legal community, which steeps its apprentices in its particular methods, just as branches of science are the domain of particular scientific communities, which train their young researchers in the methods of their leading paradigms, as Kuhn emphasised. Moreover, the doctrine of precedent and the use of arguments by analogy from decided cases in the law seems to correspond closely to Kuhn's mature theory of "exemplars", and the use of implications from fundamental doctrines corresponds to Kuhn's idea of the "disciplinary matrix": note 1 *supra*, p 182, 187ff; D Oldroyd, *The Arch of Knowledge*, New South Wales University Press (1986) pp 324-5.

14 Note 1 *supra*, pp 92-4, 208. At the same time, there are suggestions that the political idea was influenced by cosmological notions of revolution.

15 Horrigan likewise sees constitutional reasoning as raising particularly acute issues: note 2 *supra* at 33.

16 Note 1 *supra*, p 42. Despite his historicist approach, it has been conjectured that Kuhn also thought that there is some "inner meaning of the common ground amongst the sciences", an "underlying idea that all 'real' sciences share the same professional and behavioural essence": JA Schuster note 8 *supra*.

must admit of a solution).[17] Can one likewise presuppose an inherent order, or integrity, in constitutional law? What if the constitutional text reflects more compromise than coherent theory? Either some higher law, such as that found in natural rights theory, or the superhuman synthesis of a Justice Hercules, can provide a rationalistic or systematic coherence to overrule the incoherence of positive law, or law is inherently disorderly. The latter view is perhaps antithetical to a Kuhnian analysis of law.[18]

Importantly, Kuhn's theory is interpreted as a precursor to the "sociology of knowledge" approach to science.[19] Kuhn placed an emphasis on the scientific community, examining the ways in which it trained scientists and controlled the directions of "valid" scientific research. His theory can therefore be understood as corresponding to sociological approaches to law. Kuhn distinguished between rules and paradigms, suggesting that the scientific community "can agree ... in their *identification* of a paradigm without agreeing on, or even attempting to produce, a full *interpretation* or *rationalization* of it".[20] For Kuhn, a form of tacit knowledge enables us to recognise scientific paradigms without being able to define them. Consequently, the outworking of a paradigm is not simply a matter of logical derivation. According to Kuhn, paradigms therefore resemble Wittgenstein's idea of "family likenesses".[21]

II. PARADIGMS AND THE ANALYSIS OF CONSTITUTION LAW

A. What Would a Paradigm Shift in Law Look Like?

It is necessary to tighten our definition of "paradigm" and explore what a paradigm, and a paradigm shift, would look like in law. As Masterman pointed out, there are as many as twenty-one different senses in which Kuhn used the term "paradigm", ranging from myth or tradition to a general epistemological outlook or organising principle which governs perception and defines reality itself.[22] Certainly, as Kuhn explicitly acknowledged, different levels or degrees of scientific "revolution" can be distinguished. For the early Kuhn, a paradigm

17 Note 1 *supra*, p 37.

18 This is true at least on one interpretation of Kuhn: see JA Schuster, note 8 *supra*. An inherent disorder in law would be thus analogous to Feyerabend's theory of science. See C Sampford, *The Disorder of Law: A Critique of Legal Theory*, Blackwell (1989). The capacity of liberalism to provide a unifying theory of law is widely questioned: see for example, A MacIntyre, *After Virtue*, Duckworth (1985) p 253; A MacIntyre, *Whose Justice? Which Rationality?*, University of Notre Dame Press (1988); LH Tribe, "Comment" in A Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law: An Essay by Antonin Scalia*, Princeton University Press (1997) p 65.

19 D Oldroyd, note 13 *supra*, p 323; see T Kuhn, note 1 *supra*, p 205-7. Kuhn, however, resisted some of the specific theses of sociology of knowledge in science: JA Schuster, note 8 *supra*; MD King, "Reason, Tradition and the Progressiveness of Science" (1969) 10 *History and Theory* 3.

20 Note 1 *supra*, p 44.

21 *Ibid.*

22 M Masterman, "The Nature of a Paradigm" in I Lakatos & AE Musgrave (eds), note 12 *supra* at 59-89.

was tantamount to an all-encompassing "world-view".[23] But he allowed for "sub-revolutions" in the original version of his theory, and in later versions substantially revised the idea of paradigm so that it referred more to "micro-events" rather than the "grand revolutions" of his original thesis.[24] Thus the later Kuhn focused on the sub-revolutions to be found in more discrete fields of scientific inquiry.[25]

A similar distinction can be suggested in law and politics.[26] At one extreme, there are those fundamental political revolutions which involve total, or near-total, legal discontinuity. The lawful transmission of legal authority through abdication of jurisdiction or cession of territories may work a legal disruption of comparative proportions. Less abrupt, although often as far reaching, are those changes in fundamental legal outlook which accompany a shift in professional allegiances.

However, there seem to be important differences between these examples. The first instance is associated with Hans Kelsen's notion of a "revolutionary" change in the constitution of a legal system having the effect of substituting an *entirely new* legal order.[27] But as John Finnis has pointed out, even exponents of this theory accept that after the "revolution" the content of the law most often remains "similar, if not identical".[28] Moreover, Australia has not in any case undergone legal discontinuity in the sense of having asserted an *autochthonous* constitution.[29] Rather, the means adopted for the cessation of Imperial legislative authority over Australia were meticulously designed to comply with preexisting law, even though there are some doubts concerning the legal efficacy of particular aspects of the *Australia Acts* scheme.[30] Nevertheless, an alteration in the fundamental grounds of the constitutional system is perceived, and this is often connected to a apparent shift in professional allegiances; a paradigm

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23 Kuhn's idea of "scientific revolution" is often described as a *gestalt* switch (one of Masterman's senses of "paradigm"), an idea from psychology which suggests that human beings perceive things as *wholes*, and that, in particular cases, perceptions of the whole are liable suddenly to switch: note 1 *supra*, pp 85, 111; D Oldroyd, note 13 *supra*, p 322. Another controversial feature of Kuhn's theory is that different paradigms are incommensurable: note 1 *supra* at 102. This suggests that if there is a paradigm shift in progress, those holding to different paradigms of the law will in all likelihood be arguing at cross purposes.

24 D Oldroyd, note 13 *supra*, p 324; T Kuhn, note 1 *supra*, pp 49, 177. This moderated the problem of incommensurability between paradigms.

25 Note 1 *supra*, ch X, and the 1969 postscript, pp 174-210.

26 See the varying analyses of legal revolutions in FW Maitland, *The Constitutional History of England*, Cambridge University Press (1955), pp 283ff and HJ Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press (1983).

27 H Kelsen, *General Theory of Law and State*, Russell and Russell (1973) pp 117-19, 366-9, discussed in JM Finnis, "Revolutions and Continuity of Law" in AWB Simpson (ed), *Oxford Essays in Jurisprudence*, Clarendon Press (1973).

28 *Ibid* at 45.

29 M Moshinsky, "Re-enacting the Constitution in an Australian Act" (1989) 18 *FLR* 134; KC Wheare, *The Constitutional Structure of the Commonwealth*, Clarendon Press (1960) chs 3 and 4; and G Marshall, *Constitutional Theory*, Clarendon Press (1980) pp 57-72.

30 See the discussion in HP Lee, "Legislative Comment: The Australia Act 1986 – Some Legal Conundrums" (1988) 14 *MonLR* 298 and L Zines, *The High Court and the Constitution*, Butterworths (3rd ed, 1992) pp 261-6.

shift.[31] Thus the relationship between constitutional revolution and changes in the substantive content of the law is a complex and elusive one.[32] Although the connection between the two is often made, there seems to be a very important difference between revolutions in the legal positivist sense and "revolutions of the understanding."

Bryan Horrigan distinguishes four "fundamental levels of legal analysis", each representing an increasing level of abstraction: "legal practice" (for example, what must be done in order to comply with the law), "substantive law" (that is, the actual content, rules and principles of the law), "conceptions of law" (for example, forms or kinds of legal reasoning) and "concepts of law" (that is, the nature of law, or "what counts as law").[33] In Horrigan's analysis, paradigm shifts have to do with methods of reasoning, and he identifies standard examples in the perceived shift from rule-based to policy-based reasoning, from literal to purposive interpretation, and from formal to substantive decisionmaking.[34] In that sense, Horrigan's focus is on what he calls "conceptions of law", although he clearly places this in the context of the more abstract concern with concepts of law, as defined.

For others, a paradigm has to do with an even more abstract "ideal of society" which informs one's concept of law and the Constitution. For example, Jürgen Habermas understands paradigms of law as having to do with a social epoch's "implicit image of society", an image which involves an identifiable "social ideal" or "social vision" as a paradigm of law or "understanding of the constitution" in the broadest sense.[35] In his analysis, there are two such paradigms, the liberal and the social-welfare models, which have successively dominated Western understandings of law. Habermas proposes a third *proceduralist* paradigm[36] which seeks to better realise the common goal of all three, namely, "the project of realizing an association or self-constitution of free and equal citizens".[37] Noticeably, for Habermas, each of the paradigms thus share a more ultimate commitment to a normative understanding of law as a means of overcoming sheer violence in all its forms, private and public.[38] Further, it is important to note that for Habermas, we are aware of these paradigms of law: our discussion of them is self-conscious; it can (and must) be self-critical.[39]

By contrast, Michel Foucault proposed a notion of "paradigm" in a more elusive sense of an underlying, "preconceptual" level of cultural mentality, lying

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31 See the cases and commentary referred to in notes 2-4 *supra*.

32 See JM Finnis, note 27 *supra*.

33 B Horrigan, note 2 *supra* at 34. It is useful to note that Horrigan's association of "conceptions of law" (that is, methods of legal reasoning) with "concepts of law', seem to correspond to Kuhn's association of "methods in science" with "scientific paradigms".

34 *Ibid* at 38.

35 J Habermas, *Between Facts and Norms*, MIT Press (1996) pp 389-92. Contrast the "Newtonian" and "post-Newtonian" paradigms developed by Laurence Tribe: note 9 *supra*.

36 J Habermas, note 35 *supra*, p 409.

37 *Ibid*, p 392.

38 *Ibid*, p 391.

39 *Ibid*, p 393.

beneath, and beyond, the reach of conscious theorizing.[40] He termed this hypothetical construct variously: as an "episteme", a "discursive formation," or the "conditions of emergence of discourse". Foucault wrote of these as unconscious cultural formations which define the rules of reasoning, thought and discourse, such that the appropriate forms of logic, taxonomy or theorising emerge from it. Theorising cannot test these deep assumptions, because the assumptions are fundamental to theorising itself, and each "community" of discourse is closed to itself.[41]

Thus inherent in the idea of paradigm is the threat of incommensurability between paradigms, and Kuhn's theory, for instance, has often been charged with this.[42] But what, then, would a paradigm in law look like? By their very nature, Foucault's epistemes can barely, if at all, be recognised, let alone described by those who operate within them. But at a less abstract level, in the sense Habermas uses, the notion of paradigm as an identifiable vision of society and a resulting understanding of the Constitution is probably more useful for the analysis of Australian constitutional case law.[43] By introducing the notion of an ideal of society, and linking it to Horrigan's concepts and conceptions of law, we can construct what might prove to be a useful picture of what paradigm shifts in law would look like. We could also seek to link the notion of paradigm in Habermas' sense of a 'vision of society' to the more abstract notion involved in Habermas' identification of an overarching project of Western law and governance as a commitment to the law as normative. It would then be possible to ask of a particular change in the law whether it involved a "paradigm" shift at any one of these levels of abstract analysis. Adapted in this way to issues of legal analysis, Kuhn's structure of scientific revolutions might be used for the identification and understanding of *constitutional* revolutions.

B. A Kuhnian Account of Implied Freedom of Speech

In these terms, it is possible to advance an account of the implied freedom of speech cases. Such a story would begin with those cases as portending a fundamental legal revolution based on the lawful transmission of legal authority embodied in the *Australia Acts* and accompanied by an ostensible shift in professional allegiances. With the abdication of the legislative powers of the

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40 M Foucault, *The Archaeology of Knowledge*, trans A Sheridan (Tavistock, 1969 [1972]) pp 60-3.

41 *Ibid*, 69-70. It is important to note that Foucault rejected the "quest" for a "unitary spirit of an epoch or the general form of its consciousness": "Politics and the study of discourse" (1978) 4 *Ideology and Consciousness* 7 at 10. But contrast the claim made in M Foucault, *Power/Knowledge*, Harvester Press (1980) pp 94-5: "the King remains the central personage in the whole legal edifice of the West. When it comes to the general organisation of the legal system in the West, it is essentially with the King ... that one is dealing".

42 Peter Galison defends science against this charge of incommensurability in P Galison, *How Experiments End*, University of Chicago Press (1987), and most recently in P Galison, note 12 *supra*.

43 I thus intend for the most part in this article to abstract a general notion of paradigm from Habermas' theory rather than seek to apply his specific notions of liberal, welfare and proceduralist paradigms of law. However, there are certain points in the cases which are especially suggestive of Habermas' more specific paradigms, and I make mention of these from time to time without developing the analysis along those lines.

Imperial Parliament, the Constitution was reinterpreted as a kind of social contract founded on popular sovereignty, rather than as a sovereign Act of the Imperial Parliament.[44] According to this account, the "paradigm shift" involved a conspicuous shift in the Court's method of interpretation, away from 'literalism' or a narrow 'legalism', towards a 'progressive' interpretation which sought to read the Constitution against the requirements and nature of contemporary society.[45]

Until this shift occurred, so the story would go, the "normal science" of the High Court regarding civil and political rights had been summed up in the well-known words of Sir Owen Dixon:

> With the probably unnecessary exception of the guarantee of religious freedom, our constitution makers refused to adopt any part of the Bill of Rights of 1791 and *a fortiori* they refused to adopt the Fourteenth Amendment. ... [O]ne view held was that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people. Why, asked the Australian democrats, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting either the federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restrictions?[46]

The equally well known comments on those remarks by Sir Robert Menzies reflected the same view:

> In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.[47]

Consistent with this tradition or paradigm (in Habermas' sense of "ideal of society" and "understanding of the constitution"), the High Court for most of its tenure had not found occasion to discover any indication of individual rights implicit within the Constitution. Even the explicit guarantees received a narrow construction.

But as time progressed, dissentient attitudes increasingly emerged: the paradigm was challenged by alleged[48] anomalies. At a level corresponding to Habermas' "ideal of society", such challenges suggested that majoritarian

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44 Just as *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*Engineers*) introduced an "Imperial Act" paradigm to displace the "federal pact" paradigm which dominated prior to 1920.

45 Compare B Horrigan, note 2 *supra* at 38.

46 O Dixon, "Two Constitutions Compared", *Jesting Pilate*, Law Book Co (1965) at 102. Contrast however Dixon's preparedness to contemplate (and indeed analyse) the effect of "paradigm" shifts of a different order: "An inquiry into the source whence the law derives its authority in a community, if prosecuted too far, becomes merely metaphysical. But if a theoretical answer be adopted by a system of law as part of its principles, it will not remain a mere speculative explanation of juristic facts. It will possess the capacity of producing rules of law." See O Dixon, "The Statute of Westminster", *Jesting Pilate*, Law Book Co (1965) at 82.

47 R Menzies, *Central Power in the Australian Commonwealth*, Cassell (1967), p 54.

48 I say "alleged" because, as Kuhn argued, when a governing paradigm is under attack, those who subscribe to a different fundamental outlook begin to regard the empirical "puzzles" which scientists under the dominant paradigm had sought to account for, as in fact "anomalies" which demonstrate that the paradigm is itself defective.

government provides insufficient protection for minority and individual rights. Accordingly, some favoured a wider reading of the express guarantees, or spoke of rights to be found deeply entrenched in the structure of the Constitution, in the "nature of our society" and in the common law itself.[49] However, bearing in mind the so called "counter-majoritarian dilemma"[50] and charges of judicial activism and non-interpretivism, others opted for the less ambitious argument that certain democratic rights are essential to the very democratic credentials of Parliament and are necessarily implied by representative government.[51]

Further, at a level corresponding to Horrigan's "concept of law", the dominant 'positivist' paradigm of law had for some time been challenged by a 'realist' paradigm, which in effect asked whether the "constitution" as such is to be equated with the text of the *Commonwealth of Australia Constitution Act*, or whether the "constitution" is "whatever the judges say that it is". In turn, at the level of Horrigan's "conceptions of law", the realist paradigm suggested that judges should openly take account of the social purposes and outcomes of constitutional law and interpret the Constitution in ways which accord with an appropriate "ideal of society".

Accordingly, in 1992, as is well known, the High Court engaged in what Kuhn would have called "extraordinary investigations" of the dimensions of representative government under the Commonwealth Constitution, and found an implied guarantee of freedom of political communication. And since then, the issue has been a contentious one, even among members of the Court. This controversy is typical of the debates which Kuhn said accompany nascent scientific revolutions.

In this adversarial context, the unanimous decision in *Lange v Australian Broadcasting Corporation* came as something of a relief.[52] The Court heard

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49 *McGraw-Hinds v Smith* (1979) 144 CLR 633 at 667-70; *Miller v TCN Channel Nine* (1986) 161 CLR 556 at 581-2; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations and Another* (1986) 7 NSWLR 372 *(BLF)*; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10; *Street v Queensland Bar Association* (1989) 168 CLR 461; P Bailey, *Human Rights: Australia in an International Context*, Butterworths (1990) pp 84-6.

50 See A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Bobbs-Merrill (1962).

51 D Feldman, "Democracy, the Rule of Law and Judicial Review" (1990) 19 *FLR* 1; TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford University Press (1993).

52 Editorial, "Free speech must stay" *The Australian Financial Review*, 9 July 1997, p 16 ("Faced with a difficult balancing act between freedom of speech concerns and mounting criticism of judicial activism, the High Court's seven justices ... have constructed a unanimous decision."); D Flint, "A stronger High Court has emerged" *The Australian Financial Review*, 9 July 1997, p 17; Editorial, "Lange case spells need for reform" *The Australian*, 9 July 1997, p 12 ("entrenching the basic achievement of the court under former chief justice Anthony Mason ... such coherence and consolidation is good for the court itself as an institution, considering the vehemence of the recent spate of attacks ... ."); B Lane, "High Court reshapes free speech" *The Australian*, 9 July 1997, p 5 ("a great achievement" quoting Professor George Winterton, "a very good decision, a very clever decision" quoting David Flint); M Kingston, "Compromise brings stability" *The Sydney Morning Herald*, 9 July 1997, p 5; P Bartlett, "Court rules for truth and balance" *The Age*, 10 July 1997, p A15.

submissions from "a large number" of interveners and from two *amici curiae*.[53] Armed with the "full argument" the justices had "heard in the present case and the illumination and insights gained from the subsequent cases of *McGinty v Western Australia*, *Langer v Commonwealth* and *Muldowney v South Australia*", the Court sought "to settle both constitutional doctrine and the contemporary common law of Australia governing the defence of qualified privilege in actions of libel and slander".[54] With clarity and simplicity, the High Court delivered a concise, synthesising and conciliating judgment: a judgment, it could be argued, which purports to define the nature and level of the paradigm shift, and which asserts that the Constitutional Revolution is over, and adjudication can return to the "tradition-bound" activities of "normal science" – subject to the dictates of the new paradigm.

As a synthesising judgment, *Lange* certainly brought together the strands of the previous decisions, and confirmed a central consensus. As a conciliating judgment, there were evident points at which the various justices conceded their particular opinions before the dictates of precedent and (since *stare decisis* did not require all of the concessions) the dictates of comity and predicability, if not the force of argument. As a synthesising and genuinely compromising judgment, the language could afford to be clear and concise; there was little need for fine distinctions. In this sense, somewhat analogous to the way in which a basic textbook recounts the terms of a new paradigm as if beyond doubt, the unanimous judgment in *Lange* spelt out the terms of the new constitutional settlement. At the same time, however, the particular circumstances of the case gave the Court the opportunity to extend the operation of the freedom in important respects which had not been canvassed previously, although such applications were certainly within the scope of the earlier decisions.

The arguments in *Lange* were heard with another important case, *Levy v Victoria*.[55] Both cases called for a reopening of the controversial *Theophanous*. A case stated from defamation proceedings, *Lange* was focussed on the defamation implications of the constitutional requirement of freedom of political communication. As a demurrer arising out of a prosecution under Victorian Regulations prohibiting certain forms of expressive conduct, *Levy* raised issues focussed on State legislative and executive powers, and the connection between speech and non-verbal conduct. Significantly, *Lange* was brought down first. It purported to settle the terms of the new constitutional paradigm in an unanimous judgment. *Levy*, which followed, took up some of the remaining ambiguities (Kuhn would have called them "puzzles"), and seemingly exemplifies the parameters of constitutional debate under the new paradigm.

Moreover, in the subsequent case of *Kruger v Commonwealth* the plaintiffs asked the Court to extend the basic principles of the *Freedom of Speech Cases* to a set of limits on Parliamentary power based on a range of implied limitations on

53 Note 5 *supra* at 523.

54 *Ibid* at 527. See *McGinty v Western Australia* (1996) 186 CLR 140 (*McGinty*), *Langer v Commonwealth* (1996) 186 CLR 302 (*Langer*) and *Muldowney v South Australia* (1996) 186 CLR 352 (*Muldowney*).

55 Note 6 *supra*.

legislative power, including freedom of movement, freedom of association, fundamental legal equality, due process and a prohibition on genocidal legislation. The curial responses to these arguments reveal the hidden ambiguities of *Lange*, while seemingly affirming its paradigmatic character. Perhaps, like Kuhn's scientists, the justices seem able to identify the paradigm without agreeing on a full interpretation or rationalization of it.[56]

C. Applying Paradigmatic Analysis to *Lange*, *Levy* and *Kruger*

If *Lange* represents the consolidation of the new constitutional paradigm brought about by *ACTV*, Kuhn's theory predicts that the latter cases, namely *Levy* and *Kruger* will exemplify the "puzzle" solving activities of normal science. However, it may be that *Levy* and *Kruger* demonstrate such deeply rooted differences of opinion that a conflict of disparate agendas works to undermine the existence of the *ACTV* "paradigm" itself. It is not unprecedented in other areas of constitutional law for the Court to embody 'agreement in principle' while countenancing radical differences in application.

On the wider view of paradigm, one might expect the revolutionary cases to rest in a fresh "ideal of society". This ideal or idea of society would be the tacit background against which the Constitution would be understood, producing a new view of the fundamental nature of the Constitution, and carrying with it the use of constitutional implications which rely on the fundamental societal perspective required by the paradigm. This is of course reminiscent of Justice Murphy's attempt to base constitutional rights and other implications more or less directly on 'the nature of our society'. It is instructive in this regard that even in *ACTV* the majority judges declined to base implications on an ideal of Australian society, but rather focussed on the structure and nature of the constitutional text itself.

But the importance of the fundamental nature of the Constitution itself seems to have declined in the recent cases, and the idea of structural implication was arguably always a part of constitutional orthodoxy.[57] Thus, *ex hypothesi*, *Lange* could represent the consolidation of a new *weltanschauung* in Australian constitutional law first introduced in *ACTV* and *Nationwide News*, but if the individual justices subsequently read *Lange* in divergent ways, the paradigmatic status of these cases must be questioned. So there remains the question of how far the "paradigm" really extends, assuming one can identify a paradigm at all. If the Court remains hesitant to find further rights or freedoms based on representative democracy, then the depth of any new paradigm must be re-evaluated. Perhaps there has only been a "sub-revolution", the introduction of a new rule of law as Horrigan defines it, rather than a more fundamental shift in basic concepts or conceptions of law at the deeper level.[58] Of course, if that is

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56 Note 1 *supra*, p 44.

57 Mason CJ was at pains to show this in *ACTV* note 3 *supra* at 134-5; and recently he re-emphasised the point: A Mason, "Interpretation in a Modern Liberal Democracy" in C Sampford & K Preston (eds), note 2 *supra* at 23-7.

58 See the discussion in B Horrigan, note 2 *supra*.

so, one is not really talking about a paradigm in the original Kuhnian sense of "worldview", or in Habermas' sense of "ideal of society".[59]

Yet another possibility is that *Lange* merely reflects an *incremental* series of shifts in the views of individual High Court justices. Thus, for example, one might discern changes in view or approach of individual justices in their successive judgments in *Miller v TCN Channel Nine*,[60] *Davis v Commonwealth*,[61] *ACTV*, *Nationwide News*, *Theophanous*, *Stephens*, *McGinty*, *Langer*, *Muldowney*, *Lange*, *Levy* and *Kruger*. On such a view, the shift is more cautiously evolutionary than boldly revolutionary. Interestingly, such an analysis would tend to correspond with certain "post-Kuhnian" sociologies of science.[62] Schuster points out that after Kuhn's ground breaking work, scholars came to recognise a process by which:

> paradigms, or more broadly, the cultural resources in play in a tradition of research at a given moment, are constantly subject to partial re-negotiation and modification within "normal research".

Accordingly:

> once it was seen that normal science involves discoveries, negotiated into place and redeployed, thus modifying the paradigm, then some began to see revolutions, if they occur at all, as shifts within cultures or traditions, not as battles between armies from different intellectual planets.[63]

Finally, a more cynical possibility is suggested by Schuster's analysis of the way in which Kuhn precipitated an evaluation of the "rhetorical and propaganda functions of ... methodological pronouncements" in the sciences.[64] By analogy, this would suggest that the emphasis on methodology and legal reasoning has an important rhetorical dimension.

D. The Hypothesis

The hypothesis that will be *tested* in the second part of this article is that *Lange* represents the settlement of a constitutional paradigm inaugurated by *ACTV* and *Nationwide News*, and that *Levy* and *Kruger* reveal the workings of normal science in judicial decisionmaking. This supposition will be tested by measuring the degree to which individual justices reinterpreted the unanimity of *Lange*, adapting it to their own purposes, thus interpreting the supposed

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59 In this connection, it is interesting to note that Justice Windeyer, when ruminating on the impact and significance of *Engineers*, suggested that the case did not turn merely on a purely legal question of interpretation, but that a new conception of Australian society and Australia's place as an independent nation in the world had made the constitutional transition necessary. This suggests that indeed, as noted earlier, *Engineers* reflected and was part of a genuine paradigm shift rooted in a different "concept of law", and more fundamentally, in a different idea of Australian society: *Victoria v Commonwealth* (1971) 122 CLR 353 at 397.

60 (1986) 161 CLR 556.

61 (1988) 166 CLR 79.

62 See JA Schuster, note 8 *supra*.

63 *Ibid.*

64 *Ibid.* See also JA Schuster, "Methodologies as mythic structures: A preface to the future historiography of method" (1984) 1-2 *Metascience* 15 at 18, in which Schuster identifies three levels at which "method discourse" in the sciences can be analysed: (1) abstract discourse, (2) methodological redescriptions of target fields and (3) actual fields of inquiry.

"paradigm" in potentially divergent ways. I will be arguing therefore that the *existence* and the *extent* or *level* of any paradigm shift must be tested and measured by reference to a series of oppositions between fundamental ideas and methodologies which lie at the heart of differences of opinion within the various judgments. The themes which irresistibly present themselves concern:

- the multifaceted opposition between the literal text, the basal principles and fundamental nature of the Constitution; and
- the associated affirmation of *Lange* as the key authority, which (together with *McGinty* and *Langer*) is set up against *ACTV*, *Nationwide News*, *Theophanous* and *Stephens*.

I will endeavour to identify a series of concessions and compromises made by all justices on the High Court in order to achieve the unanimity of *Lange*. The key issues here concern the textual and structural basis of the guarantee of freedom of political communication, and the formula for determining whether legislation which impacts on free speech is a reasonably proportionate means to achieving some legitimate governmental objective. While *Lange* is generally treated as especially authoritative, in *Levy* and *Kruger* the unanimity gave way to the latent differences of opinion which the concessions and compromises of *Lange* had tended to conceal. These differences again centrally concerned the place of the text as opposed to fundamental principle, and the proper way to test the proportionality of legislation.

III. APPLICATION

A. *Lange* — The Settlement Of A Paradigm Inaugurated in *ACTV*?

Mr David Lange, former Prime Minister of New Zealand, commenced proceedings in the New South Wales Supreme Court for damages for allegedly defamatory statements published by the Australian Broadcasting Corporation. The statements concerned Lange's conduct as a member of the New Zealand Parliament. The ABC raised two important defences, both of which turned on a reading of the High Court's 1994 decisions, *Theophanous* and *Stephens*. The first defence initially alleged that the publication was made pursuant to a "freedom guaranteed by the Commonwealth Constitution" concerning political affairs in New Zealand. The second defence relied on "common law qualified privilege", [65] and particularised matters which sought to bring the facts under that principle. Lange argued that *Theophanous* and *Stephens* ought to be reopened, having been wrongly decided, and in the alternative, argued that they did not support the defences pleaded, particularly in that the case involved the conduct of a member of the New Zealand Parliament.[66] The Court had to determine whether, and if so, in what way, the implied freedom of political communication impacted on the law of defamation.

65 Note 5 *supra* at 572.
66 *Ibid* at 558.

(i) Textual Detail or the Conceptual Basis of the Constitution?

It is immediately noticeable that the unanimous judgment set out to confirm the implied freedom as first applied in *ACTV*, but in a way which separated it from the wider use of fundamental doctrine typical of *ACTV* and *Theophanous*. This is of utmost importance for the identification of any paradigm shift involved in these cases. From the outset, the Court managed to reopen *Theophanous* and *Stephens* by denying that they contained a "binding statement of constitutional principle" due to the absence of a majority supporting a particular set of reasons for judgment.[67] The Court then performed a careful and extensive examination of the text of the Constitution, rather like the survey which was crucial in *McGinty* and noticeably absent in *ACTV* and *Nationwide News*.[68]

This survey made clear that representative and responsible government are "given effect to" or "provided for" by the text and structure of the Constitution.[69] In addition to ss 7, 24, 25 and 128 (all considered in 1992), the Court examined ss 1, 7, 8, 13, 28 and 30, and also relied on the framers' intentions and the incomprehensibility of these sections without reference to a system of representative government.[70] The Court did the same with the doctrine of responsible government, referring in some detail to ss 6, 62, 64, 49 and 83.[71]

It appears that over the course of decisions between 1992 and 1997 the Court has indeed expanded and refined its analysis of the representative provisions of the Constitution. From these diverse and partly hesitant beginnings, there is a real sense in the unanimous judgment that the Court has settled on an agreed framework for working through the democratic implications of the Constitution. But is this a new paradigm?

Representative and responsible government are the joint premises of the implied freedom of political communication.[72] But these premises have always been regarded as part of constitutional orthodoxy; it was the inference that was new. It is therefore difficult to locate here a new view of the fundamental nature of the Constitution. Furthermore, at least some form of representative government is tantamount to being *explicitly* provided for in the Constitution. The Court all but demonstrated that the step from the text of the Constitution to what it called "the institutions of representative and responsible government"

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67 In *Theophanous*, Deane J agreed with the answers, not the reasoning, of Mason CJ, Toohey and Gaudron JJ: see *Lange*, note 5 *supra* at 554-6.

68 In *McGinty*, note 54 *supra*, the Court reasoned from a very careful survey of the constitutional text, and drew its conclusions as to underlying doctrines in a guarded manner, speaking of the "adaptation of representative government to federalism". See NT Aroney, "Representative Democracy Eclipsed? The *Langer*, *Muldowney* and *McGinty* Decisions' (1996) 19 *UQLJ* 75. Also see HGA Wright, note 2 *supra* at 175.

69 Note 5 *supra* at 561.

70 *Ibid.* See also *ibid* at 567. There is no mention of section 29.

71 *Ibid* at 561. It is noticeable that these sections, like so much of the Constitution, entrench the gains consequent on the basic principles of the Glorious Revolution of 1688. Section 81 is an odd omission from the Court's analysis.

72 *Ibid* at 562.

involves nothing but the strictly logical implications of the language itself, hardly a movement away from the *Engineers* "paradigm".[73] Indeed, what the Court passed over is that responsible government undoubtedly depends on a system of non-justiciable constitutional conventions which are certainly not "provided for" in a direct or explicit sense, but which are "implied" by the Constitution and were clearly anticipated by at least most of the framers.[74] Avoiding this issue reinforced the textualist flavour of the judgment.

Noticeably, the subject matter was consistently referred to as "representative government", not "representative democracy". Dawson and McHugh JJ had pointed out in *Theophanous* that democracy is wider than representative government since it is often associated with "equality of rights and privileges".[75] It might be added that democracy and equality are more suggestive of a particular "ideal of society" than the more technical and legal "representative government". Indeed, this shift away from the language of democracy and popular sovereignty reflected something of a concession from Toohey and Gaudron JJ, who had generally used the term representative democracy in their own judgments and continued to do so in *Levy* and *Kruger*.

Moreover, the unanimous judgment later pointed out:

> Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it.[76]

Hence "representative government" is a 'shorthand way' of referring to whatever the relevant sections specifically require. The question is not "what is required by representative and responsible government?", but rather "what do the terms and structure of the Constitution prohibit, authorize or require?".[77] This is precisely what McHugh J had emphasised in *Theophanous* and *McGinty*. In *Lange*, the Court unanimously confirmed that there is no "free-standing" idea of representative government which forms the basis of constitutional implications. Implications turn on the specific text and structure of the Constitution. In this, there is an important concession by Dawson J, since he had been critical of the derivation of implications from the "structure" of the Constitution.[78] But the key concession was from those justices who had emphasised representative *democracy*, and treated it as free-standing principle, such as Toohey and Gaudron JJ. The Court unanimously pointed out:

> Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.[79]

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73 The Court spoke of "*the* system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect": *ibid* at 557 (emphasis added).

74 Thus, a discrete implication from the text to the 'institution' can still be identified. That there are more steps to come remains problematic. See NT Aroney, "A Seductive Plausibility: Freedom of Speech in the Constitution" (1995) 18 *UQLJ* 249.

75 See note 3 *supra* at 189, per Dawson J, at 199, per McHugh J.

76 Note 5 *supra* at 566.

77 *Ibid.*

78 *McGinty*, note 54 *supra* at 184.

79 Note 5 *supra* at 567.

If that is all that is at stake, it is difficult to identify a paradigm *shift*, in the fundamental sense of a new conception of society or of its constitution.

(ii) A New Rule of Law Relating to Freedom of Speech or a New Conception of Legal Reasoning and Constitutional Implications?

At the same time however, the Court clearly confirmed the decision in *ACTV*, based as it was on the "indispensability" of "freedom of communication on matters of government and politics". This was a concession for Dawson J, who had constantly avoided conceding any implied "freedom of communication" in so many words. In an accommodating gesture, therefore, the unanimous judgment quoted initially from Justice Dawson's distinctive verbal formula: a "true choice" made with "an opportunity to gain an appreciation of the available alternatives".[80] Merging this with a rhetorical device that had been used by Brennan J, the Court concluded that an "absolute denial" of access to political information is inconsistent with the "true choice" required by s 24.[81] As a result, the Court unanimously affirmed what Horrigan calls a new "rule of law"; but that is all.

Nevertheless, the Court had to concede that freedom of communication is not expressly mentioned in the Constitution, and so relied on the framers' assumption that elections under the Constitution would be free in the sense of performed under conditions of freedom of speech *and freedom of political organisation.*[82] This affirmation of freedom of political organisation was an endorsement of the view of the matter taken by Justices Gaudron and McHugh in 1992.[83] It suggests that representative government as embodied in the Constitution can still produce new declarations of implied rights; but this is still short of the suggestion that the abstract idea of democracy or of a conception of Australian society can do so. The justices were to have another opportunity to discuss the matter in *Kruger*.

The next step in this synthesising judgment concerned an important point which had been previously emphasised by Brennan and Deane JJ, namely that the implied freedom is to be understood as a *limitation* on governmental power,

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80 *ACTV*, note 3 *supra* at 187.

81 That Justice Dawson's formula had teeth was remarkably demonstrated in *Langer* note 54 *supra*, where his Honour was the only justice to strike down the legislation which prohibited Mr Langer from encouraging people to take advantage of sections of the *Commonwealth Electoral Act* which enabled voters to complete a formal vote while not necessarily expressing a preference between all candidates on the ballot paper.

82 Note 5 *supra* at 560. Note Chief Justice Mason's distinction between assumptions and implications in *ACTV*, note 3 *supra* at 135. Thus the Court deftly avoided the problem that it is not so clear that the framers' intention was that there be a corresponding implied limitation on the power of the Commonwealth and State legislatures which would be enforced by the courts. It later supported this conclusion, rather unconvincingly in my view, by pointing out that the State and Commonwealth Parliaments are not supreme or sovereign due to their adaptation "to a federal system of government embodied in a written and rigid Constitution": note 5 *supra* at 562. Judicial review as a federal precaution does not of itself necessarily imply judicial review as a safeguard of implied individual immunities.

83 *Ibid* at 212, per Gaudron J, at 227-33, per McHugh J.

with a consequential *immunity*, rather than as an individual, personal *right*.[84] This distinction was crucial for working out the implications for the defences available under the law of defamation, in a way that departed from the conclusion in *Theophanous*. It also became important in respect of the argument in *Kruger* that a breach of a constitutional "right" could issue in damages. In this respect, it is very clear that even if we grant a shift in fundamentals at the level of methods of constitutional interpretation, the Court is still reading the Constitution as a liberal document, which suggests, if anything, that the justices have consciously or otherwise adopted what Habermas would call the liberal paradigm or "ideal of society'.[85]

(iii) Proportionality: An Agreed Method of Constitutional Analysis?

Next, the court traversed fairly uncontroversial ground when it pointed out that the freedom is not absolute, but is limited to "what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution".[86] The precise verbal formulation was:

> the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.[87]

This formulation is different from the precise terms in which it had been expressed previously. Moreover, it involved a decided concession on the part of Dawson J, in that he had consistently resisted applying a proportionality analysis unless the relevant legislative head of power was "purposive", narrowly construed.[88] However, the formula was also an apparent concession by those justices who had distinguished between legislation which directly impinges on freedom of speech (to which a very high standard of scrutiny is applied) and legislation which only incidentally impacts on it.

Perhaps of more importance from the perspective of paradigmatic or epistemic evaluation, Justice Dawson's concession underscores the importance of proportionality in the new freedom of speech jurisprudence. This suggests that perhaps the real "revolution", if one has occurred at all, should fundamentally be traced to *Davis v Commonwealth* rather than *ACTV* in the sense that it was in *Davis* that the court first used a proportionality approach to limit the scope of federal heads of power in terms of freedom of speech.[89] Such an argument would stress that an (albeit tenuous) majority in *Nationwide News* decided the case on *Davis* grounds and that Gaudron J, at the least, has continued to maintain

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84 Note 5 *supra* at 560, 566; *ACTV*, note 3 *supra* at 150; *Theophanous*, note 3 *supra* at 147-9.

85 For the main part, however, I am not using Habermas' specific conception of the liberal paradigm in this article.

86 Note 5 *supra* at 561.

87 *Ibid.*

88 See *Nationwide News*, note 3 *supra* at 88 and *Langer*, note 54 *supra* at 324-5.

89 Note 61 *supra*.

the approach she enunciated in *Nationwide News* in those terms. The argument would continue by pointing out that in a practical sense it is the proportionality analysis conducted by the court that is decisive in "freedom of speech" cases, notably in *Levy*. Finally, such an argument would maintain that the Court's orientation in making the kind of "balancing" decisions involved in proportionality issues is grounded in a particular conception of the nature of its judicial review function in Australian society.

Be that as it may, is this proportionality test an integral part of the new paradigm established by *Lange's Case*? If so, the "normal science" of constitutional adjudication will proceed in terms of this test, and disagreements will be controlled by it. However, the unanimous judgment explicitly earmarked the existence of 'differences of opinion' which would continue to operate in the "post-revolutionary era". The Court said:

> different formulae have been used by members of this court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted.[90]

As future decisions are handed down, it can be expected that the significance of the different tests will come to the forefront. *Lange* gave the Court an ample opportunity to consolidate the constitutional position by focusing on what could be agreed between the various justices, but the differences of emphasis were left open, and became apparent in *Levy* and especially *Kruger*. These differences reveal significantly disparate conceptions of the role of the courts in judicial review.

(iv) Leeways of Choice and the Limits of Constitutional Interpretation

Lange was centrally concerned with the impact of the Constitution on the common law of defamation as amended by the statutory law of the various states. It was therefore necessary for the court to consider the general relationship between the common law and the Constitution. Because the High Court, as the highest court of appeal, decides both constitutional and common law cases, there is "but one common law in Australia" and "one system of jurisprudence", unlike the position in the United States where the common law is "fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations".[91]

This is of abiding significance, since as part of "one system of jurisprudence" the Constitution may have an effect on the content of common law, and in fact does so when it comes to the law of defamation. The issue in *Lange* was whether the common law defence of qualified privilege as formulated historically was consistent with the freedom of political communication required

90 Note 5 *supra* at 562.
91 *Ibid.*

by the Constitution. Common law develops "in response to changing conditions" such as changes to the franchise, literacy, modern political structures, and mass communications.[92] It is these changing conditions, together with the existence of the Constitution, which confer on the High Court the responsibility to develop the common law of defamation in an integrated fashion. Accordingly, "the common convenience and welfare of society" requires the Court to "strike a balance ... between absolute freedom of discussion of government and politics and the reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics".[93]

This reasoning casts into relief the distinction Brennan J had drawn between the "leeways of choice" available to the Court at common law, and the view that the Constitution provides the Court with *no* leeway of choice.[94] The constitutional freedom involves a limitation on legislative power and a consequential immunity.[95] Since the constitutional freedom is essentially a limitation on legislative power rather than a personal right, the common law is controlled by the Constitution in only a 'negative' sense, while the common law confers a positive right. This means that freedom of speech under the Constitution prevents the expansion of the common law or statutory rights of persons defamed, but does not limit the extent of the defences that the common law or statute may say are available to those who publish defamatory material. This restrained view of the capacity of constitutional immunities to influence and control common law and the statutory powers of the States reflects a decided difference from the reasoning and tenor of the majority in *Theophanous*. It confirms that *Lange* militates against the existence of a fundamental paradigm shift as regards an "ideal of society" or a concept of the Constitution in which implied constitutional rights are absolute trumps over common law and statute.

(v) The Specific Text of the Constitution or the Nature of the Australian Polity?

However, the reasoning does continue to affirm the *Theophanous* proposition that the legislative capacities of the State Parliaments are limited by the constitutional freedom operating at a federal level. What is strikingly absent from the discussion in *Lange* however, is any reference to s 106 of the federal Constitution or to the more amorphous idea of the "organic unity" of the Australian polity, both of which had been raised in the previous cases as grounds upon which constitutional limitations would apply to the legislative powers of the States.[96] In one sense, this might be construed as an important concession by the minority in *Theophanous* and *Stephens*, since they had resisted the

92 *Ibid* at 565.

93 *Ibid.*

94 *Theophanous*, note 3 *supra* at 143.

95 Note 5 *supra* at 565.

96 *Nationwide News*, note 3 *supra* at 52, per Brennan J, at 76, per Deane and Toohey JJ; *Theophanous*, note 3 *supra* at 38, per Brennan J, at 48-50, per Deane J; contrast *McGinty*, note 54 *supra* at 207-10, per Toohey J; *Muldowney*, note 54 *supra* at 376-7, per Gaudron J.

application of the freedom to State legislative powers. According to the Court in *Lange*, it appears that a sufficient limitation on State legislative power can be based on the constitutional need to protect federal political processes. Since federal and state political issues are necessarily integrated, the Court consistently referred simply to "government and political matters" without specifying a federal or state dimension.[97]

The important thing for the present analysis is that Justice Gaudron's "organic unity" was not adverted to in the unanimous judgment. Such an argument is indeed suggestive of a conscious appeal to "the nature of our society", reflecting a particular "ideal of society" in Habermas' sense of paradigm, and analogous to Kuhn's original notion of paradigm as worldview. However, the unanimous judgment chose rather to express its decision in much more concrete terms.

(vi) The Significance of Lange's Case

When it came to the crucial question in *Lange* of determining whether the available common law defences to the defamatory torts are consistent with the constitutional freedom, the Court endorsed the two-pronged proportionality test previously mentioned. However, the Court's unanimous summary of the majority decision in *ACTV* seems to adopt a 'strict scrutiny' approach, in that the broadcasting legislation in *ACTV* was understood as struck down "because there were other less drastic means by which the objectives of the law could be achieved".[98] This is in the nature of the relatively stringent test that the United States Supreme Court applies, and has been favoured by Mason CJ and Deane, Toohey and Gaudron JJ. It is to be distinguished from the wider "margin of appreciation" which Brennan CJ has been inclined to grant to Parliament, in line with the approach of the European Court of Human Rights. These differences, as has been mentioned, reflect different conceptions of the role of the courts in a representative democracy.

It appears, therefore, that the Court's unanimous decision in *Lange* represents an important consensus achieved through real concessions and the suppression of latent differences of opinion. Under unanimously adopted verbal formula, the Court placed the existence of the implied freedom of political communication beyond doubt, but expressed this in a way which portended judicial restraint and a concern to grapple with the text of the Constitution rather than rely on broad statements concerning underlying constitutional doctrines and the democratic nature of our society. Whether this represents the settlement of a new paradigm needs to be further assessed against the decisions in *Levy* and *Kruger*.

B. *Levy* — The Puzzles of Normal Science?

Mr Lawrence Levy sought a declaration that regulation 5 of the *Wildlife (Game) (Hunting Season) Regulations* 1994 (Victoria) was invalid. In June

97 *Nationwide News*, note 3 *supra* at 52, 76. It further appears from the case that local, and indeed international, political issues may fall within the scope of the freedom: note 5 *supra* at 571-2.

98 Note 5 *supra* at 568.

1994, Levy had been charged under the regulations and associated provisions for entering a permitted hunting area during prohibited times without a valid game licence. For him, entry into the hunting area was a means, indeed, the only effective means, of protesting against the practice of duck shooting, since it would enable him to bring the practice to the attention of the television viewing public and to collect wounded ducks as evidence of the inhumanity of the practice. He therefore argued that the regulations were contrary to an implied constitutional freedom to protest against the law, policy and practice of duck shooting through his physical presence or activity in the hunting area, thereby attracting media attention to actual events; to engage in informed, rational and persuasive debate of the issues, making use of actual samples; and to be publicly seen aiding injured ducks.[99]

Levy was asking the Court to go further than it had previously. First, he had been engaged in protest activities which, while a form of communication, were not specifically speech or writing. Secondly, while the Victorian Constitution, like its counterpart in Western Australia, provides for a system of representative government, the relevant provisions are not "entrenched" by requiring a popular referendum for their alteration. Nor do the relevant provisions use the important words "chosen by the people" which appear in the Commonwealth and Western Australian Constitutions. It lies within the power of Parliament to alter the system of representative government in Victoria. In *Stephens*, it was the entrenchment of "democracy" which placed freedom of political communication beyond the power of the Western Australian Parliament. Without this firm basis for the derivation of a freedom of communication, the plaintiff was forced to rely on the guarantee operating under the Commonwealth Constitution, as applied in *Theophanous*. Thirdly, the subject matter of political discussion was primarily a State issue. Fourthly, and most importantly, the Regulations were introduced in response to an official Regulatory Impact Statement which contained reports of dangerous confrontations between armed shooters and rescuers.[100] Their professed purpose was to protect against potentially lethal encounters, and the magnitude of the risk called for strong measures.

The Court unanimously held that the freedom extended to expressive conduct, including the conduct of the plaintiff,[101] the important qualification being that certain forms of conduct may, by their nature, require regulation, so long as the regulation is for a legitimate purpose and the prohibition is proportionate to achieving that purpose. Indeed, Gaudron J saw the Regulations as restricting the plaintiff's freedom of movement, rather than freedom of communication, and affirmed the existence of a constitutional freedom of movement which she

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99 The range of constitutional arguments are set out by Kirby J note 5 *supra* at 632-5. One of them touched on the possibility of fundamental common law rights, the infringement of which lies beyond the capacity of Parliament. Kirby J noted "there are many problems" with such a line of argument: *ibid* at 644. Compare his Honour's judgment in the *BLF* case, note 49, *supra*.

100 There were problems with the admissibility of the Impact Statement as evidence.

101 Note 6 *supra* at 595, per Brennan CJ, at 613, per Toohey and Gummow JJ, at 623, per McHugh J, at 637, per Kirby J. At 622, note 148, McHugh J pointed out that *Lange* shows that the scope of the freedom is at least as wide as that recognised in *ACTV* and *Theophanous*.

developed in *Kruger*.[102] In this sense, the proportionality analysis was of crucial importance in *Levy*, again suggesting that the real paradigm shift, if one can be identified, be traced to *Davis* rather than *ACTV*.

(i) Textual Detail and the Meaning of Lange

In coming to this conclusion, the judgments can be understood as generally treating *Lange* as a key authority laying down the terms of the ruling paradigm, with the Court accordingly maintaining a restrained attitude to the question of constitutional implications. However, in focusing on *Lange* and not *ACTV*, the judgments actually weaken the sense in which any deep paradigm shift has occurred, since *Lange* avoided all reference to "the nature of our society" or representative democracy as a "free-standing principle". Dawson and McHugh JJ especially took the opportunity in *Levy* to interpret *Lange* in a manner which would limit the scope of further implications. For McHugh J, *Lange* was at once the authority which placed the freedom beyond doubt, and which also tied that freedom to the system specifically "provided for by the Constitution", based on ss 7, 24, 64 "and supporting sections".[103] Citing *Lange*, Dawson J stated that "it is now clear that the Constitution does not incorporate any concept of representative government other than can be identified in the provisions of the document itself".[104] Kirby J likewise tied the freedom to the system for which the text and structure of the Constitution provides.[105]

Since the question is therefore not what representative government requires, but what the Constitution itself requires, Dawson J echoed *Lange's* emphasis on the closely textual foundation of the implied freedom. Quoting himself as quoted in *Lange*, the Constitutional requirement was most precisely understood as a "choice ... to be made at periodic elections", and necessarily a "true or genuine choice". McHugh J emphasised that the freedom was negative in nature, and did not constitute a positive right. Therefore, one must have had the right at general law to engage in particular conduct before one could complain about legislation which unconstitutionally intervened to prevent the exercise of that right.[106] Dawson J went further by suggesting that this was best understood *not* as an implication, but as a matter of simply "construing the text", while acknowledging that the distinction between these two is not always an easy one to draw. The freedoms that we enjoy are due to the absence of laws inhibiting them. Freedom of political communication is at best indirectly derived from the Constitution in the strict sense that the freedom is a residual one, based on a restriction of power, not a positive right; and it is certainly not derived from "any underlying or overarching concept of representative government".[107] Dawson J thus firmly reinforced what Habermas would call the liberal paradigm of law and

102 *Ibid* at 617; and see the discussion of *Kruger* below.
103 *Ibid* at 622.
104 *Ibid* at 606.
105 *Ibid* at 644.
106 *Ibid* at 622, 626; see also at 636, per Kirby J.
107 *Ibid* at 607.

society. For Kirby J, it was likewise important to warn against slipping from a constitutional *restriction* on power into "the language of individual rights".[108]

The Court did not decide the question whether such a freedom could be derived from the Victorian Constitution. In a cautious and brief judgment, Brennan CJ thought an answer to this question unnecessary, and in discussing the matter pointed to the two hurdles involved: it would be necessary to show how the freedom was *implied by the particular provisions*, and how that freedom was sufficiently *entrenched*.[109] He therefore eschewed any wide ranging discussion of the Victorian Constitution or, indeed, the idea of Victorian society in a paradigmatic sense.

The decision in *Lange* intervened on the issue of whether the freedom derived from the Commonwealth Constitution extended to state political issues.[110] However, even on this issue, Brennan CJ said that he remained unconvinced, and avoided the issue by deciding the case on the basis that the Regulations were proportionate to attaining a legitimate objective.[111] McHugh J expressed similar doubts, but did not direct them to whether the freedom could extend to state matters in principle, but rather directed them to the specific question of whether the duck shooting issue was connected in any way to the affairs of the federal government.[112] This again seems to imply an understanding of *Lange* that the freedom at a federal level can extend to any political issue so long as a factual connection with federal politics can be demonstrated. What all of these approaches reinforce is that *Lange*, while now a pivotal authority in this field, is far from portending any fundamental paradigm shift in constitutional methodology founded on a new view of the Constitution itself and the "ideal of society" which it reflects.[113]

(ii) Proportionality and the Breakdown in Unanimity

The explicit purpose of the Regulations was to "ensure a greater degree of safety of persons in hunting areas during the open season", as stated in regulation 1. This, as has been noted, was the decisive issue.[114] The Court held that the prohibition in regulation 5 was reasonably appropriate and adapted to the protection of persons in the hunting areas.[115] However, the plaintiff also argued that the five metre buffer zone required by regulation 6 indicated the most

108 *Ibid* at 644. Kirby J noted that the plaintiff himself "disclaimed" any reliance on a "free-standing" right to free expression: at 631-2.

109 *Ibid* at 599; see also at 609 per Dawson J, at 611 and 614 per Toohey and Gummow JJ, at 619 per Gaudron J, at 626 per McHugh J, at 643 per Kirby J, who also noted some of the difficulties.

110 *Ibid* at 595-6 per Brennan CJ; at 642-4 per Kirby J.

111 *Ibid* at 595-6.

112 *Ibid* at 627-8.

113 While acknowledging that the decision in *Levy* presents a formidable obstruction in the way of discerning a fundamental paradigm shift in the case-law, Wright (note 2 *supra* at 166 and 176) seems to suggest that the decision on the facts may be explained as simply due to the weight that had to be accorded to the protection of human life. The judgments of Brennan CJ and Dawson, McHugh and Kirby JJ certainly do little to support this interpretation, although Gaudron, Toohey and Gummow JJ seem to leave the matter open, suggestive of the result in *Kruger* note 7 *supra*.

114 Note 6 *supra* at 635-6, per Kirby J.

115 See *ibid* at 597, per Brennan CJ.

appropriate level of control. This argument gave rise to important differences in approach, and different conceptions of the judicial role, which remain after the unanimity of *Lange*.

In response to this argument, the Chief Justice denied that the courts should "assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice".[116] Dawson J took the matter further, reasoning that since the freedom is not a positive right, there is never the question of 'balancing' it against other interests, it is simply a question of whether the impugned law precludes the holding of the free elections required by ss 7 and 24. Therefore, the *Lange* formula is merely a 'suggestion' and must be understood as subordinate to the ultimate question, which is whether the law is compatible with the elections which the Constitution requires to be held. Thus the 'proportionality paradigm' *ex hypothesi* ushered in by *Davis*, was still resisted by Dawson J.

In the field of law, it is difficult to discount such a minority view as one could in science. This and other significant dissents on matters of fundamental principle serve to accumulate a case that no fundamental paradigm shift, even in terms of the *Davis* thesis, has occurred. Of course, this in turn serves to underscore a fundamental difference between law and science and to suggest that, at the least, accounts of paradigm shifts in law have to deal on one hand with the institutional traditionalism involved in the doctrine of precedent, and on the other hand with the institutional weight that is still accorded to the opinions of dissenting judges. Nevertheless, Dawson J assessed the law on the basis of whether it had a legitimate objective and an incidental impact on freedom of communication, and whether it was appropriate and adapted to a legitimate objective and "reasonable in the interests of an ordered society".[117] This might suggest that the doctrine of precedent is nevertheless finally dominant (according to the "common law paradigm"!), and that it is the doctrine of precedent which is the fundamental difference between law and science as Kuhn conceived it.

Kirby J, in any case, noted the various proportionality tests and formulations that had been advanced, and saw benefit in them all, while pointing out that "a universally accepted criterion is elusive." Thus despite disagreeing with some of Justice Dawson's criticisms of the concept of proportionality, his Honour likewise thought that the question was whether the law was inconsistent with the system of representative government for which the Constitution provides, a less stringent test.[118] At the same time, he treated the *Lange* formulation as determinative, and when considering the Regulations, his Honour noted that they were appropriate and adapted, proportionate and within the margin of appreciation to be accorded to the legistlative power. Kirby J appeared to disagree with the focus adopted by Gaudron J, however, in that he held that the legislation did not specifically target the content of the message, and thus did not require a compelling justification.[119]

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116 *Ibid* at 598.
117 *Ibid* at 608.
118 *Ibid* at 647.
119 *Ibid.*

McHugh J, and Toohey and Gummow JJ in their joint judgment, treated *Lange* as establishing the applicable standard of evaluation, and refrained from seeking to qualify the test for proportionality stated therein.[120] In deciding that the Regulations were "reasonably capable of being seen as appropriate and adapted to the aim pursued", their Honours referred to the range of cases we now have in this field. Toohey and Gummow JJ contrasted the *incidental* impact on communication posed in *Lange*, the *direct* prohibition of certain forms of communication in *ACTV* and the *facilitation* of the democratic process in *Langer* and *Muldowney*.[121]

Gaudron J noted the emphasis she had placed on the purpose of the legislation and the standards of common law in her judgment in *Nationwide News*. However, she distinguished the 'less stringent' test advanced by Brennan CJ in *Langer*, and the two tier test expounded by Mason CJ and by Deane and Toohey JJ in *ACTV*. Her Honour affirmed that if the direct purpose of the law was to restrict political communication, it would require some "overriding public purpose"; whereas if the interference was only incidental, the regulation need only be reasonably appropriate and adapted to its legitimate end. Thus regulation 5, which she thought had the direct purpose of restricting the freedom of movement of those who wished to protest against duck shooting, had to be justified by some overriding public purpose; but human safety, given "the use of firearms and the likely enthusiasm", was such an overriding concern.[122]

(iii) Puzzles or Anomalies?

Accordingly, the decisions in *Levy* seem to confirm the role of *Lange* as settling a "paradigm", but at the same time begin to demonstrate the latent differences of opinion that remain, especially over the question of proportionality and the role of the courts. Certain justices interpreted *Lange* as closely tying the implied freedom to the literal text of the Constitution. A few also expressed doubts concerning particular propositions advanced in that case. Therefore, if *Lange* represents the settlement of a Kuhnian paradigm shift, these issues must be seen as "puzzles" to be worked out in the course of the "normal science" of future judicial decisionmaking. On the other hand, if the outstanding issues are actually based on fundamental differences of principle (which *Lange* obscured and which *Levy* began to reveal), they would seem to be more in the nature of Kuhn's "anomalies", as perceived from the various points of view. We could then left with two competing and possibly incommensurate paradigms vying for preeminence. But even then, we still have to identify how deep the differences of perspective go in order to work out whether the idea of a paradigmatic analysis is actually a useful way of understanding the cases in this field of law.

120 *Ibid* at 610-11, per Toohey and Gummow JJ, at 624, per McHugh J.
121 *Ibid* at 614.
122 *Ibid* at 620.

C. *Kruger* — A Clash of Incommensurate Paradigms?

In *Kruger*, a number of Aboriginal Australians brought an action alleging that as children, they had been unconstitutionally removed from their parents and detained under the *Aboriginals Ordinance* 1918 (NT), and in one case, that her child was taken from her. They sought a declaration that the Ordinance was invalid, and sounded in damages either in trespass or a "constitutional tort". In support of these contentions, the plaintiffs raised a number of grounds of invalidity. They argued that the Ordinance was not "for" the government of the Territory, hence beyond the power contained in s 122 of the Constitution. They also argued that the Ordinance was contrary to s 116, or alternatively, contrary to a number of implied constitutional limitations on legislative power, including freedom of movement, freedom of association, fundamental legal equality, due process and a prohibition on genocidal legislation.

The justices expressed varying measures of concern or regret at the policy which motivated these removals.[123] However, they also took the view that the actions of the past needed to be evaluated in light of the views of the past, and not contemporary standards.[124] Moreover, due to the circumstances of the case, there were a number of hurdles which the plaintiffs unfortunately faced. Under the procedure adopted, the questions reserved for determination by the Court were to be decided on the pleadings, so final determination of the cases would have to wait full trial of the matter. This hamstrung the capacity of the Court to make a final determination of those constitutional issues which turned in part on matters of fact. Moreover, the Ordinance was passed under the *Northern Territory (Administration) Act* 1910 (Cth), itself based on s 122 of the Constitution. Due to cases which had held that s 122 should be understood as "non-federal" in nature, there was a question whether the various express and implied limitations on legislative power would apply to it. Finally, there was the ultimate question whether the existence of the implied limitations could be sustained and, if so, whether they applied in the particular circumstances.

In the result, a majority of Brennan CJ, Dawson, McHugh and Gummow JJ (the latter reluctantly) held that the implied limitations on legislative power had no relevant operation. For Brennan CJ and Dawson J (with whom McHugh J agreed),[125] apart from s 116, the case turned on a failure to establish the existence of the implied limitations on power. By contrast, Gummow J thought that some of the implied limitations could be found within the Constitution, but held that he was bound by previous decisions; decisions which had not been opened for reconsideration, and which placed s 122 outside the scope of such limitations. In this, his Honour agreed with Gaudron and Toohey JJ that there were relevant implied limitations on legislative power, especially the guarantee of freedom of movement and freedom of association. The latter concluded that

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123 See note 7 *supra* at 36, 53, 76, 158. Gaudron J observed that the Ordinance "authorised gross violations of the rights and liberties of Aboriginal Australians": at 102.

124 *Ibid* at 36, 52-3, 92-3, 158. At the same time, Gummow J thought that the provisions were, "and are now, reasonably capable of being seen as necessary for a legitimate non-punitive purpose (namely the welfare and protection of those persons) rather than the attainment of any punitive objective": at 162.

125 *Ibid* at 141-2.

those limitations had an application to the Ordinance, so that for Gaudron J, the freedoms of association and movement rendered the Ordinance invalid without need for further consideration of the facts, while Toohey J thought that the matter continued to turn on evidence which would need to be supplied at trial. Gaudron J also thought that the Ordinance could be contrary to s 116 should the necessary facts be established.

Thus while the Court delivered a unanimous judgment in *Lange* and maintained unanimous result in *Levy*, in *Kruger* it produced a 4:2 result, with a 3:3 split on many of the fundamental issues. This disagreement serves to weaken the idea that a paradigm shift has actually occurred as a result of *ACTV*.

(i) Textual Detail or the Conceptual Basis of the Constitution?

In a number of ways, the majority judgments in *Kruger* exemplify the nature of the approach consolidated in *Lange* and exemplified in *Levy*. One of the most important characteristics is a renewed attention to the detail of the Constitution itself, as opposed to a direct reliance on constitutional doctrines and underlying principles. For instance, in determining the question whether the powers in s 122 could be subject to Chapter III, Gummow J turned "first to the constitutional text", and concluded that, apart from certain authorities which stood in the way, the answer "both simple and close to the text" was that it applied, and that much was to be said for this view, since "the text of the Constitution ... must be controlling".[126] This approach tends to reinforce the significance of *Lange* and superficially suggests that *Lange* embodies a governing paradigm, assuming one can be identified.

Adopting a line of reasoning not unlike that to be found in the judgments of McHugh and Gummow JJ in *McGinty*, Brennan CJ thought that the "legislative inequality" contemplated by ss 51(xix) and (xxvi) "destroy[s] the argument that all laws of the Commonwealth must accord substantive equality to all people irrespective of race".[127] Gummow J also saw the significance of these sections.[128] Dawson J took the analysis of the text further, relying on the decision in *McGinty* that there is no guarantee of equality of voting power.[129] Pointing to specific sections, his Honour noticed that "where the Constitution requires equality it does not leave it to implication". Accordingly, the attempt by Deane and Toohey JJ to read these provisions as manifesting the underlying doctrine of equality, "not only denies the accepted canon of construction expressed in the maxim *expressio unius, exclusio alterius*; it turns it on its head".[130]

Of course, the various instances of mandated equality and mandated inequality to be found in the Constitution can each be interpreted as representing the "underlying doctrine", so the argument from *expressio unius* can cut both ways. Toohey J affirmed the approach he had taken in *Leeth*, that the "underlying or

126 *Ibid* at 162-3, 168. See also his treatment of section 80: *ibid* at 172-3.
127 *Ibid* at 44-5.
128 *Ibid* at 155.
129 *Ibid* at 64.
130 *Ibid* at 64-5.

theoretical equality of all persons under the law and before the courts" was a "necessary implication" of the "*conceptual* basis of the Constitution", a Constitution "brought into existence by the will of the people".[131]

All of this seems to confirm, as the early Kuhn maintained, that changes in paradigms are changes in world-view. Under different paradigms, different worlds appear; there are no "brute constitutional facts" susceptible to a "neutral" reason. This fundamental difference of view therefore undercuts the extent to which the Court has settled on an *agreed* paradigm, but it does support the idea that paradigms or epistemes of one kind or another influence constitutional interpretation in a fundamental and unavoidable sense. Moreover, the difference of opinion, focusing as it does on the issue of equality before the law, fits nicely into Habermas' discussion of the liberal paradigm of law as formal legal equality, and the way in which both the liberal and welfare paradigms seek, on his analysis, to achieve a more fundamental commitment to society as an association of free and equal individuals.

(ii) The Meaning of Lange

In any case, the same attention to textual detail came out in the use of *Lange* as embodying the appropriate approach, if not consolidating a new paradigm. Citing his own formulation, Dawson J pointed out that as a result of *Lange*, "it is now established" that the protection of freedom of communication is based on the requirement that members of the federal Parliament be "directly chosen by the people at periodic elections", as this is to be discerned in ss 1, 4, 12, 24, 28 and 32. It is thus based on "the system of representative government for which the Constitution specifically provides", and this reasoning excludes any further implications based on "the nature of our society", including Justice Gaudron's suggestion of freedom of movement and freedom of association.[132] In a brief judgment which largely seemed to accord with Justice Dawson's perspective, the Chief Justice also held that no "textual or structural foundation for the implication" of a freedom of movement or association had "been demonstrated".[133] At least for these two justices, it is thus difficult to identify a paradigm shift even at the level of conceptions of law (meaning methods of reasoning which, *ipso facto*, would allow for further implied freedoms).

Moreover, the underlying, and wider, differences of approach among the justices clearly surfaced when it came to the question of whether the implied freedom would bind the Northern Territory's institutions of government. Relying on *Lange*, McHugh J pointed out that the implied freedom of political communication rests on the constitutional mandate that the federal Parliament be "directly chosen by the people". Accordingly, the implied freedom "exists for the protection of the 'people of the Commonwealth' ... and for 'the people of the State[s]'" — as ss 7 and 24 require. Consequently, it "cannot protect those who are not part of 'the people' in either of those senses", and ss 24, 25 and 26 make

131 *Ibid* at 65-6, emphasis added.
132 *Ibid* at 69.
133 *Ibid* at 45.

plain the exclusion of residents of the Territories from this definition.[134] What is significant about this is the degree to which McHugh J again eschewed any grounding of implied rights in the fundamental nature of the constitutional system as democratic, let alone on an ideal view of Australian society. His Honour thus tacitly adopted a formalistic and in a sense liberal "paradigm" of Australian constitutional law. It is difficult to see how this aspect of the reasoning could involve a fundamental paradigm shift *away* from the *Engineers* viewpoint.

Thus while McHugh J adhered to the suggestion of an implied freedom of movement and association which he had made in *ACTV*, he limited it to the purposes of the "constitutionally prescribed system of government and referendum procedure".[135] Furthermore, his Honour pointed out that during the relevant period under the Ordinance, Northern Territory residents had no constitutionally entrenched rights to vote in the "constitutionally prescribed system": their current voting rights flow from legislation between 1922 and 1974, and their right to vote in referenda was constitutionally recognised only in 1977. The freedoms could therefore have no relevant operation which benefited the plaintiffs.[136]

However, underscoring a radical difference in outlook, Gaudron J agreed with this observation, but turned it on its head as far as the argument over genocide was concerned. She reasoned that since the Territories are liable "to be ruled as Commonwealth fiefdoms" under s 122, the absence of constitutional voting rights for Territorians means that they have no democratic capacity to protect themselves from abuses of power. Therefore, the power in s 122 is especially to be read as *not* authorising "gross violations of human rights and dignity contrary to established principles of the common law".[137] Toohey J likewise thought it relevant to point out that the plaintiff's claim as regards genocide was "anchored firmly in the Constitution", although the plaintiffs' claims raised "difficult questions".[138] It is difficult not to conclude that a very different paradigmatic or epistemic conception of the Constitution, and indeed of Australian society, is at work here.

Again, a particular view of the text of the Constitution and of the effect of *Lange* came out in the way Toohey and Gaudron JJ dealt with the argument over freedom of association and movement. It is noticeable that Toohey J resisted close textual analysis, and tended, rather, to broad statements as to the nature and effect of the Constitution. Thus he suggested that there should be further consideration of Justice Murphy's view of freedom of movement as "a fundamental right arising from the union of the people in an indissoluble

134 *Ibid* at 142. Dawson J also held that any such implied guarantees would not limit the powers in section 122: at 69-70.

135 *ACTV* note 3 *supra* at 227-33; note 7 *supra* at 142.

136 *Ibid* at 143-4.

137 *Ibid* at 105-06, 123. Her Honour thus ingeniously by-passed the *Engineers* principle that constitutional powers are not to be read down in order to prevent abuse of power: *Engineers* note 44 *supra* at 151-2. This raises an intriguing problem of synthesis with the reasoning in *ACTV* note 3.

138 Note 7 *supra* at 87.

Commonwealth".[139] His Honour affirmed the reasoning which he had adopted in *Nationwide News*; that representative government is one of "three main general doctrines of government which underlie the Constitution", and that the "rational basis of that doctrine is the thesis that all powers of government ultimately belong to, and are derived from, the governed".[140] Gaudron J likewise saw freedom of communication as "settled constitutional doctrine", founded on representative government and representative democracy, terms which had been used interchangeably.[141] Moreover, for Toohey and Gaudron JJ the freedom of speech identified in the earlier cases extends to communications "between all persons, groups and other bodies in the community", that is, "all speech relevant to the development of public opinion". It is "one of the most fundamental rights in a free society".[142] Visions of society, in Habermas' sense, are clearly at work here.

Thus in Justice Toohey's view, *Lange* is authority for the proposition that the freedom of political communication "is beyond question", and nothing said in that case "diminishes the scope of the implied freedom" as Toohey J identified it; "rather the decision reinforces it".[143] While also citing the case, it is perhaps of some significance that Gaudron J declined to make much use of the unanimous judgment, relying mostly on the broad statements to be found in *ACTV*, *Nationwide News*, *Theophanous* and *Stephens*, and especially in the judgments of herself, Mason CJ, Deane and Toohey JJ (and, to a lesser extent, McHugh and Brennan JJ).[144] Thus Brennan J in *Nationwide News* was given in support of the proposition that the Constitution impliedly "mandates whatever is necessary for the maintenance of the democratic processes for which it provides".[145] But whether derived from the democratic system directly, or via the implied freedom of political communication (as seemed to be her Honour's approach),[146] citizens are not intended to be "islands", nor to be "held in enclaves", so that citizens have a constitutionally protected freedom of association, which in turn entails freedom of movement.[147] In this way, her Honour especially adopted the kind of reasoning which predominated in *ACTV* and *Nationwide News*.

Gaudron and Toohey JJ thought that the residents of the Northern Territory:

> had to be free to provide other members of the body politic with their views on all matters relevant to their government and to discuss those matters amongst themselves.[148]

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139 *Ibid* at 89, quoting *Buck v Bavone* (1976) 135 CLR 110 at 137.
140 *Ibid*, quoting *Nationwide News*, note 3 *supra* at 69-70, 72.
141 Note 7 *supra* at 114, n 447.
142 *Ibid* at 90, per Toohey J. See also Gaudron J at 115.
143 *Ibid* at 90-1.
144 *Ibid* at 114-21, also 127-8, notes 454-5, 458-60, 468-9, 477.
145 *Ibid* at 114; *Nationwide News*, note 3 *supra* at 48, per Brennan J.
146 Note 7 *supra* at 127.
147 *Ibid* at 115.
148 *Ibid* at 91, per Toohey J. See also Gaudron J at 116-23.

As to the view of McHugh J that residents of the Northern Territory lacked the requisite constitutional and legal rights to enjoy the implied freedom, Justice Toohey's response was that:

> The people is the body of subjects of the Crown inhabiting the Commonwealth regarded collectively as a unity or whole, and the sum of those subjects regarded individually.[149]

To exclude residents of the Territories on the basis of their electoral status is, accordingly, "to take an impermissibly narrow view" of the meaning of "the people", for "the freedom does not turn upon the electoral status of individuals".[150] Competing conceptions of the nature of "the Australian people" are at work here. Justice Toohey's definition of "the people" reduces the Australian system to one of irreducible unity and particularity, discounting any allowance for the people organised as States as a mediating level of organisation and government. For this reason it suggests some of the latent dimensions of the federal issues raised by the decision, as discussed below. More relevantly, it very clearly, again, involves a paradigmatic vision of Australian society. It goes well beyond Horrigan's "rules of law', or indeed "conceptions" and "concepts" of law and invokes an "ideal of society" itself. Such an approach very nearly invites comparison to a world-view in Kuhn's original sense of paradigm, or indeed Foucault's episteme.

The same general approach was adopted by Gaudron and Gummow JJ in emphasising that the Constitution is "one coherent instrument for the government of the federation", not "two constitutions, one for the federation and the other for its territories." Thus the Northern Territory is not a "*quasi* foreign country" – again, a vision of Australian society itself.[151] And to "the special position of Territories in our Constitutional arrangements", Gaudron J added "the nature and scope of the freedom of political communication", that is, it extends to "all matters which may fall for consideration in the political process".[152] Ingeniously, since the people of the Commonwealth elect the Parliament which provides for the government of the Territories, the people must enjoy freedom of political communication between them and residents of the Territories.[153]

Thus Toohey and (especially) Gaudron JJ down played *Lange*. Gummow J, by contrast, emphasised the decisions in *McGinty* and *Lange*, contrasting them with *ACTV*, *Nationwide News*, *Theophanous* and *Stephens*. It was argued that *ACTV* spoke of freedom of movement and association. For Gummow J, however, *McGinty* and *Lange* made apparent that *ACTV* is no authority for "any proposition of this width".[154] Therefore there was no *general* freedom of

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149 *Ibid* at 92, quoting *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 35.

150 Note 7 *supra* at 92. See Toohey J also at 97.

151 *Ibid* at 119, per Gaudron J, and at 163, per Gummow J, adopting the words, respectively, of Kitto and Dixon JJ in *Lamshed v Lake* (1958) 99 CLR 132 at 153-4, 144.

152 Note 7 *supra* at 118.

153 *Ibid* at 120. For Gaudron J, the same outlook meant a wide view of the express limitation in section 116: at 122-3.

154 *Ibid* at 156-7.

association such as would incorporate the familial associations destroyed by the forced removals under the Ordinance.[155]

(iii) Judicial Restraint

Brennan CJ, Dawson, McHugh and Gummow JJ focussed on the text, and eschewed the 'grand' style of reasoning of Gaudron and Toohey JJ. An associated characteristic of the majority judgments was an interpretation of *Lange* (and *McGinty*) which, while understood as consolidating freedom of political communication, calls for judicial restraint. For Gummow J, the necessity for restraint was explicit, citing Chief Justice Brennan's important remark in *McGinty* that:

> Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis.[156]

Thus when his Honour came to consider the argument from substantial legal equality, he observed:

> But in the absence of an anchor in the constitutional text it is a large step to extract from the whole corpus of the common law a "general doctrine of legal equality" and treat it as constitutionally entrenched.[157]

When addressing the argument about freedom of movement and association, he thoughtfully pointed out:

> The problem is in knowing what "rights" are to be identified as constitutionally based and protected, albeit they are not stated in the text, and what methods are to be employed in discovering such "rights'. Recognition is required of the limits imposed by the constitutional text, the importance of the democratic process and the wisdom of judicial restraint.[158]

Justice Gummow's restraint was also manifested, obliquely, in the fact that he rejected the arguments for a wide freedom of association and movement, but saw strength in the argument from the *explicit* immunities contained in s 116.[159]

The Chief Justice's restraint was more implicit: he simply declined to find that the Constitution implies a right to freedom of movement and association, since the necessary "textual or structural foundation" had not been "demonstrated".[160] Likewise, Brennan CJ and McHugh J avoided deciding the constitutional issue raised by the genocide argument by holding that in any case the Ordinance did not authorise genocide, and nor was it for the purpose of inflicting mental harm, as alleged.[161] Dawson J went further, repeating his rejection of any common law rights so fundamental that even Parliament could not destroy them; for the doctrine of parliamentary sovereignty is also deeply rooted in the common

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155 *Ibid.*

156 *McGinty*, note 54 *supra* at 168. His Honour also cited himself, Dawson and McHugh JJ from *McGinty* at 291, 188 and 230-2 respectively.

157 Note 7 *supra* at 154.

158 *Ibid* at 156.

159 *Ibid* at 160-1.

160 *Ibid* at 45.

161 *Ibid* at 40, 144.

law.[162] Gummow J likewise saw the force of parliamentary supremacy and, with Dawson J, rejected the argument from customary international law.[163]

The same restraint came into the question whether there was any right to damages arising simply by reason of breach of constitutional rights. Brennan CJ responded to this argument by repeating that the Constitution is concerned with powers and restraints on power, not positive rights, a proposition clearly endorsed in *Lange*.[164] Gummow J raised "formidable obstacles" in the way of the plaintiffs on this point, and one of these was the nature of the relationship between common law and the federal Constitution which had been clarified in *Lange*.[165] Even Toohey and Gaudron JJ concluded similarly.[166] Without citing Justice McHugh's strenuous denial that the Constitution contains a "free standing principle" of representative democracy in *McGinty*,[167] Gaudron J thought that it had not been established that "the Constitution gives an independent or free standing right" of movement or association the breach of which would sound in damages. Thus while the Constitution confers no "additional right over and above those provided by the common law", actions in trespass and false imprisonment would in principle be available.[168]

This 'judicial restraint' of Brennan CJ, Dawson, McHugh and Gummow JJ clearly differs from the arguments of Toohey and Gaudron JJ, which seem explicitly to draw on a particular, paradigmatic ideal of society. Thus two competing paradigms would seem to be in evidence here. At the least, then, a constitutional revolution, in Kuhn's terms, is at best far from consummated since fundamental differences of episteme seem to be in evidence.

(iv) A Federal or Unitary Paradigm of the Australian Polity?

Another important theme in *McGinty* was the recognition of the place which federalism must take in the interpretation of the Constitution. This was again at issue in *Kruger* since, as noted, one important question was whether the power in s 122 could be understood as subject to the various express and implied limitations on legislative power to be found elsewhere in the Constitution. Brennan CJ emphasised this theme by insisting that s 122 "must be construed in its context", a context which "declares" that:

> The Constitution, though in form and substance a statute of the Parliament of the United Kingdom, was a compact among the peoples of the federating Colonies.[169]

Accordingly, "the leading object of the Constitution was the creation of the Federation".[170] In that context, the first five chapters of the Constitution "belong to a special universe of discourse, namely that of the creation and the working of

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162 *Ibid* at 73, citing *Kable*, note 3 *supra* at 590.
163 Note 7 *supra* at 155, 159.
164 *Ibid* at 46. Cf Dawson J at 69.
165 *Ibid* at 148, 153-5; see also 175.
166 *Ibid* at 1029.
167 *McGinty*, note 54 *supra* at 347.
168 Note 7 *supra* at 124-6.
169 *Ibid* at 41-2.
170 *Ibid* at 42.

a federation of States", while Chapter VI concerns a "fundamentally different topic" and the power in s 122 is "non-federal".[171] Thus while s 122 conferred a power which was not to be shared with the States, neither was the power intended to distort the federal distribution of functions.[172] The Chief Justice proceeded to deny that s 122 was limited by any requirement of due process or fundamental legal equality, assuming such could be established from the "federal provisions" of the Constitution in the first place.[173]

Dawson J also took this point firmly, likewise citing previous decisions where the non-federal, national, sovereign, plenary, unlimited, unrestricted and unqualified nature of the power in s 122 had been emphasised.[174] Section 116, which appears in Chapter V, therefore had an operation as part of "the division of power between the Commonwealth and the States within the federation", and has no application to the "disparate and non-federal" concerns of s 122.[175]

What is interesting here is that this line of argument actually suggests a third, 'federalist' paradigm which could likewise vie for dominance as against the formalistic and textualist on one hand, and the substantive and 'democratic' on the other. Thus Gaudron, Toohey and Gummow JJ resisted any vision of the Constitution and Australian society as being fundamentally secured through a "federal pact" between the States as constituent members, although Toohey J acknowledged that "the Commonwealth considered in its federal aspect" was the concern of s 71.[176] As noted, their Honours stressed the national and unitary features of the Australian system, especially that "the territories form an integral part of the Commonwealth and of a single federal system".[177]

The federal issue came up again in Justice Dawson's critique of "substantive due process", noted above. Deane and Toohey JJ had reasoned that the States were but "artificial entities", so that a free "agreement of the people" conceptually undergirded the Constitution and implied an "inherent equality of the people as parties to the compact".[178] Dawson J, however, saw the Constitution as essentially a federal pact, so that the relevant implication was a protection of the States from discriminatory treatment.[179] Thus a third paradigm is suggested here, reminiscent of the High Court's pre-*Engineers* jurisprudence. Noticeably, the reduction of the States to "artificial entities" is reminiscent of the view taken by Alfred Deakin when opposing the arguments in favour of state representation in the Senate being put by Sir Samuel Griffith during the 1891 constitutional convention held in Sydney.[180] These arguments evoke vying

171 *Ibid* at 40-4, citing Kitto J in *Spratt v Hermes* (1965) 114 CLR 226 at 250.
172 Note 7 *supra* at 43.
173 *Ibid* at 44-5.
174 *Ibid* at 53-8.
175 *Ibid* at 60. Brennan CJ was content to dispense with the s 116 argument on the basis that the Ordinance did not have the *purpose* of prohibiting the free exercise of religion: *ibid* at 40.
176 *Ibid* at 81-3, per Toohey J; 162ff, per Gummow J.
177 *Ibid* at 82, per Toohey J; at 163-4, 167, 1075, per Gummow J.
178 *Leeth* note 3 *supra* at 484, 486.
179 Note 7 *supra* at 63-4.
180 G Craven (ed), *Official Record of the Debates of the Australasian Federal Convention*, Legal Books (1986), vol 1, *Sydney 1891*, pp 74-5, 78.

paradigms or ideals of Australian society, but the fact of their multiplication now into three distinct "paradigms" further undermines the notion that *ACTV* constituted a fundamental constitutional revolution in the most profound sense.

(v) Proportionality

Finally, as has been noted, one of the matters clearly left open in *Lange* was the formulation and application of the appropriate test of proportionality. In *Kruger*, this issue only became a live one for Toohey and Gaudron JJ. It is noticeable that when discussing this issue Gaudron J declined to cite *Lange* altogether, preferring the statements to be found in *ACTV* and *Nationwide News*.[181] This is all the more striking when it is considered that her Honour concluded that the various verbal formulations set out by Mason CJ, Deane, Toohey and McHugh JJ and herself pointed to "but one test ... namely, whether the *purpose* of the law in question is to prohibit or restrict political communication".[182] For Gaudron J, this meant that since the Ordinance conferred powers directly to prevent freedom of movement and association, the matter turned on whether an "overriding public purpose" was in view, and if so, whether less drastic measures were available. It would therefore have to be shown that detention of Aborigines was necessary for their protection or preservation as a people; but this could in no way be shown. The relevant provisions of the Ordinance were accordingly at all times invalid.[183]

IV. CONCLUSION

Is *Lange* the settlement of a new constitutional paradigm inaugurated by *ACTV*? Certain points do seem to have been settled, and *Levy* and *Kruger* treat them as such. There is certainly a constitutional freedom (but not a positive constitutional right) of political communication, which will extend to all political issues that as a matter of fact have a relation to federal politics. However, a clear majority seem to have fixed on the view that implications flow only from the text or structure of the Constitution, and that the specific provisions of the Constitution may serve to negative general implications, such as equality. This suggests that while a change in legal doctrine has occurred, it is difficult to identify a consolidated shift in judicial technique or in the judicial conception of the Constitution and its place in Australian society.

Indeed, the Court has adopted a single verbal formulation for the way in which the freedom will be balanced against the legitimate objectives of a particular statute. However, while the Court has agreed on matters such as these, individual justices clearly disagree on the basis of implied freedoms and on the precise way in which proportionality analyses will be conducted. Some justices remain restrained, even explicitly so; others are prepared to find implications in

181 Note 7 *supra* at 127-8.

182 *Ibid* at 128, emphasis added.

183 *Ibid* at 129-30.

the underlying concepts and fundamental values said to lie at the base of the Constitution. *In an important sense, radically different paradigms are at work here.* The justices were not simply treating the difficult provisions of the Constitution as "puzzles" to be solved as part of the "normal science" of constitutional interpretation. Rather, these sections were treated, especially in *Kruger*, as "anomalous facts" open to different interpretations in a war between competing paradigms or understandings of the judicial role, of the Constitution and of Australian society.

A change has therefore occurred, but not, perhaps a "revolution" at the deepest level, and not with uniform results. Arguments from fundamental legal conceptions of popular sovereignty seem for the moment to be confined to a minority of justices. Even though the Constitution can no longer be understood as deriving its authority from being contained in an Act of the Imperial Legislature, that has not necessarily prevented members of the Court from interpreting it as a statute, albeit as a statute of fundamental significance. Moreover, there is a resurging recognition of some of the salient federal features of the Constitution, although this has not blossomed into a fully-orbed vision of the Constitution or Australian society as having been based on a fundamental "federal pact". As a result, any shift to a "progressive" approach to interpretation, whatever that may mean, is far from consummated.[184] On the contrary, it would seem that incommensurable theoretical perspectives – in the sense of there being no single agreed perspective, not that there are no identifiable perspectives – will continue to produce discordant results, despite the unanimity of *Lange*.[185]

The existence of the implied freedom of political communication has certainly been put beyond doubt, if *ACTV* had not done so earlier. But *Lange's* textual reformulation of the basis of this implication and the reticence of a majority of the Court to take the steps sought in *Kruger* show how far the Court has yet to travel before a new paradigm, in the most radical sense of the word, can be said to have been settled.

184 See *Theophanous*, note 3 *supra* at 173, per Deane J.

185 A MacIntyre, *After Virtue*, note 18 *supra* at 8. It is tempting to cite MacIntyre's pessimistic disparagement of attempts to discover "a set of consistent principles" behind the United States Supreme Court's decisions (*ibid* at 253): "The Supreme Court ... play[s] the role of a peacemaking or truce-keeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none."