CHAPTER TWO: UNENUMERATED RIGHTS

KEY CONCEPTS FOR THE CHAPTER

● U.S. courts have held that the Fifth and Fourteenth Amendments’ protection against deprivation of liberty without due process of law has two components: liberty cannot be deprived unless certain procedures are used by government, and certain rights that are encompassed by “liberty” cannot be deprived unless the government can justify the deprivation. The latter concept is known as “substantive due process”

● In neither Canada nor the U.S. are individual rights absolute.
  - In the U.S., certain “fundamental” rights can be limited only if the government persuades judges that there are good reasons for doing so; for “non-fundamental” rights, courts defer to legislative judgments under the so-called “rational basis” test
  - In Canada, the Charter protects “fundamental” rights and subjects them to close scrutiny under a 4-prong test (the “Oakes” test); non-fundamental rights are simply deemed not to be protected by the Charter

● Given the breadth of the language of the Fourteenth Amendment and s.7 of the Canadian Charter, identification of rights worthy of active judicial protection is a matter of judicial discretion and judgment, considering the text, history, precedents, and ability of courts to apply judicially manageable standards
  - In particular, judges on both sides of the border struggle to distinguish the protection of rights from the discredited “Lochner era,” which history suggests involved judges striking down progressive legislation because of their personal right-wing political views

● The Australian framers incorporated several rights into the Constitution, but explicitly rejected open-ended constitutional entrenchment or individual rights. The High Court of Australia has ‘uncovered’ an implied right — or more properly, freedom — but only for political communications. The Court has made it clear, however, that this serves only as a limitation on legislative power, and does not constitute a personal right. Some limited protection against deprivation of rights has also been found to arise from the Constitution’s separation of powers. This includes an implied prohibition on bills of attainder, and a prohibition on punitive detention other than by the order of a court.
I. The Problem of Un-enumerated Fundamental Rights

A. Protection of Individual Rights through explicit constitutional provisions

The U.S. Bill of Rights specifies a variety of fundamental rights that American courts will closely protect against undue government intrusion. Although initially designed only to restrain the federal government, the U.S. Supreme Court has held that the Fourteenth Amendment now protects against state interference with these rights as well. The rights specifically protected by the Bill of Rights* include:

- freedom from a state-established religion and to exercise religious beliefs
- freedom of speech, assembly, and right to petition the government
- freedom of the press
- freedom from unreasonable searches and seizures
- when accused of a crime, right not to be subject to double jeopardy, self-incrimination, deprivation of life or liberty without due process, or cruel and unusual punishment or excessive fines as well as right to speedy trial, to be confronted by accusers, to use compulsory process for defense witnesses, trial by jury for serious crimes, and to have counsel
- freedom from slavery**

The Canadian Charter*** also enumerates a host of rights that courts will carefully protect, including:

- freedom of conscience and religion
- freedom of expression, including freedom of the press and peaceful assembly
- freedom of association
- right to vote
- right of citizens to enter, remain in, or leave Canada and to move to and work in any province
- freedom from unreasonable searches and seizures
- when accused of crime, the freedom from arbitrary detention, denial of bail without just cause, being again for crimes for which one is finally acquitted or convicted, ex post facto laws, cruel and unusual punishment, and forced self-incrimination and the right to be informed of reasons for arrest

* This list could also include several enumerated individual rights provisions from the original Constitution, including freedom from
  - suspension of the writ of habeas corpus absent special circumstances
  - deprivations from bills of attainder or ex post facto laws
  - impairment of contracts

** Deliberately omitted from this list are a variety of equality provisions, discussed in Chapters Three and Four.

*** This list could also include several enumerated individual rights provisions from the British North America Act, including various educational rights possessed by groups prior to confederation, commercial rights to inter-provincial trade, the right to have matters traditionally decided by courts of general jurisdiction determined by federally-appointed judges with life tenure, and the right to use English or French in federal and Quebec courts.
or formal charges, counsel, habeas corpus, trial within a reasonable time, a presumption of innocence, a fair and public hearing before an independent tribunal (and a jury for serious crimes), and an interpreter if necessary.

The Australian Constitution also specifies a number of individual rights (some, as noted below, protect citizens only against infringement by the Commonwealth government):

- right to trial by jury for Commonwealth (federal) indictable offences
- right to “just terms” for property compulsorily acquired by the Commonwealth
- freedom of movement within Australia
- freedom of religious worship
- freedom from compulsory religious worship
- freedom from state laws that discriminate on the ground of residence in another state

A quick review demonstrates the similarity of many of these rights, and the minor differences that exist are beyond this scope of these materials.

B. Due Process and Principles of Fundamental Justice

*Should courts have the power to prevent governments from infringing rights not expressly guaranteed in the constitutional text?*

In part, your answer is likely to be based on your own ideology, as well as your assessment of the current political context in which your country’s legislators and judges operate. Consider the controversial issue of abortion. A pro-choice resident of Alabama might strongly favor a judicial decision recognizing a woman’s right to choose when and if to terminate a pregnancy, which would likely be severely restricted by state legislators; one who believes that abortions terminate innocent human life would strongly disagree. Citizens in a country where voters are overwhelmingly pro-choice might be more neutral about the issue. At earlier points of Irish history, the views would be reversed, with a greater likelihood that the Dail might ease abortion restrictions that might be struck down by judicial interpretation of the Irish Constitution to protect the unborn. In addition to these normative values, understanding the chronology of rights-adoptions in the United States, Australia, and Canada is critical to comparing each country’s approach to this issue.

In the United States, these issues arise because, in addition to the rights specifically enumerated in the Constitution, the Fifth Amendment ratified in 1790, and the Fourteenth Amendment, ratified in 1868, contain broadly worded provisions prohibiting the federal and state governments from denying to citizens “life, liberty, or property without due process of law.” The U.S. Supreme Court has interpreted these provisions to protect additional fundamental rights not enumerated in the constitution. As we will see, during the so-called Lochner era beginning in the late 19th century, American judges used these

**** Deliberately omitted from this list are equality rights discussed in Chapters Three and Four, linguistic rights discussed in Chapter Four, and aboriginal rights, discussed in Chapter Seven.
provisions to strike down a wide variety of social and economic reforms enacted by Congress and state legislatures.

When the Australian framers met during the 1890s to draft their nation’s Constitution, they gave careful consideration to the American approach, and explicitly rejected it. They believed that the common law would prove adequate to protect “due process” rights and procedural fairness, and they objected to including a constitutional prohibition on the government’s doing things it was not empowered to do in the first place. The majority also wanted the states to remain free to pass discriminatory laws, in particular with respect, in particular, to the employment of racial minorities. As this Chapter’s materials suggest, the New Deal “revolution” at the U.S. Supreme Court meant that, after World War II, the Fifth and Fourteenth Amendments were construed more narrowly. Courts developed a “two-tier” doctrine, protecting certain rights deemed fundamental while deferring to legislative choices with regard to progressive social welfare legislation.

This evolution in American constitutional jurisprudence was featuring prominently in the minds of drafters of the Canadian Charter. Section 7 prohibits any governmental body from depriving anyone of “life, liberty, or security of the person” except “in accordance with the principles of fundamental justice.” The framers explicitly rejected efforts to protect property rights (a topic fully explored in Chapter 6) as well as the precise “due process” language from the U.S. Constitution.

American constitutional law has sub-divided the due process limitations on government. The doctrine of “procedural due process” requires that the government use fair procedures in any matter resulting in a deprivation of protected interests. The doctrine of “substantive due process” protects certain fundamental rights from abridgement by the state, regardless of what procedures the state uses to abridge the rights in question. Substantive due process is not controversial when it is used to prohibit states from infringing fundamental rights enumerated in the Constitution – freedom of speech for example. The issue becomes more complex when due process is used to protect non-enumerated rights, such as abortion, marriage and personal relationships, or parenting, for example.

Canadian constitutional law is somewhat less transparent. The Supreme Court of Canada has rejected the American dichotomy of substantive and procedural due process. However, it is clear that s. 7 contains a substantive component. For example, in the B.C. Motor Vehicle Reference, discussed below, the Court held that the imposition of a penal sanction for driving without a license, without some form of mens rea, was a deprivation of liberty not in accord with principles of fundamental justice, even though all procedures for the accused were properly followed. (The principles of procedural due process under American constitutional law closely resemble the principles of “natural justice” under Canadian common law. Because of their similarities, we do not pursue them in detail in these materials).

Australian law does not use the langue of “substantive due process”, although procedural due process is important. Most rights relating to arrest, trial and detention (such as habeus corpus; the right to silence; the right to legal counsel as an element of a fair trial, among others) are common law rights. The Constitution (section 75 (v) ) preserves the High Court’s power to issue writs (of mandamus, injunction and prohibition) against an officer of the Commonwealth from legislative interference. This has proven critical in keeping open avenues of appeal against individual executive decisions, in particular
concerning refugee or immigrant status. The requirement of procedural fairness (or natural justice) in executive or administrative decision —making is a cornerstone of administrative law (originally part of the common law, now substantially incorporated into legislation). It is not constitutionally protected, however, and is susceptible to legislative override.

C. Close judicial scrutiny of interference with fundamental rights

An understanding of the cases discussed in this chapter requires a preliminary grasp of the type of review that the Courts make of legislative classifications. Section 1 of the Charter provides that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Although the U.S. Constitution has no textual equivalent to section 1, in neither country are rights pure and absolute. The key question is always this — whether the government’s justification is sufficient. We return to this issue in Chapter 4 in connection with equality jurisprudence.

The landmark case establishing the methodology for close judicial scrutiny in Canada is R v. Oakes, [1986] 1 S.C.R. 103, hailed by Professor Hogg as a “brilliant” opinion written for a unanimous court by Chief Justice Brian Dickson. The case involved a challenge to a “reverse onus” provision of the Narcotic Control Act requiring those found in possession of illegal drugs to prove that they were not intending to distribute the drugs to others to avoid conviction for narcotics trafficking. The court first determined that the provision contravened Oakes’ rights under s.11(d) of the Charter, guaranteeing a presumption of innocence. Of significance to our analysis, the Court then proceeded to consider whether the statute was a “reasonable limit” on the Charter right to presumed innocence. The Court held that the burden is on the government to justify such limits. First, the government must show that the objective of the provision is a pressing and substantial public need. “The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.” Id. at 138. These principles include, but are not limited to:

respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. Id. at 136.

******** Published reports have identified UBC Law Professor Joel Bakan as the clerk who actually drafted the landmark test for Chief Justice Dickson. See, e.g., Beverly Baines, Book Review, The Charter Revolution and the Court Party by F. L. Morton and Rainer Knopff, 26 Queens L. J. 589, 601 (2003).

******** Similarly, the U.S. Supreme Court has held that the Due Process clauses prohibit the government from shifting the burden of proof for any element of a crime to the defendant and that the government must prove “every ingredient of an offense beyond a reasonable doubt.” Patterson v. New York, 432 U.S. 197 (1977). See generally Wayne R. LaFave, Criminal Law (4th ed.2003) §3.4.
Second, that the means chosen to achieve the pressing public need must be proportional to the legislative ends. Although the precise contours of this test “will vary depending on the circumstances,” the Court referred to three considerations to determine proportionality: (a) the means chosen to achieve an important objective should be rational, fair and not arbitrary; (b) the means chosen should impair as little as possible the right or freedom under consideration, and (c) the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved. Id. at 139. The Court concluded that, while the objective of protecting society from the ills of drug trafficking was sufficiently important, it was irrational to infer that a person had an intent to traffic on the basis of possession of a very small quantity of narcotics. So the restriction was not reasonable. Id. at 142. Although Oakes involved an effort to justify a reasonable limit on an enumerated right, Morgentaler II, infra, applies practically the same inquiry in determining that an infringement of security of the person under s.7 is not consistent with principles of fundamental justice.

The U.S. Supreme Court uses a somewhat different approach to close judicial scrutiny. Since the path-breaking decision in United States v. Caroleene Products Co., 304 U.S. 144 (1938), the U.S. Supreme Court has suggested a different level of judicial scrutiny for due process challenges, depending on the individual rights impinged upon. Where rights are fundamental, the statute is strictly scrutinized: the government must show a “compelling” interest and must select the “least restrictive alternative” to achieve its goals. Where rights are not fundamental, the statute is deferentially reviewed -- if “any rational basis” can be conceived to support the bill, the legislation will be upheld. To summarize, under that rational basis test:

• any legitimate interest can support the legislation, whether or not a judge thinks it is important or compelling
• justifications cannot be generally challenged as pretext
• overbroad and underinclusive legislation is permissible, and the legislature is permitted to solve part of a problem with solving all of it
• the legislature is entitled to its own view of factual dispute, even if evidence in court might lead a judge to believe that the legislature was wrong

Thus, the constitutionality of many statutes will turn on how they are characterized by reviewing courts. In Canada, if the party challenging the statute can demonstrate that her liberty or security of the person have been infringed, the rigorous Oakes standard applies; if the party cannot, the law will be sustained. In the U.S., the definition of “liberty” is somewhat broader, but the analysis is similar. If the party challenging the statute demonstrates an infringement of a “fundamental right,” then close scrutiny applies; if not, a much more deferential standard applies and the law will usually (albeit not always) be sustained. For both courts, the critical question then is what non-enumerated rights are worthy of non-deferential protection.

******** In contrast, by way of example, see R. v. Whyte, [1988] 2 S.C.R. 3 (reasonable limit on presumption to require accused, charged with having “care and control” of an automobile when sitting in the driver’s seat while intoxicated, to show that he did not intend to operate the car).

******** The case and its equal protection analysis is excerpted in Chapter Four.
D. Interpreting “liberty” in the shadow of *Lochner*

**LOCHNER v. NEW YORK**

**SUPREME COURT OF THE UNITED STATES**

198 U.S. 45; 25 S. Ct. 539; 49 L. Ed. 937 (1905)

[Before Fuller, C.J., and Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes, Day, JJ.]

MR. JUSTICE PECKHAM delivered the opinion of the Court:

[Defendant was convicted of a misdemeanor violation of a New York statute], in that he wrongfully and unlawfully required and permitted an employe working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employe. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. *** It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employe may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employe to earn it.

The statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful
act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail -- the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

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It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext -- become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

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The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

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We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in
any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? *** No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. ***

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. ***

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes. Under such circumstances the freedom of master and employe to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting.

[Justice Harlan’s dissent accepted the existence of a constitutionally guaranteed liberty of contract, but argued that “the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.” Under that more deferential standard, the dissenting justices were of the view that, regardless of the economic philosophy of unfair bargaining that may have been held by the Legislature] the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that
there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation.

[The dissent went on to cite research about health problems among overworked bakers. It found evidence to support the conclusion that labor in excess of 10 hours per day was a danger to health.]

If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution [*73] of the United States. ***

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The judgment in my opinion should be affirmed.

MR. JUSTICE HOLMES dissenting.

I regret sincerely that I am unable to agree with the judgment [*75] in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.******** [Justice Holmes cited cases upholding state vaccination laws, state and federal antitrust laws, securities regulation, and miners' labor.] Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. [*76] It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word

*********[Ed. note: This 1850 text by an English philosopher was a powerful argument for economic libertarianism, and was one of the key works that influenced a philosophy of “social Darwinism” that preached that society would improve by the survival of the economically prosperous.]
liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. ***

FERGUSON v. SKRUPA

SUPREME COURT OF THE UNITED STATES

372 U.S. 726; 83 S. Ct. 1028; 10 L. Ed. 2d 93 (1963)

[Before Warren, C.J., and Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg, JJ.]

MR. JUSTICE BLACK delivered the opinion of the Court.

[A three-judge District Court enjoined enforcement of a Kansas statute making it a misdemeanor for any person to engage "in the business of debt adjusting" except as [*727] an incident to "the lawful practice of law in this state." The statute defines "debt adjusting" as "the making of a contract, express, or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with a plan agreed upon."] The three-judge court heard evidence by Skupa tending to show the usefulness and desirability of his business and evidence by the state officials tending to show that "debt adjusting" lends itself to grave abuses against distressed debtors, particularly in the lower income brackets.]

[The district court] relied heavily on Adams v. Tanner, 244 U.S. 590 (1917), which held that the Due Process Clause forbids a State to prohibit a business which is "useful" and not "inherently immoral or dangerous to public welfare."

*** the philosophy of Adams v. Tanner, and cases like it, [is] that it is the province of courts to draw on their own views as to the morality, [*729] legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, Coppage v. Kansas, 236 U.S. 1 (1915), setting minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924). This intrusion by the
judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. ***

The doctrine that prevailed in **Lochner, Coppage, Adkins, Burns**, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. ***

*** Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, [*732] or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.

Reversed.

MR. JUSTICE HARLAN concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective. See **Williamson v. Lee Optical Co.**, 348 U.S. 483, 491.

Professor Hogg expounds upon **Lochner's** effect in Canada:

All this happened in the United States, but the **Lochner** era casts its shadow over Canada as well. The framers of Canada's Charter of Rights deliberately omitted any reference to property in s. 7, and they also omitted any guarantee of the obligation of contracts. These departures from the American model, as well as the replacement of "due process" with "fundamental justice", *** were intended to banish **Lochner** from Canada. The product is a s. 7 in which liberty must be interpreted as not including property, as not including freedom of contract, and, in short, as not including economic liberty. §44.7(b).

**E. Social and Economic Rights**

[Note: we do not dwell upon this critically important aspect of constitutional theory in these materials, because, in this regard, the approach taken on each side of the border is quite similar. Those

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* [Ed. note: This issue is addressed in Chapter Six, below.]
interested in a comparative inquiry into this area of constitutional law will find the recent South African approach illuminating.]

U.S. President Franklin Delano Roosevelt once famously remarked that “necessitous men are not free men.” He attempted to convert this thought to action, devoting his State of the Union speech in 1944 to a call for a “Second Bill of Rights” that guaranteed every American the right to a job, sufficient income to provide for food and clothing, a decent home, adequate medical care, protection in old age and unemployment, and education. Congress never formally acted upon Roosevelt’s call, which was never expressly intended by Roosevelt to become judicially-enforceable legal rights. These concepts were, however, incorporated in the U.N.’s Universal Declaration of Human Rights (in no small measure due to the advocacy of former First Lady Eleanor Roosevelt).

During the 1960s, there was serious consideration that the U.S. Supreme Court would extend some form of judicial protection to important social and economic rights. The high water-mark was Goldberg v. Kelly, 397 U.S. 254 (1970), a decision holding that the state could not withdraw welfare benefits without providing the recipient with a hearing. Although the decision involved procedural due process, the decision necessarily required the Court to conclude that welfare benefits constituted “life, liberty, or property” that the Due Process Clause protects. However, shortly thereafter, the Court backed away, making it clear that the highly deferential test for socio-economic regulation articulated in Ferguson v. Skrupa, supra, would apply as well to challenges to government action involving basic economic and social needs. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting a claim that a welfare benefit scheme was not appropriately tailored to meet the government’s legitimate objectives); Lindsey v. Normet, 405 U.S. 56 (1972)(rejecting active judicial protection of rights to housing); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (same for education). As the Court explained in Lindsay, 405 U.S. at 74, the “Constitution does not provide judicial remedies for every social and economic ill.”

When drafting the Charter in 1982, the Canadian framers did not follow the course that would be adopted subsequently by countries such as South Africa, which does include enforceable economic rights in their Constitution. The Supreme Court of Canada has reaffirmed its aversion to read economic rights into s. 7 in the context of basic economic needs. See, e.g., Gosselin v Quebec (Attorney General), [2002] 4 S.C.R. 429 (rejecting close scrutiny for conditioning welfare benefits on education or training). Cf. Chaoulli v. Quebec (Attorney General) [2005] S.C.J. No. 33, June 9, 2005 (divided court did not reach judgment on whether health care law barring private insurance that required citizens to endure significant waiting times, resulting in pain and reduced quality of life, violated s. 7, finding plan illegal under Quebec Charter of Human Rights and Freedoms protection for “life and personal inviolability.”)

F. Focus of this Chapter’s materials

Parts II and III present leading cases establishing the approach to active judicial scrutiny of unenumerated rights in the U.S. and Canada. Part IV presents cases establishing the more limited approach used in Australia. In reviewing these materials, focus on the following questions:

- Which rights are worthy of active judicial protection? How do the courts identify these rights?
Are there principled/meaningful ways to explain the active protection of these rights while economic rights are not deemed worthy of active judicial protection?

What legitimate justifications can be invoked by the government to permit reasonable restrictions on protected rights?

II. Close scrutiny of deprivations of liberty under the Fourteenth Amendment

Although, post-Lochner, the United States Supreme Court has cautioned against the use of active judicial scrutiny in most cases, a variety of non-enumerated rights are protected by active judicial scrutiny. The Court has found that the right to procreate, vote, travel, divorce, determine whether to continue a pregnancy, live with grandchildren, and engage in intimate private personal relations with another person of the same sex all require heightened governmental justifications. Professors Rotunda and Nowak, at § 11.7, conclude that

there was no real break in the use of a subjective test for finding individual rights and liberties following the 1937 renouncement of substantive due process as a control over economic and social welfare legislation. [Because the justices] were deprived of the natural law-substantive due process language to describe the process by which they identified and enforced these fundamental rights ... the justices have attempted to give different justifications for actions that were simply a form of substantive due process.

The rights warranting close judicial scrutiny all relate to a general concept of a right to individual privacy. The landmark post-Carolene Products case recognizing such a right was Griswold v. Connecticut, 381 U.S. 479 (1965). The appellants were officials of the Planned Parenthood League of Connecticut and were convicted of providing information, instruction, and medical advice to married persons regarding contraceptives. They were convicted of a misdemeanor violation of a Connecticut law prohibiting the distribution or use of any “drug, medicinal article or instrument for the purpose of preventing conception.” The Court held that the statute was unconstitutional.

The majority opinion disavowed any return to Lochner v. New York. “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”

Acknowledging the lack of an express right to privacy or marital relations in the Constitution, the Court noted earlier precedents establishing the right to educate a child in a school of the parents’ choice, whether public or private or parochial, Pierce v. Society of Sisters, 268 U.S. 510 (1925), and the right to study any particular subject or any foreign language (Meyer v. Nebraska, 262 U.S. 390 (1923)). These cases, the Court held, indicate that:

specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522
(dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

***

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

In a concurring opinion, Justice Goldberg (joined by Warren, C.J., and Brennan, J.), added the view "that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." He concluded that the right to liberty protected by the Fifth and Fourteenth Amendments required close scrutiny of government action impinging on the unenumerated "right to marital privacy" is also supported by the Ninth Amendment.

Goldberg noted that the Amendment, the work of chief constitutional drafter James Madison as a leading member of the first House of Representatives, was intended to respond to fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which
specifically states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (Emphasis added.)

Again heeding the concerns about the Lochner experience, Goldberg made clear his view that "judges are not left at large to decide cases in light of their personal and private notions."

Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." Powell v. Alabama, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe v. Ullman, 367 U.S. 497, 517 (dissenting opinion of MR. JUSTICE DOUGLAS).

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." Id., at 521.

***

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

Justices Black (joined by Justice Stewart) dissented. Although noting his personal opposition to the challenged law, he wrote: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."] Black, J., noted that the two cases relied upon by those voting to strike down the law involving family privacy, Pierce and Meyer, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in Lochner v. New York.

The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e. g., Lochner v. New York, 198 U.S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than
those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in [post-New Deal] cases ***.

***

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

"It has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the [*525] general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." Calder v. Bull, 3 Dall. 386, 399 (emphasis in original).

Justice Stewart, joined by Justice Black, separately dissented in rejecting Justice Goldberg’s reliance on the Ninth Amendment. In his view, that provision was designed simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.”

In the years following Griswold, the U.S. Supreme Court has recognized a variety of fundamental liberties relating to personal and family life. Detailed in Rotunda & Nowak, §§18.26-18.30, these decisions require careful judicial scrutiny over state law involving:

- sterilization
- contraception (regardless of marital status)
- freedom of choice in marriage, including the ability of the poor to marry or to obtain a divorce
- procedural and substantive ability of parents to defend against termination of parental rights
- control by custodial parents over visitation by others
- [perhaps] the decision of a competent person to refuse life sustaining medical treatment*****

***** But not an affirmative right to receive assistance in suicide.
ROE v. WADE

SUPREME COURT OF THE UNITED STATES
410 U.S. 113; 93 S. Ct. 705; 35 L. Ed.2d 147 (1973)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

***

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

***

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras; or among those rights reserved to the people by the Ninth Amendment. Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VII

[First, the Court summarily dismissed the argument, not made by counsel in these cases, that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Second was the concern that when most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. The Court, however, observed that improvements in medicine are such that medical data indicate that abortion is now safe and, in some cases, safer than carrying a child to term.]

The third reason is the State's interest -- some phrase it in terms of duty -- in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

It is with these interests, and the weight to be attached to them, that this case is concerned.
The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as \textit{Union Pacific R. Co. v. Botsford}, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, \textit{Loving v. Virginia}, 388 U.S. 1, 12 (1967); procreation, \textit{Skinner v. Oklahoma}, 316 U.S. 535, 541-542 (1942); contraception, \textit{Eisenstadt v. Baird}, 405 U.S., at 453-454; id., at 460, 463-465 (WHITE, J., concurring in result); family relationships, \textit{Prince v. Massachusetts}, 321 U.S. 158, 166 (1944); and child rearing and education, \textit{Pierce v. Society of Sisters}, 268 U.S. 510, 535 (1925), \textit{Meyer v. Nebraska}, supra. This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some \textit{amici} argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some \textit{amici} that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. \textit{Jacobson v. Massachusetts}, 197 U.S. 11 (1905) (vaccination); \textit{Buck v. Bell}, 274 U.S. 200 (1927) (sterilization).

***
Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

** IX **

[The Court held that it need not resolve "the difficult question of when life begins," but noted that legal protections afforded to "persons" generally does not apply to fetuses. "In short," the Court concluded, "the unborn have never been recognized in the law as persons in the whole sense."]

** X **

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. [The majority concluded that the state's interest in reasonable regulations regarding abortion designed to protect a woman's health becomes sufficiently "compelling" at the end of the first trimester, because at that point abortions become more medically risky than childbirth. With respect to the state's "important and legitimate" interest in "potential life," the "compelling" point is when the fetus is viable. With regard to first-trimester abortions, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."]

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[The concurring opinions of MR. CHIEF JUSTICE BURGER and MR. JUSTICE DOUGLAS are omitted.]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in Ferguson v. Skrupa, 372 U.S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Id., at 730.

 Barely two years later, in Griswold v. Connecticut, 381 U.S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in Skrupa, the Court's opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is

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2 There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350-351 (footnotes omitted).
equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, Griswold stands as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process, and I now accept it as such.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.

* * *

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. ***

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

* * *

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

* * *

II

[First, the dissent rejected the conclusion that any right of "privacy" was involved in the case. The statute barred a medical procedure by a state-licensed physician.] A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. Katz v. United States, 389 U.S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). ***
While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 20, §§ 14, 16. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time."

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

* * *

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting:

[This opinion was a combined dissent to the Court's judgment in *Roe* and a companion case, *Doe v. Bolton*.]

*****

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has
authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court’s judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court’s exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA v. CASEY

SUPREME COURT OF THE UNITED STATES

505 U.S. 833; 112 S. Ct. 2791; 120 L.Ed. 2d 674 (1992)

JUSTICE O’CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, an opinion with respect to Part V-E, in which JUSTICE STEVENS joins, and an opinion with respect to Parts IV, V-B, and V-D.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again asks us to overrule Roe. See Brief for Respondents 104-117; Brief for United States as Amicus Curiae 8.

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. * * * The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent’s consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is [interpreted to] include any significant threat to the woman’s health. In addition to the above
provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services.

*****

... we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures. After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that Roe’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

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The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e. g., Duncan v. Louisiana, 391 U.S. 145, 147-148, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view. It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized:

"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from
unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. "Poe v. Ullman, supra, at 543 (opinion dissenting from dismissal on jurisdictional grounds) [this was a challenge to a ban on contraceptive use later struck down in Griswold v. Connecticut].

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Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. * * * These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

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III

[The opinion then discusses at length the reasons for adhering to Roe for reasons of stare decisis, concluding]:

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the
cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

IV

[While adhering to Roe's recognition “of a woman's right to terminate her pregnancy before viability,” the plurality emphasized that Roe had also recognized the State’s "important and legitimate interest in protecting the potentiality of human life." This interest, the plurality concluded, had been given too little weight in post-Roe decisions enforcing a rigid “trimester” framework permitting state regulation in the final trimester, forbidding almost all regulation in the first trimester, and permitting regulations to protect a woman’s health in the second trimester. The plurality rejected this framework, adopting instead an “undue burden” standard, which they declared to be “a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” The following “guiding principles” were set forth: (a) an “undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability”; (b) throughout pregnancy the State may legislate to ensure women make informed choices and may seek to persuade women to choose childbirth over abortion; (c) health regulations are measured by whether they have the purpose or effect of presenting a substantial obstacle to abortion; (d) the ultimate choice must remain the woman’s; (e) the state may regulate or proscribe abortion after the fetus is viable except for the preservation of the life and health of the mother.]

[Applying the undue burden standard to the facts of the case, the plurality upheld, as not unduly burdensome, the statute’s requirements of a 24-hour waiting period, that a physician (and not another health care professional) inform the woman of the nature of the procedure, the health risks involved, and the probable gestational age of the “unborn child,” that the woman be informed of various social welfare and adoption services and child support requirements, and that the woman certifies in writing that she has been so informed. Although they found “troubling in some respects” the district court’s findings that the practical effect of the statute will be to require many women to make at least two visits to the doctor, and that multiple visits will increase the exposure of women seeking abortions to “the harassment and hostility of anti-abortion protestors demonstrating outside a clinic,” the plurality ultimately concluded that it would reserve for later specific cases specific challenges to the statute as applied to individual women. The plurality also rejected as “insufficient” the District Court’s reasoning that the waiting period was “particularly burdensome” for poor women, those who must travel long distances, and those who have difficulty explaining their whereabouts to husband, employers, or others.]

[At the same time, the plurality voted to invalidate provisions barring abortions for married women without a statement that her husband was notified (subject to exceptions for assault, where the husband is not the man who impregnated her, or where the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her). Noting that “there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands” and these women “may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion,” including fear of abuse to the family’s children or psychological abuse to themselves as well as other harms beyond bodily injury, the plurality concluded]
that the “spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.”]

D

[The plurality adhered to prior cases upholding requirements that a minor obtain parental consent, as long as there exists a procedure allowing the minor to obtain on an individualized basis judicial dispensation from the requirement.]

JUSTICE STEVENS, concurring in part and dissenting in part:

[The opinion began by endorsing the plurality's *stare decisis* analysis, noting that of the 15 justices who have sat in review of the issues since *Roe v. Wade*, “11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and JUSTICES BLACKMUN, O'CONNOR, KENNEDY, SOUTER, and myself. Only four -- all of whom happen to be on the Court today -- have reached the opposite conclusion.” Next, Stevens sought to analyze the nature of the State’s legitimate interests, and when these should be found to outweigh the pregnant woman’s interest in personal liberty. Stevens observed that the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest. He identified two such interests: the minimization of the offense that many Americans take at what they believe to be an unacceptable disrespect for potential human life, and a broader interest in expanding the population, that “the potential human lives might include the occasional Mozart or Curie.” In counterpoise is the woman's constitutional interest in liberty, which includes a right to bodily integrity and her freedom to decide matters of the highest privacy and the most personal nature, because the “authority to make such traumatic and yet empowering decisions is an element of basic human dignity.” Applying these tests, Justice Stevens concluded that provisions mandating information about health were constitutional, but those designed to persuade a woman not to have an abortion improperly infringed on a woman’s decisional autonomy, rejecting the argument that anything that discourages abortions is legitimate, and finding no evidence that the mandated 24-hour waiting period benefits women or is necessary to convey relevant information to the patient.

JUSTICE BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

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Three years ago, in *Webster v. Reproductive Health Services*, 492 U.S. 490, (1989), four Members of this Court appeared poised to "cast into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. *Id., at 557* (BLACKMUN, J., dissenting). All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. But now, just when so many expected the darkness to fall, the flame has grown bright.

I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before
Webster. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

I

Make no mistake, the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle. *** the authors of the joint opinion today join JUSTICE STEVENS and me in concluding that "the essential holding of Roe v. Wade should be retained and once again reaffirmed." In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages."

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II

[Justice Blackmun observed that restrictions on abortion “force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts,” such as surgical removal of bullet from murder suspect or pumping the stomach of a drug suspect. He also addressed an argument, considered in Chapter Four, that abortion restrictions “also implicate constitutional guarantees of gender equality.”]

[Applying the strict scrutiny standard he believed to be more appropriate, Justice Blackmun concluded that requirements that information be provided by a doctor were “not narrowly tailored to serve the Commonwealth's interest in protecting maternal health,” nor was the 24-hour waiting period tailored to legitimate state ends.]

III

***

Even more shocking than THE CHIEF JUSTICE's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental -- for THE CHIEF JUSTICE, only women's psychological health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision. Post, 505 U.S. at 967-968. In short, THE CHIEF JUSTICE's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

* * *

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

IV

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short -- the distance is but a single vote.
I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), but beats a wholesale retreat from the substance of that case. We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases. We would * * * and uphold the challenged provisions of the Pennsylvania statute in their entirety.

I

***

In Roe v. Wade, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 152-153. We are now of the view that, in terming this right fundamental, the Court in Roe read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." Harris v. McRae, 448 U.S. 297, 325, (1980). The abortion decision must therefore "be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." Thornburgh v. American College of Obstetricians and Gynecologists, supra, at 792 (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See Michael H. v. Gerald D., supra, at 124, n.4 (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." [The dissent noted that the common law inherited from England made abortion an offense after "quickening," at the the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace, and although many states had liberalized abortion restrictions in recent years, 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when Roe was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother.] On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.
II

[The opinion then discusses why *stare decisis* does not require reaffirmation of *Roe*, concluding]:

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither stare decisis nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955). With this rule in mind, we examine each of the challenged provisions.

III

[The dissent explained why the informed consent, 24-hour waiting period, and parental consent requirements met the rational basis test. For example, the dissent acknowledged that some women required to notify spouses might be victims of domestic abuse, but observed that there was no evidence that this constituted a "large fraction" of pregnant women, and suggested that other women uncomfortable with discussing this with their spouses find it beneficial. This is sufficient under the more relaxed rational basis test.]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

* * *

The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." The Court is correct in adding the qualification that this "assumes a state of affairs in which the choice does not intrude upon a protected liberty," *ibid.* -- but the crucial part of that qualification is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example -- with which entire societies of reasonable people disagree -- intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my
views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected -- because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

***

The emptiness of the "reasoned judgment" that produced Roe is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. *** Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deeply personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. ** *

[The dissent criticized the new "substantial burden" test, noting that] any regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not unduly hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

The Court’s most recent abortion decision may well reflect the replacement of Justice Sandra Day O’Connor by Justice Samuel Alito. In Stenberg v. Carhart, 530 U.S. 914 (2000), a 5-4 majority struck down a Nebraska statute outlawing certain types of “partial birth” abortion procedures as imposing an “undue burden” on a woman’s reproductive rights, principally on the ground that the statute lacked an exception for the use of such procedures when necessary to preserve the health of the mother. The Court accepted the district court’s factual findings rejecting the state’s claim that safe alternatives existed. The Court also faulted the statute for being too overbroad in potentially including in its prohibition aspects of more typical and widespread abortion procedures. In Gonzales v. Carhart, 127 S.Ct. 1610 (2007), a 5-4 majority upheld a more carefully drafted federal statute.+

The majority began by observing that 3 of its members strongly dissented from Casey, but that “[w]hatever one’s views concerning the Casey joint opinion, it is evident a premise central to its conclusion -- that the government has a legitimate and substantial interest in preserving and promoting fetal life -- would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.”

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* The prior majority, sans Justice O’Connor, all dissented, while the prior dissenters, with Chief Justice Rehnquist replaced by Chief Justice Roberts and Justice O’Connor replaced by Justice Alito, formed the majority.
similarity to the killing of a newborn infant “and that the government may use its voice and its regulatory authority to show its profound respect for the life within the woman,” and that it was “self-evident” that mothers who regret their choice to abort will suffer more to learn about the details of the proscribed abortion procedures. The Court concluded that a statute is not “invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures considered to be safe alternatives.

The dissent was authored by Justice Ginsburg. She viewed Roe v. Wade as focusing “in considerable measure” on vindicating the right of a physician to administer medical treatment in accordance with his professional judgment, id. at 1641 n.2, while Casey “described more precisely” the “centrality of the decision whether to bear a child to a woman’s dignity and autonomy, her personhood and destiny, and her conception of her place in society.” Id. (quotations and citations omitted):

As Casey comprehended, at stake in cases challenging abortion restrictions is a woman’s "control over her [own] destiny." 505 U.S., at 869. "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Id., at 896-897. Those views, this Court made clear in Casey, "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S., at 897. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Id., at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Ibid. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, e.g., Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1002-1028 (1984).

She criticized the majority’s emphasis on “moral concerns” that “could yield prohibitions on any abortion.” She added:

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "severe depression and loss of esteem." Because of women’s fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the [prohibited] procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.

This way of thinking reflects ancient notions about women's place in the family and under the Constitution -- ideas that have long since been discredited.

Taking note of the changed precedent, she concluded, at 1652-53:
Though today's opinion does not go so far as to discard Roe or Casey, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of stare decisis." Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health. Although Congress' findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings. A decision so at odds with our jurisprudence should not have staying power.

**LAWRENCE v. TEXAS**

**SUPREME COURT OF THE UNITED STATES**

539 U.S. 558; 123 S. Ct. 2472; 156 L. Ed. 2d 508 (2003)

[Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.]

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. [The appellant was convicted of a misdemeanor for engaging in anal sex with another man. These offenses are rarely prosecuted; the arrest occurred because police entered their apartment because of a reported weapons disturbance. The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.]
II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court’s holding in Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986) where a 5-4 majority rejected a constitutional change to a similar Georgia statute.

***

The Court began its substantive discussion in Bowers as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." Id., at 190, 92 L Ed 2d 140, 106 S Ct 2841. That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

[The court took issue with Bowers claim that proscriptions against homosexual sexual activities had “ancient roots,” arguing instead that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” Rather, traditionally sodomy was illegal regardless of the sex of those involved. Historically, the court suggested that the vast majority of sodomy prosecutions did not involve relations between consenting adults, which the Court understood to be motivated in part by strict evidentiary rules making it difficult to prove rape.]

[The majority observed that the “most relevance” should be given to “our laws and traditions in the past half century,” which showed “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Kennedy, J., stated that “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” Thus, the majority took note of the decriminalization of consensual sexual relations in the 1955 Model Penal Code, the 1957 British parliamentary committee recommendation of similar action, taken by Parliament in 1967, a 1981 decision of the European Court]
of Human rights, the reduction since Bowers from 25 to 13 of anti-sodomy laws, and the strong pattern of non-enforcement in those remaining states, including Texas.]

[The majority relied upon an equal protection case, Romer v. Evans, 517 U.S. 620 (1996), where the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. Romer concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. Id., at 634.]

[The majority rejected an alternative argument to strike the statute down on equal protection grounds. Kennedy, J., reasoned that criminalizing conduct without regard to sexual orientation would continue as] an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

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[The Court then explained that stare decisis did not require adherence to Bowers because later events, including five state court decisions rejecting the reasoning on state constitutional grounds, and the lack of reliance on the precedent.]

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey, supra, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

JUSTICE O'CONNOR, concurring in the judgment.

[Justice O'Connor, who joined Bowers, declined to vote to overrule, concluding instead that the Texas statute unconstitutionally discriminated against same-sex couples in violation of the Equal Protection Clause. Equality is discussed in Chapter Four.]
JUSTICE SCALIA, with whom the CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

[The dissenters complained that the majority’s decision was incoherent in refusing to finding that engaging in intimate homosexual relations was a fundamental right and then applying “an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.” First, Justice Scalia strongly criticized the majority’s willingness to overrule Bowers in light of the plurality opinion in Casey, joined by Justice Kennedy, that refused to overrule Roe v. Wade. Second, the dissent argued that the restraints on liberty imposed by the sodomy law should be constitutionally analyzed in the same way as laws “prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim.” Rather, the Constitution “expressly allows States to deprive their citizens of "liberty," so long as “due process of law” is provided.”]

[The dissent found that the criminalization of sodomy by many states demonstrated that “that homosexual sodomy is not a right ‘deeply rooted in our Nation's history and tradition.'” Scalia, Jr., rejected the argument that an “emerging awareness” of liberty’s application to private consensual conduct does not establish a fundamental right and was factually false in light of the many states that continue to criminalize prostitution, adultery, obscenity, and adult incest. Moreover, the dissent noted that the Model Penal Code’s rejection of criminalization of sodomy was rejected by most states. He continued:] In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and traditions," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The Bowers majority opinion never relied on "values we share with a wider civilization," ante, at 156 L Ed 2d, at 524, but rather rejected the claimed right to sodomy on the ground that such a right was not "deeply rooted in this Nation's history and tradition." *** The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." Foster v. Florida, 537 U.S. 990, 537 U.S. 990, 154 L. Ed. 2d 359, 123 S. Ct. 470470 (2002) (Thomas, Jr., concurring in denial of certiorari).

IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence--indeed, with the jurisprudence of any society we know--that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," Bowers, supra, at 196, 92 L Ed 2d 140, 106 S Ct 2841 --the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. Bowers held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, “furthers no legitimate state interest which can justify its
intrusion into the personal and private life of the individual," ante, at 156 L Ed 2d, at 526 (emphasis added). The Court embraces instead Justice Stevens' declaration in his Bowers dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," ante, at 156 L Ed 2d, at 525. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.

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Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. ***

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, that in some cases such "discrimination" is mandated by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see Boy Scouts of America v. Dale, 530 U.S. 640, 147 L Ed 2d 554, 120 S Ct 2446 (2000).

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JUSTICE THOMAS, dissenting, [omitted].

Whatever one's views of the result in Lawrence, it seems difficult to quibble with Justice Scalia's claim that the majority was not really applying the highly deferential "rational basis" test of Carolene Products. Indeed, from a comparative perspective, it seems that Justice Kennedy's opinion resembles the "pith and substance" approach to Canadian federalism we studied in Chapter 1. Compare Carolene Products (refusing to consider whether banned "filled milk" was less safe than other dairy products) with Margarine Reference (ban on margarine manufacture cannot be justified on safety grounds so exceeds Parliament's criminal law power). Once the majority makes clear that animus against gay men and lesbians is not a legitimate interest, judges necessarily must determine the "real" purpose of a challenged statute. (A similar approach was used by an earlier court in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (striking down ban on zoning barring housing for disabled)). It is too
soon to tell whether this approach signals a slight but significant shift in deferential scrutiny, or is a *sui generis* transition stage toward active scrutiny of laws targeting same-sex couples.

### III. Close scrutiny of deprivations of liberty and security of the person under section 7

As noted by Professor Hogg (see Part I-D, above), among many others, the text of section 7 was written with a clear design to avoid the wholesale judicial invalidation of statutes infringing on liberty. The text was deliberately changed from that of the Fourteenth Amendment, by omitting property and adding “security of the person” and by changing “due process” to “principles of fundamental justice.” Indeed, the legislative history shows that both the professional and ministerial drafters of section 7, including former Prime Minister Jean Chretien, envisioned s. 7 as limited to ensuring procedural fairness, and providing no means for judicial protection for rights not otherwise enumerated in the Charter. A leading constitutional scholar (and later appellate judge), Walter Tarnopolsky, testified before the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada that:

> there is no doubt that the due process clause has come in academic circles to mean more and more the over-all penumbra of fairness in the administration of justice. However, our courts have not yet adopted that interpretation, and there remains a fear in many circles that any reference to a due process clause, even without reference to property in this clause, could reintroduce the substantive "due process" interpretation in the United States.

The principal drafter of the Charter, Mr. Barry Strayer, Q.C., the Assistant Deputy Minister, Public Law of the Department of Justice (and now a retired Federal Court judge) stated:

> Due process would certainly include the concept of procedural fairness that we think is covered by fundamental justice, but we think that "due process" would have the danger of going well beyond procedural fairness and to deal with substantive fairness which raises the possibility of the courts second guessing Parliaments or legislatures on the policy of the law as opposed to the procedure by which rights are to be dealt with. That has been the experience at times in the United States in the interpretation of the term "due process".

In contrast, Strayer concluded that the phrase “fundamental justice” meant

> the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.

This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept
of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.

Responding to a leading conservative MP, Minister of Justice Jean Chretien stated:

The point, Mr. Crombie, that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; Parliament has the authority to do that, and the court at this moment, because we do not have the due process of law written there, cannot go and see whether we made the right decision or the wrong decision in Parliament. If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind. You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.¹⁰

The Supreme Court of Canada, however, has refused to read s. 7 so restrictively. In the B.C. MOTOR VEHICLE REFERENCE, [1985] 2 S.C.R. 486; 24 D.L.R. (4th) 536, the Court wrote:

the simple fact remains that the Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?

Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, i.e., the intention of the legislative bodies [*509] which adopted the Charter. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the Charter debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the

¹⁰ The foregoing quotations are taken from the decision in R. v. Morgentaler, 22 D.L.R. (4th) 641 (O.C.A. 1985), which was reversed in the Morgentaler II case excerpted below.
Charter, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, *** do not stunt its growth. ***

Accordingly, the Court crafted a broader scope for s. 7. Sections 8 to 14 of the Charter (primarily providing protections for the accused) are "illuminative of the meaning, in criminal or penal law, of 'principles of fundamental justice'; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.” Although “many of the principles of fundamental justice are procedural in nature,” (here, the Court quotes American Justice Felix Frankfurter’s observation in McNabb v. United States, 318 U.S. 332,347 (1942) that "the history of liberty has largely been the history of observance of procedural safeguards"), this

is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots" ("Section 7 of the Charter: Substantive Due Process?" (1984), 18 U.B.C.L. Rev. 201, at p. 254).

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

**MORGENTALER V. THE QUEEN ("Morgentaler II")**


SUPREME COURT OF CANADA

[Before Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.]

DICKSON C.J.C. [Lamer J concurred with Dickson CJC’s opinion]:--

The principal issue raised by this appeal is whether the abortion provisions of the Criminal Code infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the Canadian Charter of Rights and Freedoms. ***

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[The challenged statute provided for life imprisonment for anyone to intentionally cause an abortion, and for two years imprisonment for a woman to intentionally obtain an abortion. However, the proscription did not apply to any doctor or patient if permission for an abortion was first obtained from a hospital committee who determined that a continued pregnancy would endanger the woman’s
life or health. The case, like Morgentaler 1, arose from the decision of the Court of Appeal allowing the Crown’s appeal from a jury verdict of acquittal.]

IV

SECTION 7 OF THE CHARTER

[Initially, Dickson, C.J.C., explained why “it is neither necessary nor wise in this appeal” to ground it in liberty in the manner of Roe v. Wade.] I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of Charter interpretation. The court should be presented with a wide variety of claims and factual situations before articulating the full range of s. 7 rights. I will therefore limit my comments to some interpretive principles already set down by the court and to an analysis of only two aspects of s. 7, the right to "security of the person" and "the principles of fundamental justice".

***

B. Security of the person

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances does the law allow others to make decisions of this nature. Similarly, art. 19 of the Civil Code of Lower Canada provides that "[t]he human person is inviolable" and that "[n]o person may cause harm to the person of another without his consent or without being authorized by law to do so". ***

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The case-law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice. ***

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. ***

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

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C. The principles of fundamental justice

Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component, I have already indicated that it is not necessary in this appeal to evaluate the substantive content of s. 251 of the Criminal Code. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions.

[The opinion focuses on the complex procedures the statute required to secure approval from a "therapeutic abortion committee" of an "accredited or approved hospital". The opinion cited reports the difficulty with these procedures, including the lack of four physicians in almost ¼ of all Canadian hospitals, accrediting requirements precluding over 1/3 of hospitals from performing the procedure, that only 1/5 of hospitals had actually set up the required committee, etc. In addition, the lack of a consistent standard for whether an abortion would harm the woman’s health led to widely differing approaches by hospital committees.]

The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice. In Reference re s. 94(2) of Motor Vehicle Act, Lamer J. held, that "the principles of fundamental justice are to be found in the basic tenets of our legal system". One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

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***... In the present case, the structure -- the system regulating access to therapeutic abortions -- is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would prima facie qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available.

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V

Section 1 analysis

[Chief Justice Dickson proceeded to consider whether the breach of fundamental justice was nonetheless a “reasonable limit” under section 1, by applying the Oakes test set forth in Part I-C of these teaching materials. He read s. 251 as expressing Parliament’s intent that “foetal interests are not to be protected where the "life or health" of the woman is threatened. At the same time, he agreed that protection of foetal interests was a valid objective, and thus balancing these goals was sufficiently important to meet the first prong of the Oakes test.]
I am equally convinced, however, that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of the three elements of the proportionality component of \textit{R. v. Oakes}. [Because “the procedures and administrative structures created by s. 251 are often arbitrary and unfair,” he concluded that] many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

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BEETZ J. [with whose opinion Estey, J., concurred, agreed with Dickson, C.J.C. that the statute was invalid].

I find it convenient to outline at the outset the steps which lead me to this result:

I -- Before the advent of the \textit{Charter}, Parliament recognized, in adopting s. 251(4) of the \textit{Criminal Code}, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when “the continuation of the pregnancy of such female person would or would be likely to endanger her life or health.” In my view, this standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the \textit{Canadian Charter of Rights and Freedoms} at s. 7.

II -- "Security of the person" within the meaning of s. 7 of the \textit{Charter} must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an Act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

III -- According to the evidence, the procedural requirements of s. 251 of the \textit{Criminal Code} significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person.

IV -- The deprivation referred to in the preceding proposition does not accord with the principles of fundamental justice. [Beetz, J., found that legitimate procedures to assure a “reliable, independent and medically sound opinion” as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, the specific procedural requirements of s. 251 of the \textit{Criminal Code} were “manifestly unfair,” because they were “unnecessary in respect of Parliament's objectives” and “result in additional risks to the health of pregnant women.”]
V -- The primary objective of s. 251 of the Criminal Code is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the Charter, justify reasonable limits to be put on a woman's right. However, rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as some of the rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the Charter. Consequently, s. 251 does not constitute a reasonable limit to the security of the person. [However, he concluded that a properly structured and narrowly tailored requirement that a hospital committee determine that a medical standard based on danger to a woman's life or health be met, before an abortion would be non-criminal, would not offend the principles of fundamental justice.]

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V -- Section 1 of the Charter

[Justice Beetz's application of the Oakes test differed from Chief Justice Dickson's in finding that the Parliamentary objective was not a balancing of foetal interests with those of pregnant women but rather protecting the foetus. He found such an interest to be sufficiently pressing and substantial to justify a proportionate limit on Charter rights. However, he found that the variety of limits and delays set forth in the statute were not even rationally related to a goal of foetal protection, and thus the statute could not be justified under s. 1.]

The gist of s. 251(4) is, as I have said, that the objective of protecting the foetus is not of sufficient importance to defeat the interest in protecting pregnant women from pregnancies which represent a danger to life or health. I take this parliamentary enactment in 1969 as an indication that, in a free and democratic society, it would be unreasonable to limit the pregnant woman's right to security of the person by a rule prohibiting abortions in all circumstances when her life or health would or would likely be in danger. This decision of the Canadian Parliament to the effect that the life or health of the pregnant woman takes precedence over the state interest in the foetus is also reflected in legislation in other free and democratic societies.

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MCINTYRE J. (dissenting) [LaForest, J., concurred with McIntyre]:-- ***

Section 251 of the Criminal Code

[The opinion notes that many Canadians find s. 251 to be unacceptable, either as overly restrictive of the right of women to control their own bodies or an inadequate protection for the inherent right to life of the unborn child. It quotes opinion polls showing about 20% of Canadians adopting each view with about 60% of Canadians favouring prohibition in some circumstances.]***

***

Scope of judicial review under the Charter

[Justice McIntyre quoted at length from American dissents by Justice Holmes and more recent majority opinions, such as Ferguson v. Skrupa, supra, of the dangers of the use of due process to strike down legislation.]
Holmes J. wrote in 1927, but his words have retained their force in American jurisprudence. In my view, although written in the American context, the principle stated is equally applicable in Canada.

It is essential that this principle be maintained in a constitutional democracy. The court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the Charter which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the court must clothe the general expression of rights and freedoms contained in the Charter with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law? This question has been the subject of much discussion and comment. Many theories have been postulated but few have had direct reference to the problem in the Canadian context. In my view, this court has offered guidance in this matter. In [several cases], it has enjoined what has been termed a "purposive approach" in applying the Charter and its provisions. I take this to mean that the courts should interpret the Charter in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing. This approach marks out the limits of appropriate Charter adjudication. It confines the content of Charter guaranteed rights and freedoms to the purposes given expression in the Charter. Consequently, while the courts must continue to give a fair, large and liberal construction to the Charter provisions, this approach prevents the court from abandoning its traditional adjudicatory function in order to formulate its own conclusions on questions of public policy, a step which this court has said on numerous occasions it must not take. That Charter interpretation is to be purposive necessarily implies the converse: it is not to be "non-purposive". A court is not entitled to define a right in a manner unrelated to the interest which the right in question was meant to protect.***

***

The right to abortion and s. 7 of the Charter

[Here, McIntyre, J. notes his disagreement with the opinions of Dickson, C.J.C. and Wilson J that s. 7 confers a right to an abortion.]

All laws, it must be noted, have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene. If a law prohibited membership in a lawful association it would be unconstitutional, not because it would interfere with priorities and aspirations, but because of its interference with the guaranteed right of freedom of association under s. 2(d) of the Charter. Compliance with the Income Tax Act, has, no doubt, frequently interfered with priorities and aspirations. The taxing provisions are not, however, on that basis unconstitutional, because the ordinary taxpayer enjoys no right to be tax free. Other illustrations may be found. In my view, it is clear that before it could be concluded that any enactment infringed the concept of security of the person, it would have to infringe some underlying right included in or protected by the concept. For the appellants to succeed here, then, they must show more than an interference with priorities and aspirations; they must show the infringement of a right which is included in the concept of security of the person.

The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the Charter or any other section. *** Furthermore, it would appear that the
history of the constitutional text of the Charter affords no support for the appellants' proposition. [Here, the dissent refers to the legislative history set forth in the materials, above.]

It cannot be said that the history, traditions and underlying philosophies of our society would support the proposition that a right to abortion could be implied in the Charter.

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Procedural fairness

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... I would suggest it is apparent that the court's role is not to second-guess Parliament's policy choice as to how broad or how narrow the defence should be. The determination of when "the disapproval of society is not warranted" is in Parliament's hands. The court's role when the enactment is attacked on the basis that the defence is illusory is to determine whether the defence is available in the circumstances in which it was intended to apply. Parliament has set out the conditions, in s. 251(4), under which a therapeutic abortion may be obtained, free from criminal sanction. It is patent on the face of the legislation that the defence is circumscribed and narrow. It is clear that this was the Parliamentary intent and it was expressed with precision. I am not able to accept the contention that the defence has been held out to be generally available. It is, on the contrary, carefully tailored and limited to special circumstances. Therapeutic abortions may be performed only in certain hospitals and in accordance with certain specified provisions. It could only be classed as illusory or practically so if it could be found that it does not provide lawful access to abortions in circumstances described in the section. No such finding should be made upon the material before this court. The evidence will not support the proposition that significant numbers of those who meet the conditions imposed in s. 251 of the Criminal Code are denied abortions.

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WILSON J.:

With all due respect, I think that the court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The right of access to abortion

***

(a) The right to liberty

The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. [She cited the work of University of Edinburgh Professor Neil MacCormick, Legal Right and Social Democracy: Essays in Legal and Political Philosophy, defining liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life." She also quoted from an earlier dissent she had written]
embracing philosopher John Stuart Mill’s principle that individuals should be able to pursue their own good in their own way as long as they do not deprive others of their own ability to do so.]

[Justice Wilson then embraced American substantive due process jurisprudence.]

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, Lecturer in European Law, University of Glasgow, has pointed out in her essay on "International Law and Human Rights: the Case of Women’s Rights", in Human Rights: From Rhetoric to Reality, the history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women’s rights has been a struggle to eliminate discrimination, to achieve a place for women in a man’s world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-2). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women’s needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman’s struggle to assert her dignity and worth as a human being.

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Both these arrangements violate the woman’s right to liberty by deciding for her something that she has the right to decide for herself.

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[Wilson J next suggested that the deprivation of rights in this case offends s.2(a) of the Charter, because the decision to terminate a pregnancy is essentially a moral decision and freedom of conscience is guaranteed by s. 2(a).]

[Finally, agreeing with Crown counsel that the state’s interests in imposing reasonable limits increased in light of the developing foetus, Wilson J adopted the trimester framework from Roe v. Wade as the appropriate test for when reasonable limits could be imposed under s.1.]

Two other important decisions further developing s. 7 jurisprudence warrant specific mention in these comparative materials. In Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, the Court rejected a challenge to Canada’s criminalization of assisting suicides in a case brought by a terminally-ill woman with ALS (Lou Gehrig’s Disease). Although the 5-4 majority found that the statute
affected her right to security of the person under s.7, Justice Sopinka concluded that the statute did not do so in a manner that violated principles of fundamental justice. He wrote:

The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. From the review that I have conducted above, I am unable to discern anything approaching unanimity with respect to the issue before us. Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other are practically compelling, the fact remains that these distinctions are maintained and can be persuasively defended. To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it.

Id. at 607-08. In reaching this conclusion, the majority relied upon, *inter alia*, societal rejection of capital punishment, opposition to decriminalizing suicide by major medical associations, and most importantly by the continuing widespread prohibition on suicide throughout the world.

*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, concerned the deportation to Sri Lanka of an alleged member of the Tamil Tigers. The government claimed that Suresh was a threat to Canada and a member of a terrorist organization. Suresh sought refugee status on the ground that he would be tortured by the Sri Lankan government, with whom the Tamil Tigers have been waging a civil war for over two decades. The Court rejected the deportation order on procedural grounds, but upheld the constitutionality of the statutory framework permitting the Minister to deport dangerous aliens even in circumstances where torture was foreseeable:

Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are per se disproportionate to any legitimate government interest. We must ask whether deporting a refugee to torture would be such a response.

**IV. AUSTRALIA**

As we have gathered, the Australian Constitution, lacking a Bill or Charter of Rights, has not generated a large body of case law concerning rights, either enumerated or unenumerated. However, in some key cases, the High Court of Australia has identified rights and freedoms as implications arising from the text and structure of the Constitution. The Court has made clear that these rights or freedoms derive from the Constitution’s provisions for parliamentary government, representative democracy, and
(arguably) the rule of law. It has not addressed questions such as whether there is an implied right to privacy, or to marry, or for a woman to have an abortion, or other rights concerning personal choice or intimate relations. Such issues are constitutionally a matter for the States, and are regulated by State law. However, at the federal level, there is a wide range of anti-discrimination legislation, most of these passed by the Commonwealth parliament to give effect to international conventions. These include: the Racial Discrimination Act 1975; Sex Discrimination Act 1984; Privacy Act (1988); Disability Discrimination Act (1992); Human Rights (Sexual Conduct) Act (1994); Age Discrimination Act (2004). Constitutional issues concerning these laws would only concern whether they genuinely or validly gave effect to in international obligation (and were therefore characterized as laws with respect to “external affairs”, and not whether the Constitution itself protected persons against the relevant form of discrimination.

In the framing of the Constitution, the delegates at the Federal Conventions considered the inclusion of a provision similar to the U.S. Fourteenth Amendment. The first draft of the Constitution indeed included the provision: “A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.” At the 1897-98 Convention, Andrew Inglis Clark, Tasmanian Attorney-General, proposed that the section be struck out, and replaced with: “The citizens of each State, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several States; and a State shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth; nor shall a State deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.”1 The Convention considered Clark’s proposal, but rejected it, along with the 1891 provision. They inserted, in its place, the provision that is now s 117 of the Constitution prohibiting out-of-State residency discrimination. The framers’ reasons were multiple. They considered the Fourteenth Amendment to be a particular response to the history of slavery in America and the denial of citizenship to African Americans; they were reluctant to insert the expression “citizen” in the Constitution, because “citizenship” had no meaning under Australian law (at the time, in common with all members of the British Empire, Australians were British Subjects) and, furthermore, until 1914, subject status was a matter for common law rather than legislation; they did not want the Constitution to interfere unnecessarily in matters they regarded as belonging to the States; they were also reluctant to prohibit things constitutionally above and beyond the prohibitions found in the common law; they also wanted the States to be free to enact laws that were discriminatory, in particular with respect to the employment of Chinese immigrants.

Over the twentieth century, a number of attempts were made to extend the range of rights protected by the Constitution or, as an alternative strategy, to enact a legislative Bill of Rights. The 1944 referendum on Post-War Reconstruction and Democratic Rights asked a single question with 14 proposed constitutional changes, including an express guarantee of freedom of speech, and religion, and safeguards against the abuse of delegated legislative power. A referendum in 1988 proposed extending to the States some of the rights or freedoms in the Constitution that bind only the Commonwealth. It

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proposed “To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.” Each was unsuccessful. Statutory Bills of Rights were introduced in 1973 into the Commonwealth parliament by Labor Attorney-General (Lionel Murphy, later to be appointed to the High Court), and in 1985 by the Labor Attorney-General. Facing a parliamentary filibuster, and loss of political will, neither Bill proceeded to a vote.

In 2004, the legislature of the Australian Capital Territory (ACT) adopted a Human Rights Act; in 2006, the Victorian Parliament adopted the Charter of Human Rights and Responsibilities. These Acts of course only apply in the relevant jurisdiction; however, combined with international pressures, their adoption generated renewed enthusiasm among proponents of a national Bill of Rights, and stimulated a new campaign. In 2008 (on the 60th anniversary of the Universal Declaration of Human Rights), the new Labor Attorney-General announced the start of a “National Consultation” on the protection of human rights in Australia. The debate quickly became focused on whether Australia should adopt a Bill (or Charter). The Committee established to administer this Consultation will hand down its report in September 2009.

The last few decades of the twentieth century saw various challenges to Commonwealth laws, based on claims for implied rights or freedoms. In A-G (NSW); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1 it was argued that the words “directly chosen by the people” in section 24 of the Constitution included an implied equality in voting power; that is, that the provision mandated adherence to the principle of “one vote, one value”, and therefore that disparities in electorate (constituency) sizes were unconstitutional. The Court rejected this argument, although one dissenting judge, Justice Lionel Murphy, found it persuasive. “Great rights are often expressed in simple phrases”, he said (a phrase suggestive of a wide scope for implied or unenumerated rights). He also quoted from the U.S. case of Wesberry v Sanders [376 US 1] in which similar words in the American Constitution had been found to imply equal representation in the House of Representatives for equal numbers of people. Stephen J, while joining the majority, suggested in obiter dicta that the words of s 24 were indeed capacious: “Three great principles, representative democracy, ... direct popular election, and the national character of the lower House, may each be discerned in the opening words of s 24.” The spectrum of political institutions characteristic of representative democracy, he said, “has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether”. No formula for knowing when this point had been reached was proposed, however. Two decades later, a similar claim regarding electorate malapportionment was made, also unsuccessfully, in McGinty v Western Australia (1996) 186 CLR 140. The renewed effort had been encouraged by indications that the Court was now willing to find specific implications in s 24. In 1992 the Court had identified an implied freedom of political communication lying in the words of section 24 (and its companion, s 7, which provides that Senators as well as MPs shall be “directly chosen by the people”).

The implied freedom of political communication (IFPC) cases had a dramatic impact on Australian constitutional jurisprudence. Until that time, implications had been held only to arise either from the constitutional text under ordinary principles of statutory interpretation (by “necessary intendment”) or for the protection of Australia’s federal system (see the discussion of the “Melbourne Corporation doctrine” in Chapter 1). The IFPC, in striking contrast, concerned the rights or freedoms of individuals. Two cases were handed down on the same day: Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, and
In the first case (which concerned a law making it an offence to use words calculated to bring a member of the Industrial Relations Commission into disrepute), four Justices enunciated the new freedom and the grounds upon it rested. In the second case (which concerned a law restricting commercial political advertising in the electronic media), the Court (with one dissent) adopted and applied the IMPC. This second case – the "political advertising case" quickly emerged as the more important of the two.

In a judgment which traversed the history of the framing of the Constitution and the evolution of Australian sovereignty, as well as challenging the "orthodox" approach to constitutional interpretation, the Chief Justice set out his reasons:

\textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, at 134-143

MASON CJ:

"...Sir Owen Dixon [former Chief Justice of the HCA] noted that, following the decision in \textit{Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.} ("the Engineers' Case") ((52) (1920) 28 CLR 129), the notion seemed to gain currency that no implications could be made in interpreting the Constitution ((53) \textit{West v. Commissioner of Taxation (N.S.W.)} (1937) 56 CLR 657, at p 681). The Engineers' Case certainly did not support such a Draconian and unthinking approach to constitutional interpretation ...Sir Owen expressed his own opposition to that approach when he said (ibid., at p 681):

"Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied."

Later, he was to say ...

"We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications."

Subsequently, Windeyer J., in a passage in which he referred to that statement, remarked (\textit{Victoria v. The Commonwealth} ("the Payroll Tax Case") 122 CLR 353, at pp 401-402) "implications have a place in the interpretation of the Constitution" and "our avowed task is simply the revealing or uncovering of implications that are already there".

In conformity with this approach, the Court has drawn implications from the federal structure prohibiting the Commonwealth from exercising its legislative and executive powers in such a way as to impose upon a State some special disability or burden unless the relevant power authorized that imposition or in such a way as to threaten the continued existence of a State as an independent entity or its capacity to function as such (\textit{Queensland Electricity Commission v. The Commonwealth} (1985) 159 CLR 192...). But there is no reason to limit the process of constitutional implication to that particular source.
Of course, any implication must be securely based. Thus, it has been said that "ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning" (The Engineers' Case (1920) 28 CLR, per Knox C.J., Isaacs, Rich and Starke JJ. at p 155) ... This statement is too restrictive because, if taken literally, it would deny the very basis - the federal nature of the Constitution - from which the Court has implied restrictions on Commonwealth and State legislative powers ... That the statement is too restrictive is evident from the remarks of Dixon J. in Melbourne Corporation v. The Commonwealth (1947) 74 CLR, at p 83 where his Honour stated that "the efficacy of the system logically demands" the restriction which has been implied and that "an intention of this sort is ... to be plainly seen in the very frame of the Constitution".

It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution ... The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate would protect the States but in the result it did not do so. On the other hand, the principle of responsible government - the system of government by which the executive is responsible to the legislature - is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution...

The implication of fundamental rights

The adoption by the framers of the Constitution of the principle of responsible government was perhaps the major reason for their disinclination to incorporate in the Constitution comprehensive guarantees of individual rights ... They refused to adopt a counterpart to the Fourteenth Amendment to the Constitution of the United States. Sir Owen Dixon said (Sir Owen Dixon, "Two Constitutions Compared", Jesting Pilate, (1965), p 102):

"(they) were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to control of the legislature itself."

The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of

So it was that Professor Harrison Moore, writing in 1901, was able to say of the Constitution ((68) The Constitution of the Commonwealth of Australia, 1st ed. (1902), p 329):

"The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power."

In the light of this well recognized background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.

However, the existence of that sentiment when the Constitution was adopted and the influence which it had on the shaping of the Constitution are no answer to the case which the plaintiffs now present. Their case is that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government. The plaintiffs say that, because such a freedom is an essential concomitant of representative government, it is necessarily implied in the prescription of that system.

Representative government

The Constitution provided for representative government by creating the Parliament, consisting of the Queen, a House of Representatives and a Senate, in which legislative power is vested (s.1), the members of each House being elected by popular vote, and by vesting the executive power in the Queen and making it exercisable by the Governor-General on the advice of the Federal Executive Council ...In the case of the Senate, s.7 provides that it:

"shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate".

In the case of the House of Representatives, s.24 provides that it:
"shall be composed of members directly chosen by the people of the Commonwealth".

...
meant that the legislators are directly chosen by the people) and direct popular election. The correctness of his Honour’s view is incontestable, notwithstanding that the Constitution does not prescribe universal adult suffrage. Such a suffrage did not exist at that time. Although prescription of the qualifications of electors was left for the ultimate determination of the Parliament ((73) ss.8, 30), the Constitution nonetheless brought into existence a system of representative government in which those who exercise legislative and executive power are directly chosen by the people...

The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty ... notwithstanding that it was adopted, subject to minor amendments, by the representatives of the Australian colonies at a Convention and approved by a majority of the electors in each of the colonies at the several referenda. Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of electors in a majority of the States ((76) s.128). And, most recently, the Australia Act 1986 (U.K.) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people ... The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. Freedom of communication as an indispensable element in representative government

Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.

Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and
the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion.

... 

The fundamental importance, indeed the essentiality, of freedom of communication, including freedom to criticize government action, in the system of modern representative government has been recognized by courts in many jurisdictions.

...

Freedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision. ...

The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision. Public affairs and political discussion are indivisible and cannot be subdivided into compartments that correspond with, or relate to, the various tiers of government in Australia. Unlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or to its workings. The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion... “

(We consider the evolution of the IFPC, including the identification of legitimate legislative limits in Chapter 3.)

This case raised many hopes and gave rise to a series of challenges to laws in which arguments were made for the further identification of unenumerated or implied rights. With some few exceptions, the excitement generated by the political advertising case did not last. The exceptions, however, are not unimportant. Some have sought to find implications in the Constitution’s provision for separation of powers, specifically for the judicial power to be exclusively exercisable the High Court, Federal Courts and State Courts invested with federal jurisdiction (s 71) – ie “Chapter III Courts”. These cases include elements of due process protection.

Polyukhovich v The Queen (1991) 172 CLR 501 concerned an amendment to the War Crimes Act 1945 (Cth) making it an offence for an Australian citizen to have “committed a war crime” in Europe during the Second World War. The High Court found the Act valid (under the Defence power (s 51 (vi) and the External Affairs power (s 51 (xxix) ), but a minority of the Justices held that the Act was incompatible with Chapter III because it created a retrospective criminal law. In the words of Justice Deane (at p. 610): “[T]he whole focus of a criminal trial is the ascertainment of whether it is established that the accused in fact committed a past act which constituted a criminal contravention ... at the time the act was done. It is the determination of that question which lies at the heart of the exclusively judicial function of the
judgment of criminal guilt.” Although this view does not lie in the ratio of the case, it is considered significant by many constitutional lawyers, and may well serve as a source of argument in future if a similar case arises.

*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 concerned a New South Wales Act directed specifically at a named individual, Gregory Kable, who had served a period of imprisonment for the manslaughter of his wife, and whose date of release was approaching. While in detention, Kable had written letters threatening members of his late wife’s family and undertaking to carry these threats out when free. The media learned of this and there was a public outcry against Kable’s release. The NSW Parliament responded with the *Community Protection Act 1994* (NSW) which provided for the Supreme Court of NSW, on the application of the NSW Director of Public Prosecutions, to make orders, renewable on six-monthly basis, for Kable’s continued incarceration. Kable challenged the Act on the ground that it constituted a legislative interference with the judicial power of the Commonwealth. The High Court upheld Kable’s claim. The reasoning in this case is very complex, and each judgment (opinion) appears to have a different ratio. We can summarise the conclusion, however: Because the Supreme Court of NSW is invested with federal jurisdiction, it is a Chapter III Court and is protected by the separation of powers provided for in the Commonwealth Constitution. This prohibits legislative interference in the exercise of judicial power. It is “incompatible” with the exercise of the judicial power of the Commonwealth for Judges to order detention at the behest of the parliament. Non-punitive detention cannot be ordered by Chapter III Courts (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1). Furthermore, an Act targeting a named-individual – a “Bill of Attainder” – amounts to legislative imprisonment, and breaches the separation of powers.

In the words of Justice Toohey (at p. 98):

> “Preventive detention ... is not an incident of the exclusively judicial function of adjudging and punishing criminal guilt. It is not part of a system of ... detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt... [T]he Act requires the Supreme Court to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process.

> The extraordinary character of the legislation and of the functions it requires the Supreme Court to perform is highlighted by the operation of the statute upon one named person only.”

The Kable “principle” has been raised in several subsequent cases (including *Baker v R* (2004) 223 CLR 513 and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575) concerning State legislative schemes for detaining dangerous prisoners beyond their period of sentence. None of these cases has succeeded. This is partly because, since *Kable*, the State legislatures have been careful to avoid passing Acts that target individuals. Also, the High Court has carved out exceptions where, so long as there are adequate, safeguards of judicial independence, the order of preventive detention by a Chapter III Court may not breach the Constitution. In *Fardon*, Chief Justice Mason identified these safeguards (at p. 57):

> “…substantial judicial discretion as to whether an order should be made, and if so, the type of order ... The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community ... There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is
to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits.”

(Some Justices also held that the State Supreme Courts, albeit Chapter III Courts, were not subject to exactly the same constraints arising from the separation of powers as the federal courts).

In 2007, the High Court entered the ground of implied democratic rights again. Roach v Electoral Commissioner concerned an amendment to the Commonwealth Electoral Act which purported to disqualify all prisoners currently serving sentences, of any length, in State prisons (there are no Federal prisons in Australia). Previously, the Act disenfranchised prisoners serving sentences of three years or more. Vicki Roach was serving a sentence of six years. She challenged the Act on the footing that it breached an implied right to vote, guaranteed in the Constitution’s provisions for the Parliament to be “directly chosen by the people”. The High Court upheld the challenge to the amendment; it left the original Act intact (thus making no alteration to Roach’s own right to vote.)

Roach v Electoral Commissioner (2007) 239 ALR 1

GLEESON CJ. The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure and ... approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty....

Speaking extra-judicially in 1942, to an audience in the United States, Sir Owen Dixon said:

"The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself."

Sir Owen Dixon found a need to explain to American lawyers the scarcity in the Australian Constitution of formal guarantees of rights and freedoms which they associated with the idea of "constitutional rights". That is not to say that the Constitution contains no guarantees or protections of individual rights, express or implied. Yet it reflects a high level of acceptance of what Barwick CJ called "the notion of the sovereignty of Parliament in the scheme of government". Nowhere is this more plainly illustrated than in the extent to which the Constitution left it to Parliament to prescribe the form of our system of representative democracy.
Important features of our system of representative democracy, such as compulsory voting, election of members of the House of Representatives by preferential voting, and proportional representation in the Senate, are the consequence of legislation, not constitutional provision. One striking example concerns a matter which the framers deliberately left to be dealt with by Parliament: female suffrage. The Constitution, in s 128, refers to States "in which adult suffrage prevails." In 1901, adult suffrage meant the franchise for women as well as men...Another example is voting by Aboriginal people, which remained an issue not fully resolved until the second half of the twentieth century.

The ...Parliament may make laws providing for the qualification of electors. That Australia came to have universal adult suffrage was the result of legislative action. Universal suffrage does not exclude the possibility of some exceptions...Could Parliament now legislate to remove universal adult suffrage? If the answer to that question is in the negative (as I believe it to be) then the reason must be in the terms of ss 7 and 24 of the Constitution, which require that the senators and members of the House of Representatives be "directly chosen by the people" of the State or the Commonwealth respectively. In 1901, those words did not mandate universal adult suffrage...

In *McKinlay*, McTiernan and Jacobs JJ said that "the long established universal adult suffrage may now be recognized as a fact". I take "fact" to refer to an historical development of constitutional significance... McTiernan and Jacobs JJ said that the words "chosen by the people of the Commonwealth" were to be applied to different circumstances at different times. Questions of degree may be involved. They concluded that universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people. I respectfully agree. As Gummow J said in *McGinty v Western Australia*, we have reached a stage in the evolution of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote. That, however, leaves open for debate the nature and extent of the exceptions. The Constitution leaves it to Parliament to define those exceptions, but its power to do so is not unconstrained. Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people. To say that, of course, raises questions as to what constitutes a substantial reason, and what, if any, limits there are to Parliament's capacity to decide that matter.

It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation. Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would
need to have a rational connection with the identification of community membership or with the capacity to exercise free choice. Citizenship, itself, could be a basis for discriminating between those who will and those who will not be permitted to vote. Citizens, being people who have been recognised as formal members of the community, would, if deprived temporarily of the right to vote, be excluded from the right to participate in the political life of the community in a most basic way. The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right.

...What is the rationale for the exclusion of prisoners? ... The rationale for the exclusion from the franchise of some prisoners, that is, those who have been convicted and are serving sentences, either of a certain duration or of no particular minimum duration, must lie in the significance of the combined facts of offending and imprisonment, as related to the right to participate in political membership of the community. The combination is important. [N]ot all prisoners are excluded, even under [the Act], from voting... A pecuniary penalty, no matter how heavy, does not lead to loss of the vote. Since it is only offences that attract a custodial sentence that are involved, this must be because of a view that the seriousness of an offence is relevant, and a custodial sentence is at least a method, albeit imperfect, of discriminating between offences for the purpose of marking off those whose offending is so serious as to warrant this form of exclusion from the political rights of citizenship.

Since what is involved is not an additional form of punishment, and since deprivation of the franchise takes away a right associated with citizenship, that is, with full membership of the community, the rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right.

...The adoption of the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct for the purpose of satisfying the rationale for treating serious offenders as having severed their link with the community, a severance reflected in temporary disenfranchisement, breaks down at the level of short-term prisoners. They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.

The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or
the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people

**LANGE v AUSTRALIAN BROADCASTING CORPORATION**

**HIGH COURT OF AUSTRALIA**

145 A.L.R. 96

8 July 1997 -- Canberra

Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

The principal questions arising from this case stated by Brennan CJ are whether the court should reconsider two decisions which hold that there is implied in the Constitution a defence to the publication of defamatory matter relating to government and political matters and, if so, whether those decisions are correct.

The case stated arises out of a defamation action brought in the Supreme Court of New South Wales by Mr David Lange, a former Prime Minister of New Zealand (the plaintiff), against the Australian Broadcasting Corporation (the defendant).

The defendant has relied on the decisions of this court in *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd* to plead a defence against an action brought by the plaintiff in respect of matters published when he was a member of the New Zealand Parliament. [Based on these precedents, the ABC alleged that the matter complained of was published “pursuant to a freedom guaranteed by the Commonwealth Constitution” to publish material “in the course of discussion of government and political matters” relating to the plaintiffs as a public official and “in circumstances such that: (i) if the matter was false (which is not admitted) the defendant was unaware of its falsity; (ii) the defendant did not publish the matter recklessly, that is, not caring whether the material was true or false; (iii) the publication was reasonable.”]

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Theophanous

In *Theophanous*, this court by majority, in answering the first question reserved in a case stated, declared that:

There is implied in the Commonwealth Constitution a freedom to publish material:

(a) discussing government and political matters;

(b) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees;

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2 (1994) 182 CLR 104; 124 ALR 1

3 (1994) 182 CLR 211; 124 ALR 80

4 (1994) 182 CLR 104 at 208; 124 ALR 1 at 26
(c) in relation to the suitability of persons for office as members of the Parliament.

By the same majority, the court answered a second question reserved as follows:

In the light of the freedom implied in the Commonwealth Constitution, the publication will not be actionable under the law relating to defamation if the defendant establishes that:
(a) it was unaware of the falsity of the material published;
(b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and
(c) the publication was reasonable in the circumstances.

The answer by that majority to a third question reserved was a declaration that:

A publication that attracts the freedom implied in the Commonwealth Constitution can also be described as a publication on an occasion of qualified privilege. Whether a federal election is about to be called is not a relevant consideration.

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Stephens

On the same day that judgment was delivered in *Theophanous*, the court delivered judgment in *Stephens*. By the same majority, the court held that defences based on the Constitution of the Commonwealth and the Constitution Act 1889 (WA) were good defences to an action brought by a State member of parliament in respect of a publication that criticised an overseas trip being made by a six-member committee of the Legislative Council of Western Australia, of which the plaintiff was a member.

Reconsidering a previous decision of the court

This court is not bound by its previous decisions.10 Nor has it laid down any particular rule or rules or set of factors for reopening the correctness of its decisions. Nevertheless, the court should reconsider a previous decision only with great caution and for strong reasons.11 In *Hughes and Vale Pty Ltd v New South Wales*,12 Kitto J said that in constitutional cases "it is obviously undesirable that a question decided by the court after full consideration should be reopened without grave reason". However, it

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10 Baker v Campbell (1983) 153 CLR 52 at 102 49 ALR 385; Damjanovic & Sons Pty Ltd v Commonwealth (1968) 117 CLR 390 at 395-6; Queensland v Commonwealth (1977) 139 CLR 585 at 610 16 ALR 487

11 Hughes and Vale Pty Ltd v New South Wales (1953) 87 CLR 49 at 102; Queensland v Commonwealth (1977) 139 CLR 585 at 602, 620 16 ALR 487; Jones v Commonwealth (1987) 71 ALR 497 at 498 61 ALJR 348 at 349

12 (1953) 87 CLR 49 at 102. See also HC Sleigh Ltd v South Australia (1977) 136 CLR 475 at 501 12 ALR 449; Commonwealth v Hospital Contribution Fund of Australia (1982) 150 CLR 49 at 56 40 ALR 673
cannot be doubted that the court will re-examine a decision if it involves a question of "vital constitutional importance" and is "manifestly wrong". Errors in constitutional interpretation are not remediable by the legislature, and the court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes. But these general statements concerning the occasions when the court will reconsider one of its previous decisions give little guidance in this case when the judgments and orders in Theophanous and Stephens are examined.

[The court did not view these precedents as binding, however, because of the lack of a clear majority opinion.]

However, for the reasons set out below, Theophanous and Stephens should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution. Those cases should also be accepted as deciding that, at least by 1992, the constitutional implication precluded an unqualified application in Australia of the English common law of defamation in so far as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience. The full argument we 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 now satisfy us, however, that some of the expressions and reasoning in the various judgments in Theophanous and Stephens should be further considered in order to settle both constitutional doctrine and the contemporary common law of Australia governing the defence of qualified privilege in actions of libel and slander.

Having regard to the foregoing discussion, the appropriate course is to examine the correctness of the defences pleaded in the present case as a matter of principle and not of authority. The starting point of that examination must be the terms of the Constitution illuminated by the assistance which is to be

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13 Queensland v Commonwealth (1977) 139 CLR 585 at 630 16 ALR 487. See also Commonwealth v Cigamatic Pty Ltd (in liq) (1962) 108 CLR 372 at 377

14 Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia (1913) 17 CLR 261 at 278-9; the Tramways case (No 1) (1914) 18 CLR 54 at 58, 69, 83; but cf Queensland v Commonwealth (1977) 139 CLR 585 at 621 16 ALR 487

15 Queensland v Commonwealth (1977) 139 CLR 585 at 630 16 ALR 487; Street v Queensland Bar Association (1989) 168 CLR 461 at 588 88 ALR 321

24 (1996) 186 CLR 140; 134 ALR 289

25 (1996) 186 CLR 302; 134 ALR 400

26 (1996) 186 CLR 352; 136 ALR 18
obtained from *Theophanous* and the other authorities\(^27\) which have dealt with the question of "implied freedoms" under the Constitution.

Representative and responsible government

Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect.

That the Constitution intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the Constitution itself. Thus, at the Second Australasian Convention held in Adelaide in 1897, the Convention, on the motion of Mr Edmund Barton, resolved that the purpose of the Constitution was "to enlarge the powers of self-government of the people of Australia".\(^30\)

Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government. ***

As Isaacs J put it:\(^31\)

[T]he Constitution is for the advancement of representative government.

Section 1 of the Constitution vests the legislative power of the Commonwealth in a parliament "which shall consist of the Queen, a Senate, and a House of Representatives". Sections 7 and 24 relevantly provide:

7 The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

24 The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.


\(^{30}\) *Official Report of the National Australasian Convention Debates* (Adelaide) (1897), p 17

\(^{31}\) FCT v Munro (1926) 38 CLR 153 at 178
Section 24 does not expressly refer to elections, but s 25 makes it plain that the House of Representatives is to be directly chosen by the people of the Commonwealth voting at elections. Other provisions of the Constitution ensure that there shall be periodic elections. Thus, under s 13, six years is the longest term that a senator can serve before his or her place becomes vacant. Similarly, by s 28, every House of Representatives is to continue for three years from the first meeting of the House and no longer. Sections 8 and 30 ensure that, in choosing senators and members of the House of Representatives, each elector shall vote only once. The effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 therefore is to ensure that the Parliament of the Commonwealth will be representative of the people of the Commonwealth.

Other sections of the Constitution establish a formal relationship between the executive government and the parliament and provide for a system of responsible ministerial government, a system of government which, "prior to the establishment of the Commonwealth of Australia in 1901 . . . had become one of the central characteristics of our polity". Thus, s 6 of the Constitution requires that there be a session of the parliament at least once in every year, so that 12 months shall not intervene between the last sitting in one session and the first sitting in the next. Section 83 ensures that the legislature controls supply. It does so by requiring parliamentary authority for the expenditure by the executive government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth, irrespective of source. Sections 62 and 64 of the Constitution combine to provide for the executive power of the Commonwealth, which is vested in the Queen and exercisable by the Governor-General, to be exercised "on the initiative and advice" of ministers and limit to three months the period in which a minister of State may hold office without being or becoming a senator or member of the House of Representatives. Section 49 of the Constitution, in dealing with the powers, privileges and immunities of the Senate and of the House of Representatives, secures the freedom of speech in debate which, in England, historically was a potent instrument by which the House of Commons defended its right to consider and express opinions on the conduct of affairs of State by the Sovereign and the ministers, advisers and servants of the Crown.\textsuperscript{36} Section 49 also provides the source of coercive authority for each chamber of the parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt.

The requirement that the parliament meet at least annually, the provision for control of supply by the legislature, the requirement that ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the executive to the organs of representative government. In his \textit{Notes on Australian Federation: Its Nature and Probable Effects}, Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the executive may be a significant determinant of the contemporary practice of responsible government.

\textsuperscript{36} See Campbell, "Parliament and the Executive", in Zines (ed), \textit{Commentaries on the Australian Constitution} (1977) 88 at 91
Reference should also be made to s 128 which ensures that the Constitution shall not be altered except by a referendum passed by a majority of electors in the States and in those Territories with representation in the House of Representatives, taken together, and by the electors in a majority of States.

Freedom of communication

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system.\(^{40}\) As Birch points out, "it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion of a representative form of government". However, to have a full understanding of the concept of representative government, Birch also states that

we need to add that the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organisation.

Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch. Furthermore, because the choice given by ss 7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in *Australian Capital Television Pty Ltd v Commonwealth*,\(^{44}\) legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.

That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the


\(^{44}\) (1992) 177 CLR 106 at 187; 108 ALR 577
exercise of legislative or executive power. As Deane J said in Theophanous,\textsuperscript{45} they are "a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense". In Cunliffe v Commonwealth,\textsuperscript{46} Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said: "The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control."

If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable "the people" to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.

In addition, the presence of s 128, and of ss 6, 49, 62, 64 and 83, of the Constitution makes it impossible to confine the receipt and dissemination of information concerning government and political matters to an election period. Those sections give rise to implications of their own. Section 128, by directly involving electors in the States and in certain Territories in the process for amendment of the Constitution, necessarily implies a limitation on legislative and executive power to deny the electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution. Similarly, those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal parliament. Moreover, the conduct of the executive branch is not confined to ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature. In British Steel Corp v Granada Television Ltd,\textsuperscript{48} Lord Wilberforce said that it was by these reports that effect was given to "[t]he legitimate interest of the public" in knowing about the affairs of such bodies. Whatever the scope of the implications arising from responsible government and the amendment of the Constitution may be, those implications cannot be confined to election periods relating to the Federal Parliament.

However, the freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the

\textsuperscript{45} (1994) 182 CLR 104 at 168; see also 146-8; 124 ALR 1 at 48

\textsuperscript{46} (1994) 182 CLR 272 at 326; 124 ALR 120

\textsuperscript{48} [1981] AC 1096 at 1168
Constitution operates as a restriction on legislative power. However, 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. 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.

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Constitutional text and structure

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. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"

Moreover, although it is true that the requirement of freedom of communication is a consequence of the Constitution's system of representative and responsible government, it is the requirement and not a right of communication that is to be found in the Constitution. Unlike the First Amendment to the United States Constitution, which has been interpreted to confer private rights, our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.

To the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. 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.

The test for determining whether a law infringes the constitutional implication

When a law of a State or federal parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by s 7, s 24, s 64 or s 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms,

49 McGinty (1996) 186 CLR 140 at 168, 182-3, 231, 284-5 134 ALR 289
operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people^70 (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid. In ACTV, for example, a majority of this court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved. And the common law rules, as they have traditionally been understood, must be examined by reference to the same considerations. If it is necessary, they must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires.

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^70 Cunliffe (1994) 182 CLR 272 at 300, 324, 339, 387-8 124 ALR 120. In this context, there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality: see at CLR 377, 396