A COMPARATIVE ANALYSIS OF THE DOCTRINAL CONSEQUENCES OF INTERPRETIVE DISAGREEMENT FOR IMPLIED CONSTITUTIONAL RIGHTS

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This Article addresses a fundamental and unexamined issue in the debate over implied constitutional rights: the effect that interpretive disagreement has on the development of implied rights more generally. Taking a comparative approach, the Article examines the implied right to abortion in the United States and the implied right to the freedom of political communication in Australia. The Article argues that despite the acceptance of both rights over time, the doubts concerning the initial recognition of the rights as well as the interrelated problems of judicial self-consciousness regarding the vulnerability of the implied right in the face of continuing controversy and the paucity of interpretive resources with which doctrinal developments could be supported, have adversely affected their development. Tracing the effects of disagreement on the development of two moderately secure implied rights across two jurisdictions, this Article ultimately concludes that the stunted development of implied rights in both jurisdictions indicates that implication is an especially weak form of rights protection in constitutional democracies.

TABLE OF CONTENTS

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INTRODUCTION

Among the cases involving the implication of rights from a written constitution, the decisions of the U.S. Supreme Court in *Roe v. Wade*,[1] implying a right of abortion, and that of the Australian High Court in *Australian Capital Television Pty Ltd v. Commonwealth*,[2] ("*ACTV*") implying a right of free communication about political matters, are among the best known to comparative constitutional lawyers. At the time of the decisions many commentators derided the courts' decisions as a matter of constitutional theory, arguing both that the courts had departed from proper methods of constitutional interpretation in favor of extra-constitutional sources and other judicially created rules, and that even

1. Roe v. Wade, 410 U.S. 113 (1973). See also the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973).

2. *Austl. Cap. Television Pty Ltd. v Commonwealth* (1992), 177 CLR 106 (Austl.) [*ACTV*]. See also the companion case of *Nationwide News Party Ltd. v Wills* (1992) 177 CLR 1 (Austl.).

when the courts applied accepted methods, the application was inappropriate.[3]

In the years following *Roe* and *ACTV*, it became apparent that the interpretive disagreement surrounding the initial implications left the implied rights peculiarly vulnerable to judicial revision in the short term and that significant modification of the initial implications had occurred over time. However, despite the perpetuation of this interpretive dispute, significant issues remain unaddressed in the implied rights debate: the effect that interpretive disagreement has had on the development of implied rights, and the impact of relying upon the implication of rights for fundamental rights protection in a constitutional democracy.

The purpose of this Article is to provide a preliminary evaluation of these questions, and to argue that, despite the acceptance of both rights over time, their development has been adversely affected by the doubts surrounding the initial recognition of the rights, and the consequent interrelated problems of both judicial self-consciousness regarding the vulnerability of the implied right in the face of continuing controversy and a paucity of interpretive resources which could support doctrinal developments. Further, this Article addresses the broader ramifications of this claim, arguing that the stunted development of the implied rights indicates that implication is an especially weak form of rights protection.

The approach taken is a case study examining the initial implications of the right to an abortion and the right of free political communication, and tracing the subsequent interpretive controversy and judicial development of the rights in the face of that controversy. This Article takes a comparative approach: implication of rights from a written constitution is not a phenomenon unique to the United States, and the interpretive debate has been mirrored in a number of stable constitutional democracies. Tracing the effects of disagreement on the development of two moderately secure implied rights across two jurisdictions allows conclusions to apply more generally and have relevance beyond the confines of U.S. constitutional jurisprudence.[4]

The analysis proceeds in four parts. Part I briefly outlines the phenomenon of interpretive disagreement and why disagreement represents a particular problem for implied constitutional rights. Parts II and III discuss the Australian implied freedom of political communication,

3. *See infra* notes 38–56, and 113, 137–52 and accompanying text.

4. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). On the value of comparative studies more generally, see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999).

and the U.S. implied fundamental right of abortion respectively, examining the doctrinal development in the face of the interpretive disagreement. Part IV draws together the doctrinal consequences outlined in Parts II and III and provides preliminary conclusions on the broader impact of these consequences for rights protection more generally.

I. INTERPRETIVE DISAGREEMENT AND IMPLIED CONSTITUTIONAL RIGHTS

A. Background

Before proceeding to examine the interpretive controversy, some institutional background is helpful. Both the United States and Australia function under written constitutions designed and implemented by constitutional convention, the former commencing in 1789 and the latter in 1901.[5] The Australian Constitution was explicitly modeled on the U.S. Constitution, although the Australian Framers were also heavily influenced by English constitutionalism.[6] Both jurisdictions have courts of final resort with the power of judicial review designated to hear constitutional matters, and claim judicial supremacy.[7] The central difference between the jurisdictions is Australia's maintenance of the Westminster system, resulting, generally, in greater judicial deference to Parliament than what generally occurs in the United States.[8] In addition, the Australian High Court, with one chief justice and six associate justices, operates under a seriatim system, whereby justices generally write separate opinions in each decision. The consequence of a seriatim system is that the

5. Albeit under markedly different circumstances. On the American constitutional founding, see AMERICAN LEGAL HISTORY (Kermit L. Hall et al. eds., 2005). On the Australian constitutional founding, see JOHN WILLIAMS, THE AUSTRALIAN CONSTITUTION: A DOCUMENTARY HISTORY (2005).

6. *See* WILLIAMS, *supra* note 5.

7. Although, in neither constitution is the power of judicial review or the concept of judicial supremacy expressly articulated. *See* U.S. CONST. art. III; AUSTRALIAN CONSTITUTION, Ch. III. The power was declared by Chief Justice John Marshall in the seminal U.S. case of *Marbury v. Madison*, 5 U.S. 137 (1803). *Marbury* was cited as support for the notion of judicial review in the Australian context in *Australian Communist Party v Commonwealth* (1951), 83 CLR 1, 262 (Austl.), where Justice Fullagar stated "in our system the principle of *Marbury v. Madison* . . . is accepted as axiomatic." However, it should be noted that the High Court had been exercising the power of judicial review long before the *Communist Party* declaration. *See generally* BRIAN GALLIGAN, POLITICS OF THE HIGH COURT (1987) (discussing how politics may affect judicial decisions).

8. *See, e.g.*, Sir Anthony Mason, *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience*, 16 FED. L. REV. 1, 6–8 (1986); Gerald N. Rosenberg & John M. Williams, *Do Not Go Gently Into that Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439, 443 (1997); L.F. CRISP, AUSTRALIAN NATIONAL GOVERNMENT 75–78 (5th ed. 1983).

law emanating from the decided case is not the result of a majority opinion but, rather, the highest common factor amongst the separate opinions.[9]

It is universally known that the U.S. Constitution enshrines the Bill of Rights, expressly protecting various fundamental rights including the freedom of speech and association, equal protection under the law, and religious liberty.[10] It is less well known that the Australian Constitution does not contain a bill of rights, either constitutional or statutory.[11] The Australian Constitution, however, does contain some provisions that are often considered "express rights,"[12] including Section 41 (right to vote), Section 51(xxxi) (acquisition of property to be on "just terms"), Section 80 (trial by jury), Section 116 (freedom of religion), and Section 117 (prohibition on discrimination against residents of other states).[13]

Compared to the broad and rights-protective interpretation given to express constitutional rights by the U.S. Supreme Court, the interpretation of these civil and political rights provisions by the High Court of Australia has been extremely limited.[14] A key consequence of Australia's exceptionalism with respect to an entrenched bill of rights is that the High Court has approached express rights provisions as limitations on government power, rather than as the basis for free-standing rights.[15]

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9. *See* Rosenberg & Williams, *supra* note 8, at 449.

10. U.S. CONST. amends. I–X.

11. *See generally* TOM CAMPBELL ET AL., PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS: INSTITUTIONAL PERFORMANCE AND REFORM IN AUSTRALIA (2006) (discussing Australia's exceptionalism).

12. On "express rights" under the Australian Constitution, see, for example, HILARY CHARLESWORTH, WRITING IN RIGHTS 30–31 (2002); LESLIE ZINES, THE HIGH COURT AND THE CONSTITUTION 410 (4th ed. 1997); GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION (1999); George Winterton, *Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 121 (Charles Sampford & Kim Preston eds., 1996).

13. Other provisions that are often considered "express rights" are Section 92 (guaranteeing that interstate trade and commerce is "absolutely free"), and Section 51(xiiiA) (preventing civil conscription of medical practitioners).

14. For critiques of the express rights, see, for example, PETER BAILEY, HUMAN RIGHTS: AUSTRALIA IN AN INTERNATIONAL CONTEXT (1990); CHARLESWORTH, *supra* note 12, at 30–31; WILLIAMS, *supra* note 12, at 245; ZINES, *supra* note 12, at 410.

15. *See* Kruger v. Commonwealth (1997), 190 CLR 1, 132 (Austl.) (Gaudron, J.); *see also* WILLIAMS, *supra* note 12, at 127–28; Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 32 (2005) [hereinafter Stone, *Interpretive Disagreement*].

B. Defining the Interpretive Controversy

Disagreement over the appropriate method of constitutional interpretation is inevitable in a modern pluralist democracy.[16] Disagreement is sharpened in Australia and the United States, where the respective written constitutions do not prescribe a method for their own interpretation (as is generally the case with written constitutions).[17] Accordingly, each is susceptible to a wide range of interpretations derived from a number of differing interpretive approaches.[18] Take, for example, the Australian constitutional provision requiring "just terms" for acquisitions of property. This provision specifies that:

> The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.[19]

An interpretation that gives primacy to the text could require "just terms" for all federal acquisitions, and not only real property. Conversely, a different interpretive approach, for example an approach that relies on the intentions of the constitutional drafters, might limit that requirement to acquisitions of land. The interpretive disagreement arises because the textual interpretation is not supported by the historical interpretation, and vice-versa.[20]

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16. John Rawls argues that even when reasonable people debate issues such as constitutional interpretation in good faith, the "burdens of judgment," including the unique formative experiences of their individual lives, can lead them to different conclusions. As a consequence, he claims that "reasonable pluralism" is an "inevitable outcome of free human reason" and a "permanent feature of the public culture of democracy." JOHN RAWLS, POLITICAL LIBERALISM 36–37, 54–57 (1993); *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 12, 90–91, 263 (1999).

17. "The Constitution contains no injunction as to how it is to be interpreted." *McGinty v. W. Austl.* (1986), 186 CLR 140, 230 (Austl.) (McHugh, J).

18. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Robert F. Nagel, *Disagreement and Interpretation*, 56 LAW & CONTEMP. PROBS. 11 (1993); Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992); Stone, *Interpretive Disagreement*, *supra* note 15, at 41; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880–85 (1996). *See generally* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS (Charles Sampford & Kim Preston eds., 1996).

19. AUSTRALIAN CONSTITUTION S 51(xxxi).

20. *See* Simon Evans, *Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good*, *in* PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS: INSTITUTIONAL PERFORMANCE AND REFORM IN AUSTRALIA 197 (Tom Campbell et al. eds., 2006).

While interpretive disagreement is inevitable in relation to any constitutional provision, express or implied, it is particularly evident in the implication of rights from the terms of a written constitution. At the broad level, implied rights exclude government power from certain areas, and for a variety of reasons, these exclusionary implications are considered more controversial than, for example, merely allocating power between governments in a federal system. At the interpretive level, interpretations of a constitution are most secure when an interpretation is clearly supported by one or more of the established methods of constitutional interpretation—such as textual arguments, historical arguments, or precedential arguments—and is not inconsistent with any of them.[21] Although disagreement will inevitably exist about the application and emphasis to be given to any one of these methodologies, it is accepted that these traditional methodologies have some place in constitutional interpretation.[22] These traditional approaches do not readily support the implication of rights. The problem for implied rights generally is that most of the methods of constitutional interpretation on which they rely are contested, either broadly or specifically in application; that is, there is at least one traditional form of constitutional argument that undermines them.[23] The implied rights, then, are subject to greater degrees of disagreement, stemming directly from the contested nature of constitutional interpretation itself, resulting in their peculiar vulnerability and special degree of weakness.

II. THE AUSTRALIAN IMPLIED FREEDOM OF POLITICAL COMMUNICATION

A. Recognizing the Implied Freedom

The implied freedom of political communication was first recognized in the 1992 High Court decision *ACTV*[24] and its companion case, *Nationwide News v. Wills*.[25] However, there were two divergent approaches in interpretation between the justices, resulting in an implied right sustained by two differing foundations of the implied freedom and,

21. Stone, *Interpretive Disagreement*, *supra* note 15, at 41.
22. *Id.*
23. *Id.*
24. *Austl. Cap. Television Pty Ltd. v Commonwealth* (1992), 177 CLR 106 (Austl.) [*ACTV*]. For a detailed outline of the case, see Dean Bell et al., Note, *Implying Guarantees of Freedom into the Constitution: Nationwide News and Australian Capital Television*, 16 SYDNEY L. REV. 288 (1994). For scholarly reactions to the decisions see the articles contained in, Symposium, *Constitutional Rights for Australia?*, 16 SYDNEY L. REV. 141 (1994).
25. *Nationwide News Party Ltd. v Wills* (1992), 177 CLR 1 (Austl.).

necessarily, two differing conceptions of the scope of judicial review of legislative action.[26]

1. A Broad Approach: The Early Majority

A four justice majority, Chief Justice Mason, and Justices Deane, Toohey, and Gaudron ("the majority justices"), held that the provisions of the Constitution establishing the Parliament and the Executive,[27] as well as the provision enabling amendment of the Constitution by referendum,[28] entrenched the institutions of representative and responsible government in the Australian Constitution.[29] Subsequently, the majority justices drew the implication that representative and responsible government required a level of free political communication, enforced by the judicial arm of government.[30]

Under this approach, the majority justices essentially reconstructed the governmental relationships enshrined in the Constitution; modeled on the English Westminster model, the Australian Constitution was determinedly established to reserve protection of fundamental rights to the Commonwealth Parliament, with the judiciary's role being secondary.[31]

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26. *See* James Stellios, *Using Federalism to Protect Political Communication: Implications from Federal Representative Government*, 31 MELB. U. L. REV. 239 (2007) [hereinafter Stellios, *Using Federalism*].

27. AUSTRALIAN CONSTITUTION S 7, 24. Section 7 reads: "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." AUSTRALIAN CONSTITUTION S 7. Section 24 reads: "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 senators. The number of members chosen in the several States shall be in proportion to the respective members of their people . . . ." AUSTRALIAN CONSTITUTION S 24. The provision continues to specify the method of selection of representatives, until Parliament provides otherwise.

28. AUSTRALIAN CONSTITUTION S 128 (specifying that the Constitution may be amended upon agreement of a majority of people in the majority of states at referendum).

29. *Nationwide News*, 177 CLR at 70–73 (Deane, J., and Toohey, J.); *ACTV*, 177 CLR at 137 (Mason, C.J.), 209–10 (Gaudron, J.). Note that Chief Justice Mason, with Justices Toohey, Gaudron, and McHugh, drew a distinction between "representative government" and "representative democracy." *ACTV*, 177 CLR at 130, 199. This distinction is not important for the purposes of this Article. *See* Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 MELB. U. L. REV. 668, 672 n.17 (1999) [hereinafter Stone, *Limits*].

30. *Nationwide News*, 177 CLR at 72 (Deane, J. and Toohey, J.); *ACTV*, 177 CLR at 138–40 (Mason, C.J.), 211–12 (Gaudron, J.).

31. *See, e.g.*, Brian Galligan & F.L. Morton, *Australian Exceptionalism: Rights Protection Without a Bill of Rights*, *in* PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS: INSTITUTIONAL PERFORMANCE AND REFORM IN AUSTRALIA 17 (Tom Campbell et al. eds., 2006); Jeffrey Goldsworthy, *Introduction*, *in* PROTECTING RIGHTS WITHOUT A BILL OF RIGHTS: INSTITUTIONAL PERFORMANCE AND REFORM IN AUSTRALIA 1 (Tom Campbell et al. eds., 2006).

The majority justices sought to reinterpret this arrangement, arguing that the federal legislative powers were never meant to encroach upon fundamental rights, and it was the role of the judiciary to protect those rights.[32] The majority justices counseled that at Federation in 1901, sovereignty had shifted not from the Imperial Parliament to the Commonwealth Parliament but rather from the Imperial Parliament to the Australian people.[33] In this view, the Commonwealth Parliament only holds legislative power in trust, and the judiciary's role is to police the exercise of that power; the implied freedom, then, was necessary to ensure the effective workings of the Australian democratic system.[34]

2. Conservative Approach: The Early Minority

Two justices disagreed with the interpretive approach of the majority justices, Justices Brennan and McHugh. Justices Brennan and McHugh were significantly more conservative, and less controversial, in their interpretative methodology in drawing implications from the Constitution. Although these justices also held that the Constitution impliedly limited government regulation of political communication, their analysis was directly linked to the text of the Constitution.[35] That is, Justices Brennan and McHugh cut out the middle step of the majority justice's three-step implication approach: (1) the written Constitution, (2) enshrines the broad institutions of representative and responsible government, and (3) those

32. *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Austl.) (Deane, J., and Toohey, J.). *See generally* Justice John Toohey, *A Government of Laws, and Not of Men?*, 4 PUB. L. REV. 158, 169–70 (1993); George Winterton, *Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 121 (Charles Sampford & Kim Preston eds., 1996); Leslie Zines, *Courts Unmaking the Law*, *in* COURTS IN A REPRESENTATIVE DEMOCRACY 125, 130–34 (Australian Institute of Judicial Administration ed., 1995); Leslie Zines, *The Sovereignty of the People*, *in* POWER, PARLIAMENT AND THE PEOPLE 91, 104 (Michael Coper and George Williams eds., 1997).

33. *Nationwide News Party Ltd. v Wills* (1992), 177 CLR 1, 71 (Austl.) (Deane, J., and Toohey, J.); *Austl. Cap. Television Pty Ltd. v Commonwealth* (1992), 177 CLR 106, 137–38 (Austl.) [*ACTV*] (Mason, C.J.); *Theophanous v Herald & Weekly Times Ltd*. (1994), 182 CLR 104, 173 (Austl.) (Deane, J.); *McGinty v W. Austl*. (1996), 186 CLR 140, 199 (Austl.) (Toohey, J.). *See generally* George Winterton, *Popular Sovereignty and Constitutional Continuity*, 26 FED. L. REV. 1 (1998).

34. This is a distinctly U.S. view of the democratic relationship and, based on the history of the framing of the Australian Constitution, is not sustainable. *See, e.g.*, Leighton McDonald, *The Denizens of Democracy: The High Court and the "Free Speech" Cases*, 5 PUB. L. REV. 160 (1994); Paul Finn, *A Sovereign People, a Public Trust*, *in* ESSAYS ON LAW AND GOVERNMENT: PRINCIPLES AND VALUES 1 (Vol. 1, Paul Finn ed., 1995); Stellios, *Using Federalism*, *supra* note 26 (manuscript at 4, on file with author); Harley G.A. Wright, *Sovereignty of the People—The New Constitutional* Grundnorm, 26 FED. L. REV. 165, 168 (1998).

35. *ACTV*, 177 CLR at 227–35 (McHugh, J.), 158–59 (Brennan, J.). *See generally* Stone, *Limits*, *supra* note 29.

broad institutions required protection by way of a judicially enforced right.[36]

Therefore, for the early minority justices, it was not the broad concepts of representative and responsible government that gave rise to the implied right; rather, it was that the constitutional provisions establishing Parliament, the Executive and the referendum process, and any implied political free speech that would be necessarily linked to those provisions and what was necessary for the effective workings of those specific institutions.[37] Under this approach, the implied right is tied to identifiable textual provisions rather than a more general concept of representative government, and the manifestation of the institutions of representative and responsible government in written form was seen as sufficient to imply a judicially protected right contrary to the traditional constitutional theory of parliamentary sovereignty.[38]

B. Initial Interpretive Attack

The *ACTV* majority justices were strongly attacked by commentators for their unorthodox interpretive methodology.[39] At the center of the

36. *Id.*

37. For general analysis of the decisions, see Stone, *supra* note 29.

38. This is most explicitly recognized by Justice Brennan in *Nationwide News*, 177 CLR 1, 48. *See also id.* at 94 (Gaudron. J.); *ACTV* 177 CLR 106, 210–12 (Gaudron, J.); *Stephens v W. Austl. Newspapers Ltd.* (1994), 182 CLR 211, 232 (Austl.) (Mason, C.J., Toohey, J., and Gaudron, J.); *Cunliffe v Commonwealth* (1994), 182 CLR 272, 298 (Austl.) (Mason, C.J.), 336 (Deane, J.); *McGinty* (1996), 186 CLR at 198 (Toohey, J.), 216 (Gaudron, J.). See the discussion in Brian Galligan, *The Australian High Court's Role in Institutional Maintenance and Development*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES AND INSTITUTIONS 184, 200 (Charles Sampford & Kim Preston eds., 1996); Sir Anthony Mason, *The Interpretation of a Constitution in a Modern Liberal Democracy*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 13, 26–7 (Charles Sampford & Kim Preston eds., 1996); Cheryl Saunders, *Democracy: Representation and Participation*, *in* ESSAYS ON LAW AND GOVERNMENT: PRINCIPLES AND VALUES 51, 68–71 (Paul Finn ed., 1995), vol 1.

39. *See, e.g.*, NICHOLAS ARONEY, FREEDOM OF SPEECH IN THE CONSTITUTION (1998); Nicholas Aroney, *A Seductive Plausibility: Freedom of Speech in the Constitution*, 18 U. QLD. L. REV. 249 (1995) [hereinafter Aroney, *A Seductive Plausibility*]; Tom Campbell, *Democracy, Human Rights, and Positive Law*, 16 SYDNEY L. REV. 195, 204–07 (1994); Stephen Donaghue, *The Clamour of Silent Constitutional Principles*, 24 FED. L. REV. 133 (1996); Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, *in* FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW 150 (Geoffrey Lindell ed., 1994); Jeffrey Goldsworthy, *The High Court, Implied Rights, and Constitutional Change*, 39 QUADRANT 46 (1995); Jeffrey Goldsworthy, *Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue*, 23 MONASH U. L. REV. 362 (1997); Jeremy Kirk, *Constitutional Implications (I): Nature, Legitimacy, Classification, Examples*, 24 MELB. U. L. REV. 645 (2000); Jeremy Kirk, *Constitutional Implications (II): Doctrines of Equality and Democracy*, 25 MELB. U. L. REV. 24 (2001); Stone, *Limits*, *supra* note 29; Leslie Zines, *A Judicially Created Bill of Rights?*, 16 SYDNEY L. REV. 166, 177 (1994) [hereinafter Zines, *A Judicially Created Bill of Rights?*]. For an excellent overview of the theoretical aspects of the post-*ACTV* implication

interpretive disagreement was the majority justices' reliance on a contested method of constitutional interpretation. Indeed, interpretive disagreement is most likely where an implication rests upon unexpressed concepts or fundamental doctrines, at least with respect to implied fundamental rights. There were two principal criticisms, both of which struck at the core of the majority justices' approach. First, critics complained that the methodology employed to identify and ground the right was generally weak in its claim of necessity in the face of its reliance on tenuous historical premises.[40] Second, it was argued that the majority justices' approach, with its reliance on the broad concepts of representative and responsible government, was too imprecise to provide a limit on government.[41]

1. Interpretive Disagreement: Necessity and Interpretive Orthodoxy

The first argument against the majority justices' grounding centered not on the question of whether an implied freedom of political communication was necessary, but whether, in the face of interpretive orthodoxy, any implied freedom necessarily gave rise to a judicially enforceable right.[42] That is, although some critics may have accepted that some level of protection for political communication was necessary to ensure the efficient workings of the democratic system, the criticism was that the system of government entrenched in the Constitution did not give rise to such an implication.

This argument was a key basis for the resistance of the sole *ACTV* dissenting justice, Justice Dawson,[43] who argued that the framers of the

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debate, see Laurence Claus, *Implication and the Concept of a Constitution*, 69 AUST. L.J. 887 (1995).

40. *See, e.g.*, Aroney, *A Seductive Plausibility*, *supra* note 39. Campbell, *supra* note 39, at 204–07 (1994); Goldsworthy, *supra* note 39, at 150; Zines, *A Judicially Created Bill of Rights?*, *supra* note 39, at 177.

41. *See, e.g.*, Stone, *Limits*, *supra* note 29; Adrienne Stone, *Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication*, 25 MELB. U. L. REV. 374 (2001) [hereinafter Stone, *Rights*]; Adrienne Stone, *The Limits of Constitutional Text and Structure Revisited*, 28 U.N.S.W.L.J. 842 (2005) [hereinafter Stone, *Limits Revisited*] (written as a response to a discussion of her ideas by Justice McHugh in *Coleman v Power* (2004) 220 CLR 1 (Austl.)); Winterton, *supra* note 12, at 121.

42. The term "interpretive orthodoxy" was coined by Jeffrey Goldsworthy in *Australia: Devotion to Legalism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 106, 147 (Jeffrey Goldsworthy ed., 2006).

43. Notably, Justice Dawson did acknowledge that some level of protection for political speech was necessary, that is, Justice Dawson held that the terms of the Constitution enshrined a limited principle of representative government that ensured that elections to the Commonwealth Parliament involved a true choice by electors. *See Austl. Cap. Television Pty Ltd. v Commonwealth* (1992), 177 CLR 106, 177–202 (Austl.) [*ACTV*] (Dawson, J., dissenting).

Australian Constitution had placed trust in the elected representatives of the people to uphold the basic freedoms of a democratic society, and, therefore, a judicially implied and protected limitation on legislative power was not "necessary or obvious having regard to the express provisions of the Constitution itself."[44] Justice Dawson held that there exists "no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth."[45]

Justice Dawson and similarly minded commentators argue that the framers of the Australian Constitution relied on democratic processes and the common law to defend fundamental rights and liberties.[46] That the framers granted Parliament significant power to determine the form that representative democracy would take in Australia stands as, as argued by leading Australian constitutional scholar Jeffrey Goldsworthy, "[t]he 'lion in the path' of any argument that judicial enforcement of freedom of political speech is practically necessary for the effective operation of our representative democracy."[47] The critics' argument does not rely on a preferred political theory; while the arguments of some critics may have had as their motivation a preference that political rights not be enforced by a counter-majoritarian judiciary, the core claim of this attack is that the system of government entrenched in the text of the Constitution does not give rise to such an implication.[48] Justice Dawson, for example, specified that the implication was something "for which the Constitution did not provide."[49]

This interpretive disagreement, then, focuses on the majority justices' reinterpretation of the framers' organization of governmental structures in the Constitution. For the critics, the Australian Constitution simply did not

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44. *Theophanous v Herald & Weekly Times Ltd.* (1994), 182 CLR 104, 194 (Austl.) (Dawson, J., dissenting); *see also Cunliffe*, 182 CLR 272, 362 (Dawson, J., dissenting).

45. *See Austl. Cap. Television Pty Ltd. v Commonwealth* (1992), 177 CLR 106, 184 (Austl.) [*ACTV*] (Dawson, J., dissenting).

46. *See, e.g.*, *Cunliffe v Commonwealth* (1994), 182 CLR 272, 298 at 361 (Dawson, J., dissenting); *Austl. Broad. Corp. v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199, 331–32 (Austl.) (Callinan, J.); Jeffrey Goldsworthy, *The High Court, Implied Rights, and Constitutional Change*, 39 QUADRANT 46 (1995).

47. Jeffrey Goldsworthy, *Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue* 23 MONASH U. L. REV. 362, 372 (1997); *see also* Geoffrey Kennet, *Implied Rights*, *in* THE CAULDRON OF CONSTITUTIONAL CHANGE 89, 90 (Michael Coper & George Williams eds., 1997); Sir Anthony Mason, *The Interpretation of a Constitution in a Modern Liberal Democracy*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 13, 28 (Charles Sampford & Kim Preston eds., 1996).

48. *See also* Kennet, *supra* note 47, at 90; Mason, *supra* note 47, at 28.

49. *Cunliffe v Commonwealth* (1994) 182 CLR 272, 362 (Austl.) (Dawson, J., dissenting).

provide for judicially enforced rights protection; rather, it enshrined the political process as the final arbiter of fundamental rights disagreement.[50] Moreover, these critics argue that representative democracy clearly existed and was effectual for ninety years before a judicially enforceable freedom of communication was available to protect it.[51]

2. Interpretive Disagreement: Broad Concepts versus Textual Foundations

The second core criticism of the majority justices' interpretive methodology was that their reliance on general principles of representative and responsible government, independent of these institutions' constitutional textual foundations, was weak and imprecise.[52] By locating the freedom in implications drawn from the Constitution, the majority justices "sacrificed the clear textual basis said to be an essential requirement of judicial review."[53] That is, it was not the *per se* making of the implication that was the cause of disagreement, it was the lack of any textual basis, and consequently the inherent subjectivity of the implied freedom.[54] For Justice Dawson, this was another ground on which he objected to the majority justices' approach to the implication question. Justice Dawson disputed that any implications could be drawn from the general concepts of representative and responsible government that the majority discerned in the Constitution,[55] stating that implications "must

50. Goldsworthy, *supra* note 45, at 48–49. Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, *in* FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW 150, 179–80 (Geoffrey Lindell ed., 1994) [hereinafter Goldsworthy, *Implications*].

51. Goldsworthy, *supra* note 45, at 49; Goldsworthy, *Implications*, *supra* note 50, at 180 (Geoffrey Lindell ed., 1994); *see also Austl. Broad. Corp. v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199, 331 n.603, 337–38, (Austl.) (Callinan, J.); David Wood, *Judicial Invalidation of Legislation and Democratic Principles*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 169, 178 (Charles Sampford & Kim Preston eds., 1996).

52. *See* Goldsworthy, *Implications*, *supra* note 50, at 181; Stone, *Limits*, *supra* note 29.

53. Stephen Donaghue, *The Clamour of Silent Constitutional Principles*, 24 FED. L. REV. 133, 134 (1996). *See generally* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 374–78 (1992); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696, 698 (1976).

54. Although there was a period in Australian constitutional history where the High Court justices held the view that no implications could be made in interpreting the Constitution, implications have been a part of Australian constitutional interpretation since Federation. *See, e.g.*, West v. Comm'r of Taxation (NSW) (1937), 56 CLR 657 (Austl.); Stephen Donaghue, *The Clamour of Silent Constitutional Principles*, 24 FED. L. REV. 133, 134 (1996). For examples of implications drawn from federalism see *Melbourne Corp. v. Commonwealth* (1947) 74 CLR 31 (Austl.), and *Queensland Elect. Comm'n v. Commonwealth* (1985) 159 CLR 192 (Austl.).

55. *Austl. Cap. Television Pty Ltd. v Commonwealth* (1992), 177 CLR 106, 185 (Austl.) [*ACTV*].

appear from the terms of the instrument itself and not from extrinsic circumstances."[56]

The idea of an implication deriving from general principles was also disavowed by Justices McHugh and Brennan. Contrary to Justice Dawson, however, these justices were willing to recognize the existence of an implied right, so long as any implication was directly tied to what the textual provisions of the Constitution required.[57] Justice McHugh wrote:

> If this Court is to retain the confidence of the nation as the final arbiter of what the Constitution means, no interpretation of the Constitution by the Court can depart from the text of the Constitution and what is implied by the text and structure of the Constitution.[58]

C. Doctrinal Retreat in the Face of Interpretive Controversy

1. The Relentless Disagreement

As more cases came before the High Court, the interpretive divide between the justices became more marked. Despite a "vigorous theoretical and critical commentary,"[59] the majority justices persisted with their controversial interpretive approach, continuing to draw various implications from the broad concepts of representative and responsible government.[60] Those justices that preferred a methodology that grounded the implication in the text of the Constitution continued to argue that an interpretive theory drawing implications from general concepts was unsustainable.[61] This more conservative view of the appropriate

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56. *Id*. at 181 (Dawson, J.); *see also The King v Smithers* (1912) 16 CLR 99, 113 (Isaacs, J.); *Queensland Elect. Comm'n v Commonwealth* (1985) 159 CLR 192, 231 (Austl.) (Brennan, J.); *cf. Commonwealth v Kreglinger & Fernau Ltd.* (1926) 37 CLR 393, 411–412 (Austl.) (Isaacs, J.).

57. *Cunliffe v Commonwealth* (1993), 182 CLR 272, 395 (Austl.) (McHugh, J.); *Theophanous* (1994), 182 CLR 104, 195–204 (Austl.) (McHugh, J.); *McGinty* (1996), 186 CLR 140, 229–36 (Austl.) (McHugh, J.).

58. *Theophanous*, 182 CLR at 197 (McHugh, J.).

59. Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 106, 146 (Jeffrey Goldsworthy ed., 2006).

60. *See, e.g.*, *Cunliffe*,182 CLR 272, 298 (Mason, C.J.); *Theophanous*, 182 CLR 104, 120–21 (Mason, C.J., Toohey, J., and Gaudron, J.), 147 (Brennan, J.), 163, 180 (Deane, J.); *Stephens v W. Austl. Newspapers Ltd.* (1994), 182 CLR 211, 232 (Austl.) (Mason, C.J., Toohey, J., and Gaudron, J.); *Muldowney v S. Austl.* (1996), 186 CLR 352, 373 (Austl.) (Toohey, J.).

61. *McGinty v W. Austl.* (1996) 186 CLR 140, 168–170 (Austl.) (Brennan, C.J.); *id.* at 182–84 (Dawson, J.), 199 (Toohey, J.), 231–32, 235–36 (McHugh, J.), 291 (Gummow, J.), *cf. id.* at 216 (Gaudron, J.). On the importance of *McGinty*, see *Lange v Austl. Broad. Corp.* (1997), 189 CLR 520, 566–67 (Austl.) (Brennan, C.J., Dawson, J., Toohey, J., Gaudron, J., McHugh, J., Gummow, J., Kirby,

interpretive theory in the Australian constitutional context led Justice McHugh to dissent in the next major political communication cases, *Theophanous* and its companion case *Stephens v. Western Australian Newspapers Ltd*.[62] In those cases, Justice McHugh strengthened his attack on the majority justices' approach, arguing that by treating representative democracy as part of the Constitution independent of specific provisions, the majority justices "unintentionally depart[ed] from the method of constitutional interpretation that has existed in this country since the time of the *Engineers' Case* [in 1920]."[63]

Following the departures of three of the majority justices, Chief Justice Mason and Justices Dean and Toohey, "a more conservative mood began to take hold in the Court."[64] Conscious of the broad criticism of the interpretive theory of the implied freedom,[65] the textual (and less controversial) approach to the implications question began to influence the Court. The early shift can be seen in the 1996 case of *McGinty v. Western Australia*,[66] where the former minority justices suddenly found themselves in the majority. In a number of individual judgments, the "new majority" rejected the majority justices' *ACTV* approach that the Constitution contained a "free standing" implication of representative government from which rights could be drawn. While holding that some form of implied freedom of political communication existed in the Constitution, they instead argued, as Justice McHugh had consistently held, that any implied

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J.); David Wiseman, *Implied Political Rights and Freedoms*, *in* FEDERAL CONSTITUTIONAL LAW: A CONTEMPORARY VIEW 346 (Melissa Castan & Sarah Joseph eds., 2001). On the influence of Justice McHugh on the interpretive direction of the implied freedom, see Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. R 724, 748 n.113 (2003), and Stone, *Limits*, *supra* note 29, at 673.

62. *Theophanous*, 182 CLR at 104; *Stephens v W. Austl. Newspapers Ltd.* (1994), 182 CLR 211 (Austl.).

63. *Theophanous*, 182 CLR 202. The reference to the "*Engineers' Case*" refers to the 1920 case of *Amalgamated Soc'y of Eng'rs v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129 (Austl.), in which the Court asserted the dominance of textualism in constitutional interpretation, stating:

> It is . . . the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia . . . and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed.

Id. at 142.

64. *See* Stone, *Limits*, *supra* note 29, at 673.

65. *McGinty v W. Austl.* (1996), 186 CLR 140, 168–70 (Austl.) (Brennan, C.J.), 182–184 (Dawson, J.), 199 (Toohey, J.), 231–32, 235–36 (McHugh, J.), 291 (Gummow, J.); Stone, *supra* note 29, at 673.

66. *McGinty*, 186 CLR at 140 (Austl.) (rejecting the argument that the principle of representative democracy implied a right of equal or equal-sized electorates for the Western Australian State Parliament).

right deriving from the concept of representative government must be directly linked to the "text" or the "structure" of the Constitution.[67] *McGinty* then suggested that a majority of the new Court were unwilling to ground the implied right in broad concepts unrelated to the text or the clear intent of the framers.[68]

2. Lange v. Australian Broadcasting Corporation*: The Ascendancy of Justice McHugh's Text and Structure Approach*

In an attempt to resolve the interpretive disagreements about the justification for the implied freedom, the High Court delivered a unanimous judgment in the seminal 1997 case of *Lange v. Australian Broadcasting Corp*.[69] The Court rejected the majority justices' revisionist view of the original intentions of the framers regarding rights protection, and in *Lange*, "there [is] no appeal to the ultimate sovereignty of the Australian people" in grounding the implied freedom.[70] The Court instead held that the implied freedom was to be drawn from the text and structure of the Constitution, not "vague theories of representative democracy said to underlie the constitutional system."[71] For the Court,

> the Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it . . . . [T]he 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?"[72]

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67. *Id.* at 171 (Brennan, C.J.) ("The principle of representative democracy . . . can be no wider than—for it is synonymous with—what inheres in the text of the Constitution or in its structure."), 180–83 (Dawson, J.), 233 (McHugh, J.), 281–83 (Gummow, J.).

68. George Winterton, *Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 121 (Charles Sampford & Kim Preston eds., 1996).

69. *Lange v. Austl. Broad. Corp.* (1997) 189 CLR 520 (Austl.).

70. Harley G.A. Wright, *Sovereignty of the People—The New Constitutional Grundnorm*, 26 FED. L. REV. 165, 175 (1998); *Lange*, 189 CLR at 557; *see also* Andrew Fraser, *False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution*, 16 SYDNEY L. REV. 213, 222–24 (1994); Stellios, *Using Federalism*, *supra* note 26, at 243 (2007); George Winterton, *Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 121, 135–42 (Charles Sampford & Kim Preston eds., 1996).

71. Stellios, *Using Federalism*, *supra* note 26, at 243; *see also Lange*, 189 CLR at 557–59.

72. *Lange*, 189 CLR at 566–67, 557.

Having eschewed broad principles in favor of text and structure, the *Lange* Court specified that there were three elements of representative and responsible government detectable in the Constitution: (1) sections 7 and 24, directing that members of Parliament be chosen "directly by the people" at election;[73] (2) the establishment of the relationship between Parliament and the Executive;[74] and (3) section 128 of the Constitution, specifying the procedure for amendment of the Constitution by referendum.[75] For the *Lange* Court, the implied freedom of political communication exists only so far as necessary to enable these constitutional institutions to function. Consequently, discussion about government and political matters must relate to the choice for electors at federal elections, amendment of the Constitution, or the administration of the federal government.[76]

D. The Persistence of Interpretive Disagreement: The Failure of Lange *as an Interpretive Solution*

The sustained interpretive disagreement regarding the foundation of the implied freedom forced the High Court's interpretive retreat into text and structure. By emphasizing that the implied freedom is to be interpreted only with reference to the text and structure of the Constitution, and without any reference to underlying theories or broad principles, the Court has consciously attempted to both suppress interpretive disagreement within the Court and to answer scholarly criticisms of the implication's

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73. *Id.* at 538. The Court relied on Section 1 (vesting Commonwealth legislative power to the Parliament), Sections 8 and 30 (electors for the Senate and House of Representatives, respectively, to vote only once), Section 25 (persons of any race disqualified from voting at elections not to be counted in determining Section 24 electorates), Section 28 (duration of the House of Representatives), and section 13 (setting the longest term for Senators at six years). AUSTRALIAN CONSTITUTION S 1, 8, 13, 24, 25, 28, 30.

74. *Lange*, 189 CLR at 558–59 (Austl.). The Court relied on Section 6 (requiring Parliament to sit at least once a year), Section 62 (executive power of the Queen to be exercised on the advice of ministers in cabinet), Section 49 (providing authority for each House of Parliament to summon witnesses or require document production), and Section 83 (requiring that money be appropriated from the treasury in accordance with the law). AUSTRALIAN CONSTITUTION S 6, 49, 62, 83.

75. *Lange v. Austl. Broad. Corp.* (1997), 189 CLR 520, 559 (Austl.).

76. *Id.* at 560–61. Although, as with any constitutional right, the protection accorded to these matters is not absolute and *Lange* specified a two-stage test by which the impugned law would be judged. *Id.* at 567. That is, the question of what kinds of communications are protected by the implied freedom is only the first stage of the enquiry. In the constitutional context, if it can be shown that the law said to burden the implied freedom is "reasonably appropriate and adapted to serve a legitimate end," *Coleman v Power* (2004), 220 CLR 1, 13 (Austl.), the communication will not be protected by the implied freedom. For discussion of the "reasonably appropriate and adapted" test, see Jeremy Kirk, *Constitutional Guarantees, Characterisation and the Concept of Proportionality*, 21 MELB. U. L. REV. 1 (1997); Stone, *Limits*, *supra* note 29.

textual foundations.[77] To a limited extent the Court's move was successful; the result of *Lange* is that by weight of the authority of the decision and its persistent application, the implied freedom now appears to be relatively secure from the possibility of reconsideration.[78] However, the controversy and misgivings surrounding the initial implication and its textual and historical foundations have had ongoing effects on the content of the implied freedom. Heightened judicial self-consciousness over the legitimacy of the foundations of the implied freedom have produced marked judicial over-confidence in the potential of "text and structure," resulting in a paucity of interpretive resources and, consequently, a number of hesitations and uncertainties in the development of the right. The initial interpretive disagreement over the foundation of the right, and the Court's subsequent retreat into the "safe harbour [sic] of constitutional text and structure,"[79] has had an ongoing impact on the development of the implied freedom despite the unanimous statement in *Lange*.

1. Text and Structure: Self-Imposed Methodological Limit

The unanimous approval in *Lange* that constitutional interpretations are founded in its "text and structure" as well as the resulting dispersal of judicial and scholarly disquiet over the foundations of the implied freedom has resulted in misplaced confidence in the determinative power of constitutional text and structure by the justices of the High Court.[80] To some degree this is understandable; the initial interpretive disagreement has left the justices wary about any reflection on the principles guiding the implied freedom, as the inevitable consequence of any such reflection would force the justices to engage with the foundations of the implication itself. Reliance on text in constitutional interpretation is a powerful form of methodological argument, and the justices seem to believe that text

77. Stone, *Interpretive Disagreement*, *supra* note 15, at 43; Adrienne Stone & Simon Evans, *Freedom of Speech and Insult in the High Court of Australia*, 4 INT'L J. CONST. LAW 677, 678 (2006) [hereinafter Stone & Evans, *Freedom of Speech and Insult*]. For an argument that the High Court is peculiarly responsive to academic criticism, see Michael Coper, *The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?*, 16 SYDNEY L. REV. 185, 194 (1994).

78. Excluding the new appointees, Justices Crennan and Keifel, Justice Callinan is alone in expressing doubts as to the legitimacy of the implication. *See*, *e.g.*, *Coleman*, 220 CLR at 29–30 (Gleeson, C.J.), 43–44 (McHugh, J.), 78 (Gummow, J., and Hayne, J.), 82 (Kirby, J.), 108–09, 113–14 (Callinan, J.), 120 (Heydon, J,); Mulholland v. Austl. Electoral Comm'n (2004), 220 CLR 181, 200–01 (Austl.) (Gleeson, C.J.), 217–18 (McHugh, J.), 244–45 (Gummow, J., and Hayne, J.), 293–94 (Callinan, J.), 305–06 (Heydon, J.).

79. Stone, *Limits Revisited*, *supra* note 41, at 845.

80. Stone & Evans, *Freedom of Speech and Insult*, *supra* note 77, at 687–88 (2006).

alone is sufficient to quell any interpretive disquiet regarding the implied freedom.

The High Court's "text alone" approach is evident in a number of recent implied freedom cases where a majority of justices have been content to state that the text supports or does not support a particular argument without detailed consideration. This is the approach that five of the seven justices took in the 2004 case of *Coleman v. Power*,[81] where the constitutional validity of a Queensland state law prohibiting insulting language was challenged. The case raised the significant and unresolved question of whether, pursuant to the implied freedom, insulting words could constitute communications about government or political matters.[82] While the majority stated that the implied freedom was infringed, their reasoning was limited to broad statements as to the political nature of the insulting words in question. Chief Justice Gleeson, for example, stated, "[l]et it be accepted that his conduct was, in the broadest sense, 'political'."[83] Justice McHugh specified that insults are a "legitimate part of the political discussion protected by the Constitution."[84] None of the justices engaged with the broader relationship between insult and political communication, nor questioned whether, for example, insult can be prohibited to prevent intimidation or to promote civility.

The Court's most recent decision on the implied freedom, *APLA Ltd v. Legal Services Commissioner (NSW)*,[85] evidences a similar confidence that the terms of the Constitution can be mechanically applied. *APLA* concerned a challenge to state regulations that prohibited advertising of legal services for personal injury matters; the plaintiffs claimed that this prohibition on lawyer-client communications was a government or political matter and therefore infringed the implied freedom.[86] The judicial consideration of this important claim was cursory at best. In fact, Justice McHugh was the only justice to give sustained attention to the determinative question of whether lawyer-client communications can be characterized as a government or political matter.[87] The approach of the other justices mirrors that of Chief Justice Gleeson and Justice Heydon

81. *Coleman v Power* (2004), 220 CLR 1 (Austl.).
82. *Id.*
83. *Coleman*, 220 CLR at 30 (Gleeson, C.J.).
84. *Id.* at 54 (McHugh, J.)
85. *APLA Ltd. v Legal Servs. Comm'r (NSW)* [2005] 44 HCA 322 (Austl.) [*APLA*].
86. *Id.* ¶ 14 (Gleeson, C.J., and Heydon, J.).
87. *Id.* ¶¶ 60–71 (McHugh, J.); *cf. Id.* ¶¶ 217–219 (Gummow, J.), ¶ 342 (Kirby, J.), ¶¶ 377–382 (Hayne, J.), ¶¶ 453, 457–461 (Callinan, J.). *See generally* Zoë Guest, *The Judiciary and the Freedom of Political Communication: The Protection of Judgment on Australia's Judges*, 17 PUB. L. REV. 5 (2006).

who in their joint judgment simply asserted that "[r]estrictions on the marketing of legal services are not incompatible with a system of representative or responsible government."[88] In support of this claim, the justices stated that were any incompatibility to exist, it "has passed unnoticed for most of the time since Federation."[89]

2. The Continuing Consequences of Interpretive Disagreement

The intersection of judicial self-consciousness in the face of interpretive disagreement and judicial over-confidence in the certainty of text and structure as a comprehensive interpretive methodology has had significant consequences.[90] The Court's self-imposed methodological limitation in relation to the implied freedom has resulted in a paucity of interpretive resources and, consequently, difficulties in the development of the right. That is, although text and structure may answer doubts about the foundation of the implied freedom, as Adrienne Stone has convincingly argued, it is not possible to understand the extent of the implied freedom without reference to some ideas and values external to the text of the Constitution.[91] By responding to the objections to *ACTV* (i.e., that general principles should not be employed as a basis for an implied right and foreswearing recourse to any extra-constitutional principles), the Court has "deprived itself of the tools it needs to develop the freedom of political communication in a coherent manner."[92]

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88. *APLA*, 44 HCA 322, ¶ 29 (Gleeson, C.J., and Heydon, J.).

89. *Id*. The irony of this justification is that this remains the key argument against the initial judicial implication and enforcement of the implied freedom.

90. Dan Meagher, *What is 'Political Communication'? The Rationale and Scope of the Implied Freedom of Political Communication*, 28 MELB. U. L. REV. 438 (2004) [hereinafter Meagher, *What is 'Political Communication'?*]; Zoë Guest, *The Judiciary and the Freedom of Political Communication: The Protection of Judgment on Australia's Judges*, 17 PUB. L. REV. 5 (2006); Stellios, *Using Federalism*, *supra* note 26; Stone, *Limits*, *supra* note 29; Stone, *Rights*, *supra* note 41; Stone, *Interpretive Disagreement*, *supra* note 15.

91. Stone, *Interpretive Disagreement*, *supra* note 15, at 43; *see also* Deborah Cass, *Through the Looking Glass: The High Court and the Right to Speech*, 4 PUB. L. REV. 229, 246 (1994) (arguing that *ACTV* failed to articulate a theory of free speech and that such a theory was necessary for future development of the implied freedom).

92. Stone, *Interpretive Disagreement*, *supra* note 15. Indeed, the Court must inevitably draw on some extra-constitutional principles, and attempting to suppress their influence merely prevents the full rationalization of explication of its reasoning. On this point, see, for example, Brian Horrigan, *Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 31, 35–36 (Charles Sampford & Kim Preston eds., 1996); Jeremy Kirk, *Constitutional Implications (II): Doctrines of Equality and Democracy*, 25 MELB. U. L. REV. 24, 52 (2001); Stone & Evans, *Freedom of Speech and Insult*, *supra* note 77.

The difficulties of such a determinedly anti-theoretical approach have been demonstrated in a number of areas of the Court's implied freedom jurisprudence, but three difficulties have been particularly evident post-*Lange:* the continued problem of justifying a judicially enforceable right, the development of a standard of review, and the development of the scope of the implied freedom.

a. Existence of a Judicially Enforceable "Right"

Despite successfully anchoring the implied freedom in the text and structure of the Constitution, disagreement remains about the third step of the *Lange* approach: the need for a judicially enforceable limitation on legislative and executive power to protect communication required for those institutions to function effectively.[93] Reliance on constitutional text fails to answer the originalist argument made against the implication: that the constitutional framers determined that rights protection was best left to the legislative branch, and any implication that imposes a judicially enforceable limitation on legislative and executive power is contrary to interpretive orthodoxy.[94]

Constitutional text simply cannot answer this critique; the implied freedom lacks specific textual recognition, and the text and structure approach of *Lange* does nothing to address the incompatibility of the implied freedom with orthodox understandings of the democratic arrangements under the Australian Constitution.

b. Standards of Review

A second uncertainty under the *Lange* doctrine regards the scope of protection provided to any communications covered by the implied freedom. Adrienne Stone has provided an extensive examination of this issue, arguing that the Court's exclusive reliance on text and structure in defining the implied freedom is unsustainable because, at some point, the Court must chose a standard of review when applying the *Lange* test.[95] As Stone argues, any choice between, for example, a proportionality test or a U.S.-style strict scrutiny test necessarily depends on extra-constitutional values and ideas, such as the level of deference given to legislative

93. *See* Stellios, *Using Federalism*, *supra* note 26, at 243–45.

94. Jeffrey Goldsworthy, *The High Court, Implied Rights, and Constitutional Change*, 39 QUADRANT 46 (1995).

95. *See* Stone, *Limits*, *supra* note 29, at 696–99.

judgments and the rationale of the implied freedom itself—the very values and ideals which the text and structure approach eschews.[96]

Although *Lange* appeared to identify a test in the unanimous judgment, differences immediately arose in the subsequent case of *Levy v. Victoria*.[97] These differences have carried into the recent decisions in *Coleman* and *APLA*, with significant variation in the various justices' formulation of the test[98] and in the qualitative inquiry undertaken.[99] As Stone states,

> [d]eciding on an answer to the standard of review question will require that the High Court depart from its commitment to text . . . and develop the freedom of political communication by reference to some values or ideas that are not, at least according to the High Court's avowed interpretive method, readily identifiable in the *Constitution*.[100]

c. Coverage of the Implied Freedom

The Court's dogged avoidance of extra-constitutional values and the adherence to text and structure has also had adverse consequences for the coverage of the implied freedom. Following *Lange*, "political communication" for the purposes of the implied freedom is communication that demonstrates a "nexus" between the communication

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96. Stone, *Limits*, *supra* note 29; Stone, *Limits Revisited*, *supra* note 41. *See also* Meagher, *What is 'Political Communication'?*, *supra* note 103.

97. *Levy v Victoria* (1997), 189 CLR 579 (Austl.). *See* Stone, *Limits*, *supra* note 29, at 675–87.

98. For example, the *Lange* test was slightly modified by the majority in *Coleman*. *Coleman v Power* (2004) 220 CLR 1, 30 (Austl.) (Gleeson, C.J.), 57, 61–62 (McHugh, J.). However, that modification was not applied by the other three judges in the subsequent case of *APLA*. *APLA Ltd. v Legal Servs. Comm'r (NSW)* [2005] 44 HCA 322 (Austl.) [*APLA*]. Additionally, some judges seem to prefer a form of words that differs from that adopted in *Lange*, as evidenced in argument during the hearing of *APLA*. *See* Transcript of Proceedings, *APLA* (High Court of Australia, 6 October 2004).

99. *See, e.g.*, *Coleman*, 220 CLR 1 (Austl). In *Coleman*, Chief Justice Gleeson stated that "the balance struck by the [legislature] is *not unusual*, and I am *unable to conclude* that the legislation, in its application to this case, *is not suitable* to the end of maintaining public order in a manner consistent with an appropriate balance of all the various rights, freedoms, and interests, which require consideration." *Id.* at 32 (emphasis added). Justice Callinan stated that a preferable formulation of the requirement that the legislation in question be "reasonably appropriate and adapted to achieving a legitimate object or end" was whether it was "a *reasonable implementation* of a legitimate object." *Id.* at 110 (emphasis added). Justice Heydon noted that "[t]he question is not 'Is this provision the best?', but 'Is this provision a *reasonably adequate attempt* at solving the problem?'" *Id.* at 124 (emphasis added). While purporting to apply the *Lange* test, these formulations of the inquiry exhibit a greater willingness to defer to legislative judgments about the regulation of political communication. *See also* Stellios, *Using Federalism*, *supra* note 26; Stone & Evans, *Freedom of Speech and Insult*, *supra* note 77, at 679–80.

100. *See* Stone, *Limits*, *supra* note 29, at 671.

and the choice for electors at federal elections, amendment of the Constitution, or the administration of the federal government.[101] However, while it may seem that this method provides a tightly constrained category of communication that counts as political, the text of the Constitution in fact provides no guidance in this regard. What is relevantly "political," then, will necessarily be guided by an individual justice's views as to the rationale of the implied freedom and whether or not that rationale is expressly articulated. That is, whether a communication is considered "political" and thus protected depends upon its relevance to the institution of representative government in question. As James Stellios has argued, that question is one that necessarily depends upon justices' differing conceptions of "how communication informs the political process."[102]

The difficulty with purporting to rely solely on text, when that text is too bare to provide clear guidance in any case, is demonstrated by the limited scope of the existing law on the scope of the "political communication." Since *Lange*, the Court has not provided an authoritative statement on what constitutes "political communication," however, its decisions indicate a narrow definition, extending the coverage of implied freedom only to explicit discussion of both actual and proposed federal government and opposition policies as well as the conduct of the federal Parliament's members and candidates.[103]

However, many other issues may be relevant to electoral choice, for example: public issues not currently on the legislative agenda (i.e., failure to adopt a policy);[104] issues that are not themselves political but that may reveal parliamentary attitudes towards particular religious, sociological, moral, or philosophical debates;[105] and issues relevant to state elections. Considering the high level of integration between the levels of government, it is often difficult to distinguish the level at which a "political matter" occurs.[106] The Court's determination to refer only to the terms of the Constitution, then, provides no principled limits on what constitutes "political communication" and provides little or no guidance for the resolution of any given case.

The resulting artificiality of the text and structure approach is best demonstrated by the recent decision in *APLA*.[107] As noted above, *APLA*

101. *Lange v Austl. Broad. Corp.* (1997), 189 CLR 520, 560–61 (Opinion of the Court).
102. Stellios, *Using Federalism*, *supra* note 26, 262 (2007).
103. Dan Meagher, *What is 'Political Communication'?*, *supra* note 103.
104. *See* Stone, *Limits*, *supra* note 29.
105. *Id.*
106. *Id.*
107. *See supra* note 98 and accompanying text.

involved the argument that, among other things, restrictions on the advertising of legal services relating to entitlements arising out of personal injuries infringed the implied freedom. Justice McHugh considered whether communications regarding judicial officers generally fell within the ambit of "government and political matters," and held that communications concerning the conduct of judges and the reasoning in or result of cases do not fall within the scope of the implied freedom. His Honor stated that "[c]ourts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense . . . . Nor are they communications concerning 'political' matters in the sense referred to in *Lange*."[108] This surely cannot be correct; far beyond the appointment and removal of judges[109] the judiciary is, at the most fundamental level, inextricably linked to the constitutional conceptions of representative and responsible government.[110]

E. Preliminary Conclusions

Despite the unanimous decision in *Lange* grounding the implied freedom in the text and structure of the Australian Constitution, the doctrine remains weighted with uncertainties. As this Part argues, these uncertainties are a direct result of the initial interpretive disagreement surrounding the foundations of the implied freedom and the Court's attempt to assuage the judicial and scholarly criticism over the initial implication by more firmly grounding the implied freedom in the text of the Constitution. However, the Court's insistence that text *alone* is a sufficient basis for the implied freedom has arguably impeded the development of the doctrine, as text alone cannot sustain the incremental development of the implied freedom when the Court is faced with novel situations.

In seeking to address the interpretive disagreement over the initial implication, then, the High Court has backed itself into an interpretive

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108. *APLA Ltd. v Legal Servs. Comm'r* (NSW) [2005] 44 HCA 322, ¶ 66 (Austl.) [*APLA*] (McHugh, J.).

109. Acknowledging that, Justice McHugh in APLA does recognize a broader category of communications that could be covered by the implied freedom. *APLA*, 44 HCA 322, ¶ 68 (McHugh, J.).

110. For a lengthy discussion, see Zoë Guest, *The Judiciary and the Freedom of Political Communication: The Protection of Judgment on Australia's Judges*, 17 PUB. L. REV. 5 (2006); *see also* Justice Ronald Sackville, Speech delivered at the 13th Lucinda Lecture, Monash University, How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary (Aug. 29, 2005).

corner where it needs to employ extra-constitutional resources to ensure a principled development of the implied freedom; however, the interpretive approach in *Lange* forswears that approach. The Court is thus left in the invidious position of being forced by necessity to develop the implied freedom while being unable to justify why it is doing so.

III. THE UNITED STATES IMPLIED RIGHT TO AN ABORTION

As with the Australian implied freedom of political communication, a woman's right to an abortion has been implied from the U.S. Constitution by the Supreme Court.[111] Like the Australian implied freedom, the implied right to an abortion has been the subject of intense disagreement as to the legitimacy of the majority's interpretive methodology in recognizing the initial implication.[112] Of course, unlike the interpretive debate over Australian implied freedom, the question of interpretive legitimacy in relation to *Roe* is largely fueled by extra-legal factors, namely intensely held views on the moral status of the fetus and the right of women to reproductive autonomy.[113] The moral character of the implied rights debate in the United States has energized significant political debate over the implied right and a natural reaction to the claim in this Article, that the Supreme Court's revisions in relation to the implied right to an abortion stem directly from the interpretive controversy about *Roe*, is that the interpretive arguments merely function as a cipher for these external, value-laden concerns.

However, this critique has its limits: scholars *have* strongly criticized the interpretive approach in *Roe*,[114] and further, it is the interpretive controversy that provides the opponents to the implied right with a potent,

111. Roe v. Wade, 410 U.S. 113 (1973).

112. *See* discussion *infra* Part III.B.1.

113. On the extra-legal factors founding disagreement about *Roe* even within the Supreme Court, see Jenny R. Kramer, *Compliance with Supreme Court Jurisprudence in the Post* Roe *and* Casey *Era*, 11 SETON HALL CONST. L.J. 529, 567 (2001). *See also* Geoffrey Stone, UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG (Apr. 20, 2007, 15:01 CT), http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html#more.

114. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1984–1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992); Tyler Baker, Roe *and* Paris*: Does Privacy Have a Principle?* 26 STAN. L. REV. 1161 (1974); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Richard Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973); Richard Gregory Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law*, 77 MICH. L. REV. 1724 (1979); Lawrence Tribe, *The Supreme Court 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). *Cf.* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. CHI. L. REV. 381 (1992).

respectable, and ostensibly apolitical constitutional argument.[115] For example, Justice Scalia, a leading critic of *Roe*, openly values the right of the unborn fetus (at any stage of *in utero* development) over the rights of the mother,[116] yet his attack on *Roe* is not grounded in religion or morality, but rather in the interpretive techniques that the *Roe* majority did (or did not) employ in grounding the implied right.[117] Whether or not the interpretive disagreement is informed by other concerns, then, it is the interpretive criticisms that the U.S. Supreme Court, like Australia's High Court, has purported to address.[118]

While the constitutional contexts of Australia and the United States are clearly different,[119] with rights occupying a far stronger constitutional position in the latter,[120] the distortions in the development of the Australian implied freedom, namely the influence of judicial self-consciousness about the vulnerability of the right and the lack of contextual support for doctrinal development, are also evident in the development of the U.S. implied abortion right. As with the implied freedom, the interpretive disagreement over the implied right centers on the privileging of the interpretive methodologies of textualism and originalism, and in both legal cultures, it is these arguments that largely fuel the interpretive disagreement over implied rights.[121]

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115. David Strauss, *Why Was* Lochner *Wrong?* (2003) 70 U. CHI. L. REV. 373, 380. At a more abstract level, see Bobbitt, CONSTITUTIONAL INTERPRETATION 22, 41 (1991).

116. Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).

117. Justice Scalia argues that abortion is not a liberty protected by the Constitution "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." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Thomas, J.).

118. Admittedly, this is a contentious claim. On the moral and religious motivations of the judicial decisions regarding abortion, see, for example, Geoffrey Stone, UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG (Apr. 20, 2007, 15:01 CT), http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html#more.

119. Although, note that the two systems are often compared. *See, e.g.*, Michael Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 842–43 (2004); Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724, 746–47, 757, 768 (2003). For an example of comparative work involving free speech, see, for example, William G. Buss, *Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication*, 34 FED. L. REV. 421 (2006); Gerald Rosenberg & John Williams, *Do Not Go Gently into that Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439 (1997).

120. The Australian Constitution is "in textual and historical terms . . . inhospitable to rights." Stone, *Interpretive Disagreement*, *supra* note 15, at 46 (2005); *see also* Sir Anthony Mason, *The Interpretation of a Constitution in a Modern Liberal Democracy*, *in* INTERPRETING CONSTITUTIONS: THEORIES, PRINCIPLES, AND INSTITUTIONS 13, 23 (Charles Sampford & Kim Preston eds., 1996).

121. *See* discussion Part III.B.1; Michael Dorf, *Interpretive Holism and the Structural Method, or*

A. Recognizing the Implied Right

The implied right to an abortion was first recognized in the 1973 case *Roe v. Wade* and its companion case of *Doe v. Bolton*. Importantly, however, the foundation for the *Roe* decision was established in the 1965 decision of *Griswold v. Connecticut*, where the Supreme Court held that Connecticut legislative restrictions on the use of contraceptives by married couples violated a "right of privacy older than the Bill of Rights."[122] The Court held that various provisions of the Constitution, including the First, Fourth, Fifth, and Ninth Amendments, created "zones of privacy,"[123] and privacy was a "fundamental personal right."[124] In its decision in *Eisenstadt v. Baird*[125] seven years later, the Court extended this holding to unmarried couples, stating that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[126]

1. The Majority Decision in Roe

A seven justice majority, Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell,[127] noted that the Court's previous decisions implying a right of privacy from the provisions of the Constitution protected "fundamental" rights "implicit in the concept of ordered liberty."[128] Undertaking a detailed examination of the history of

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How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity, 92 GEO. L.J. 833, 839, 843 (2004); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 878 (1996); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 335–36 (1998). See also the comments of Justice Scalia in *Stenberg v. Carhart*, 530 U.S. 918, 956 (2000) (Scalia, J., dissenting).

122. Griswold v. Connecticut, 381 U.S. 479, 486 (1965). The *Griswold* opinion noted a number of earlier cases where the Court had protected privacy and autonomy in family matters, including, for example, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court had also employed the Fourteenth Amendment to invalidate laws relating to marriage in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

123. Griswold, 381 U.S. at 484.

124. *Id*. at 494.

125. Eisenstadt v. Baird, 405 U.S. 438 (1972).

126. *Id*. at 453 (emphasis in original).

127. The opinion of the Court was authored by Justice Blackmun. Roe v. Wade, 410 U.S. 113, 116 (1973).

128. *Id*. at 152 (referring to the privacy right as derived in *Griswold* and *Eisenstadt*) (internal citations omitted).

abortion laws, the Court argued that restrictive abortion laws were a relatively recent phenomenon introduced not to save potential lives, but to protect women's health, an interest that "has largely disappeared."[129] For the Court, the physical and psychological burdens of pregnancy are so great that the right of privacy, whether founded in the concept of personal liberty in the Due Process Clause of the Fourteenth Amendment, or the Ninth Amendment, which reserves rights to the people, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[130]

The Court held that while the right of personal privacy protecting a woman's right to an abortion is fundamental, this right is not absolute,[131] and access to abortion can be restricted where there is a compelling state interest.[132] Although declining to make a ruling on when life begins,[133] or find that a fetus was a "person" for constitutional purposes,[134] the Court held that the state has interests in the following: first, the health of the mother, which becomes compelling in the second trimester (until this point, the Court held, an abortion was no more dangerous than carrying a pregnancy to term);[135] and second, in the preservation of potential life, which the Court held only becomes compelling at the end of second trimester, when the fetus reaches viability—at which point the Court determined the fetus has the "capability of a meaningful life outside the mother's womb."[136]

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129. Roe, 410 U.S. at 149, 135–36.

130. *Id.* at 153. On the foundations of the right to privacy, see *supra* notes 122–24 and accompanying text. *See also* Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. R. 445 (1983); Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417 (1976); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744–52 (1989). Note that Justice Douglas, in his concurring opinion, strongly resisted the idea that the Ninth Amendment grounded any enforceable rights, indicating that the implication in *Roe* rests in the Fourteenth Amendment Due Process Clause.

131. Roe, 410 U.S. at 153, 155. This is the case with most constitutional rights: for the Australian implied freedom see, for example, the comments in *Austl. Cap. Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106, 142 (Austl.) (Mason, C.J.), 159 (Brennan, J.), 169 (Deane, J., and Toohey, J.), 217 (Gaudron, J.), 234 (McHugh, J.); *Nationwide News* (1992), 177 CLR 1, 76 (Austl.) (Deane, J., and Toohey, J.).

132. Roe, 410 U.S. at 155. On the "compelling interest" test, see, for example, the comments in *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); Roe, 410 U.S. at 173 (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 223 (1973) (Rehnquist, J., dissenting).

133. Roe v. Wade, 410 U.S. 113, 159 (1973).

134. *Id*. at 157–58.

135. *Id*. at 163.

136. *Id*.

B. Interpretive Disagreement

Roe remains one of the most criticized decisions of the Supreme Court,[137] with the majority justices attacked for both the interpretive methodology they employed and the moral consequences of the decision. As discussed in this section, three broad categories of interpretive criticism were raised against the majority decision in *Roe*. First, critics argued that the implication was not grounded in the interpretive orthodoxy of constitutional text and history. Second, that there was a preferable locale, either the Equal Protection Clause or the First Amendment, for the grounding of the right to an abortion. Third, assuming that the right to an abortion was a sound implication to draw from the Constitution, the presumption of judicial protection, rather than legislative protection, was ill-conceived.[138]

1. Interpretive Disagreement: Implications and Interpretive Orthodoxy

The key criticism of the *Roe* decision is that it is not grounded in interpretive orthodoxy. This critique generally manifests in one of three forms.

a. Objection to Implications Generally

The first form of the disagreement with *Roe* that relies on interpretive orthodoxy is an objection to any theory of implied rights more generally. That is, these commentators object not only to the specific implication in *Roe* but also to the more general theory of drawing rights-based implications from a written constitution. This objection argues generally that the Constitution enumerates a series of rights, and there is no authority for judges to stray beyond these expressly articulated rights; to allow this would be to "abandon all hope of limiting judicial power."[139] This

137. *See supra* notes 113–14 and accompanying text; *see also*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 659 (1993). On the backlash created by *Roe*, see Robert Post & Reva Seigel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R-C.L. L. REV. 373 (2007).

138. Of course, there is significant overlap between these arguments.

139. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 386 (1992) (commenting in the context of criticizing this view). An express right would, of course, have greater democratic legitimacy. Supporting and opposing this view, see, for example, *Poelker v. Doe*, 432 U.S. 519, 523 (1977) (Brennan, J., dissenting, joined by Blackman, J., and Marshall, J.); City of Akron v. Akron Ctr. for Reprod. Health Inc., 462 U.S. 416, 465 (1983) (Connor, J., dissenting, joined by White, J., and Rehnquist, J.).

argument considers judge-made law to be constitutionally suspect when it has "little or no cognizable roots in the language or design of the Constitution"[140] and often relies on the historical distinction between America's adoption of a written Constitution, in direct contrast to English constitutionalism and unwritten law.[141] For these critics, it is both interpretively and democratically objectionable that the judiciary assumes responsibility for issues not expressly articulated in the written Constitution.

b. Objections to the Privacy Implication

The second form of the disagreement with *Roe* based on interpretive orthodoxy, while accepting that rights implications can be drawn from the Constitution, is an objection to the implication of privacy from the Due Process Clause. This critique of *Roe* rests on the premise that neither a strict textualist reading of the Constitution nor constitutional history supports the implication of any general privacy right.[142] Similar to the first form of the argument based on interpretive orthodoxy, the opponents of an implied right of privacy contend that "when the Constitution sought to protect private rights it specified them; that it explicitly protects some elements of privacy, but not others, suggests that it did not mean to protect those not mentioned."[143] In spite of the weight of precedent,[144] the claim is that these cases do not establish a general right of privacy, rather, they were indicative of specific privacy interests that had secure grounding in the constitutional text and history.[145]

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140. Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

141. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795) ("[I]n *England* there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In *America* the case is widely different."). See also the seminal pronouncement in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring). For an excellent outline of written versus unwritten law, both pre- and post-*Roe*, see Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289 (2001).

142. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (Black, J., dissenting, joined by Stewart, J.), 530 (Stewart, J., dissenting); Eisenstadt v. Baird, 405 U.S. 438, 471–72 (1972) (Burger, C.J., dissenting); Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357, 390 (1997) (Scalia, J., concurring and dissenting in part, joined by Kennedy, J., and Thomas, J.); Lawrence v. Texas, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting).

143. Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1422 (1974).

144. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Hill v. Colorado, 530 U.S. 703, 716–17 (2000). Although note that the Court recently appears to be employing a concept of personal autonomy in preference to privacy. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562, 574 (2003); *see also*, Martin Belsky, *Privacy: The Rehnquist Court's Unmentionable "Right"*, 36 TULSA L.J. 43, 58 (2000).

145. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J.

c. Objections to the Extension of the Privacy Implication to Abortion

The third form of the orthodox interpretive disagreement with *Roe* argues that while there may in fact be a generalized right of privacy emanating from the Constitution, it cannot extend to an implied right to an abortion because *sexual* privacy is not mentioned in the Constitution, nor does the constitutional text or history in any form suggest an original intent to protect a right to an abortion. These critics draw on the Court's own supporting argument in *Roe*, that a right will only be implied if it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[146] or "implicit in the concept of ordered liberty,"[147] and contend that while this argument can support various other aspects of "privacy," it cannot support a right to an abortion. The commentators argue that abortion rights are not deeply rooted in the traditions of the United States,[148] as they were not recognized by the drafters of the Constitution,[149] and have been consistently restricted (demonstrating that abortion rights are not implicit in the concept of well-ordered liberty),[150] notwithstanding the Court's questionable historical analysis in *Roe*.[151] One

920 (1973). *Cf.* Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U. L. REV. 765, 772 (1973) (arguing that the cases establish a sphere of interests called privacy, with the core of this sphere being the "right of the individual to make for himself . . . the fundamental decisions that shape family life").

146. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (*cited with approval* in Rochin v. California, 342 U.S. 165, 169 (1952)); *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Kenyon Bunch, *If Racial Desegregation, Then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment*, 28 HARV. J.L. & PUB. POL'Y 781, 836–37 (2005).

147. Palko v. Connecticut, 302 U.S. 319, 325 (1934) (*cited with approval* in Rochin v. California, 342 U.S. 165, 169 (1952)); *see also* Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

148. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 793 (1986) (White, J., dissenting, joined by Rehnquist, J.); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 980 (1992) (1992) (Scalia, J., concurring and dissenting in part, joined by Rehnquist, C.J., White, J., and Thomas, J.). But compare *Glucksberg*, 521 U.S. 702, 727–28 (1997), where, in order to resist an expansion of the privacy right, Chief Justice Rehnquist, and Justices Scalia and Thomas, with what might be considered breath-taking hypocrisy, distinguished voluntary euthanasia from "deeply rooted" rights, including abortion.

149. Roe v. Wade, 410 U.S. 113, 174–77 (1973) (Rehnquist, J., dissenting).

150. *Id.*; *see also Thornburgh*, 476 U.S. at 793 (White, J., dissenting, joined by Rehnquist, J.). On the tradition of regulating abortion, see, for example, Kenyon Bunch, *If Racial Desegregation, Then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment*, 28 HARV. J.L. & PUB. POL'Y 781 (2005). See also early Supreme Court cases upholding laws prohibiting abortion, *Hawker v. New York*, 170 U.S. 189 (1898), and *Hurwitz v. North*, 271 U.S. 40 (1926), and the discussion of those cases in Roy Lucas, *Forgotten Supreme Court Abortion Cases: Drs. Hawker & Hurwitz in the Dock and Defrocked*, 30 PEPP. L. REV. 641 (2003).

151. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 925 n.42 (1973); Norman Vieira, Roe *and* Doe*: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 873 (1974).

particular distinction made is that a right to an abortion is "inherently different" from the preceding privacy cases because a "pregnant woman cannot be isolated in her privacy."[152]

2. Interpretive Disagreement: Locale of the Right

The second key criticism of the Court's decision in *Roe* is that the Court incorrectly based the implied right to an abortion in the Due Process Clause's concept of privacy, instead of locating it in the arguably more secure Equal Protection Clause of the Fourteenth Amendment.[153] For these critics, giving substantive effect to the ostensibly procedural Due Process Clause has always been a contentious exercise for the Court.[154] Therefore, the abortion right would be on a more secure footing if premised instead on the textually enshrined constitutional ideal of political equality and full citizenship.[155]

For these critics, it is axiomatic that an abortion right be grounded in equal protection jurisprudence: only women become pregnant, and therefore only women may need an abortion. Women therefore form a discrete class against whom discrimination is perpetuated when the right to an abortion is denied, and any denial of an abortion right forces women to become involuntary "incubators"[156] and perpetuates traditional, constitutionally barred gender roles.[157] Anita L. Allen, a leading proponent

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152. Roe, 410 U.S. 113, 159 (1973). *See also* Casey, 505 U.S. at 852; David Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 HARV. J.L. & PUB. POL'Y 815, 830 (2001).

153. Note, however, that Ronald Dworkin claims that it is preferable to locate the right in the First Amendment Free Exercise and Establishment clauses. *See* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

154. *See, e.g.*, Richard Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973); David Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 HARV. J.L. & PUB. POL'Y 815, 818 (2001). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting) ("The Judiciary, including this Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.").

155. *See* Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POLICY 419 (1994–1995); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

156. Donald H. Regan, *Rewriting* Roe v. Wade, 77 Mich. L. Rev. 1569 (1979).

157. *See, e.g.*, CATHERINE MACKINNON, ROE V. WADE: A STUDY IN MALE IDEOLOGY IN ABORTION—MORAL AND LEGAL PERSPECTIVES (1985); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Cass Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*,

of this argument, claims that "[a] constitutional jurisprudence of abortion that expressly draws on the Fourteenth Amendment's language of 'liberty' and 'equal protection' would meld with the reality that many of the root concerns behind privacy arguments are not different from, or in opposition to, the root concerns of the gender equality arguments."[158] For these critics, grounding the implication in the Equal Protection Clause would securely situate the abortion right in the text and originalist intent of the Constitution and enable the implied right to develop responsively to the concern of those who may have the right.

3. Interpretive Disagreement: Legitimacy and Judicial Overreach

The third interpretive argument commonly raised by critics of *Roe* is that, even assuming that the Court was justified in implying a right to an abortion from the Constitution, the assessment of when that right could be overridden should have been left to the state legislatures. The Court in *Roe* specified that for a state to prohibit abortion, it must serve a compelling state interest and specified the two interests that it considered would satisfy this test: the life of the mother, and the protection of the fetus.[159]

However, these interests were not compelling over the entirety of the pregnancy; rather, the two interests become compelling incrementally. Neither interest is compelling in the first trimester, and, therefore, the state is unable to proscribe or regulate abortion in the first trimester.[160] The health of the mother becomes compelling in the second trimester.[161] The interest in protecting the fetus becomes compelling only in the third trimester, after the fetus reached viability, and, consequently, this interest permits a state to generally prohibit third-trimester abortions).[162] Underlying the Court's trimester approach is the implicit assumption that personhood begins at viability, not conception.[163]

For some critics of *Roe*, the Court's viability and trimester approach reads like "a set of hospital rules and regulations,"[164] and, in essence, is an

92 COLUM. L. REV. 1 (1992).

158. Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POLICY 419, 420 (1994–1995).

159. *See supra* notes 135–36 and accompanying text.

160. Roe v. Wade, 410 U.S. 113, 163 (1973).

161. *Id*.

162. *Id*. at 163–64. Note that viability is the point at which the fetus has the capacity to maintain life outside the uterus.

163. On this point, see Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFF. L. REV. 107, 124–25 (1982).

164. ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113

unprincipled, unjustified, and undemocratic assumption of control over what is a legislative decision. The outlining of a "kind of legislative code . . . that will satisfy the Constitution"[165] second-guesses legislative balances, and the Court asked "itself a question the Constitution has not made the Court's business."[166] These critics also make the orthodox interpretive charge that there was no basis for the trimester test in either the text of the U.S. Constitution or its history; thus, the *Roe* Court assumed responsibility for an essentially legislative decision, and, thereby overstepped the bounds of democratic legitimacy, as the right to set boundaries regarding societal values is a legislative, not a judicial function.

C. Doctrinal Advance and Retreat

1. Maintaining the Core of Roe *in the Face of Disagreement*

Following *Roe*, a significant number of states rewrote their abortion laws, ostensibly to comply with the Court's decision. Many cases swiftly arose challenging these laws as contradictory to the Court's ruling in *Roe*.[167] From the first post-*Roe* case of *Planned Parenthood v. Danforth*,[168] the interpretive disagreement between the justices was apparent, and in marked contrast to Australia where even opponents of the implied freedom have felt bound to apply *Lange*,[169] from its inception the implied abortion right has faced enemies within the Supreme Court who have chipped away at various aspects of the doctrine.[170] However, in contrast to the intra-judicial interpretive disagreement following the initial implication of the implied freedom in *ACTV*, the opposing justices in the immediate post-*Roe* cases did not attack the core of the decision of, either the grounding of the implication in the Fourteenth Amendment Due Process Clause or the

(1976).

165. Paul A. Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983).

166. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973).

167. On this point, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 176 (1991).

168. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 67–69 (1976).

169. *See, e.g.*, *Mulholland v Austl. Electoral Comm'n* (2004) 220 CLR 181, 293 (Callinan, J.). Although, note that Justice Callinan's approach has been labeled "temporary acquiescence." Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724, 767 n.212 (2003).

170. Roe v. Wade, 410 U.S. 113, 174–177 (1973) (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting), 207 (Rehnquist, J., dissenting); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 420 n.1 (1983).

trimester framework. Rather, the opposing justices held strongly to the precise words of the decision in *Roe* and opposed the *application* of the doctrine to various state abortion-curbing laws. In *Danforth*, for example, while a majority of the Court actively upheld the letter and spirit of the *Roe* doctrine, striking down a Missouri statute that required a woman to obtain her husband's consent prior to having an abortion,[171] the dissenting justices argued that even accepting *Roe*, "[t]he task of policing [*Roe*] limitation[s] on state police power is and will be a difficult and continuing venture in substantive due process,"[172] subsequently holding that limitations on abortion do not "conflict[] with the statement in *Roe*."[173]

The dissenter's method of attacking the application of *Roe* rather than the core of the doctrine successfully swayed some of the majority in a number of cases, including a series of cases upholding restrictions on the use of federal funding for abortions[174] and a number of cases requiring parental or judicial consent in the case of minors.[175] In the face of these decisions, the majority took a protective approach to the core of *Roe*, conscious of the continued disagreement both on and off the bench over the validity of the initial implication. The upholding of the core can be seen in, for example, *City of Akron v. Akron Center for Reproductive Health*,[176] where a 6–3 majority struck down a law compelling pre-abortion counseling, requiring a 24-hour waiting period, and requiring all abortions to be performed in a hospital. The majority's self-consciousness about the initial implication was evident, with the opening page of Justice Stewart's opinion for the Court specifying that "arguments continue to be made . . . that we erred in interpreting the Constitution . . . . Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[177] That the Court chose to state the importance of *stare decisis* is indicative of both the self-consciousness of the justices about the initial implication, as well as the paucity of the

171. *Danforth*, 428 U.S. at 67–69 (1976). In the case of minors, the law required a parent's consent. *Id.*; *see also* Bellotti v. Baird, 428 U.S. 132 (1979) (holding a similar Massachusetts law unconstitutional).

172. *Danforth*, 428 U.S. at 92 (White, J., concurring in part and dissenting in part).

173. *Id.*at 89 (Stewart, J., concurring).

174. *See, e.g.*, Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

175. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981)*;* Hodgson v. Minnesota, 497 U.S. 417 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990).

176. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983).

177. *Id*. at 419–20.

interpretive resources on which the Court had to rely in restating the validity of the initial implication.

A change in Court personnel resulted in heightened interpretive disagreement over the implication, and a shift in the nature of the argumentation of the dissenters. Rather than simply attacking the application of the *Roe* doctrine, the dissenters began to attack core features of the doctrine. Justice O'Connor, appointed in 1981, wrote the dissenting opinion in *City of Akron* and argued that the "trimester or 'three-stage' approach adopted by the Court in *Roe*, and, in a modified form, employed by the Court to analyze the regulations in these cases, cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests."[178] The dissenters, then, put the majority on notice that they were willing to attack at least part of the *Roe* implication.

By 1986, a self-conscious Supreme Court began to be swayed by the interpretive arguments of the *Roe* dissenters, and it was only by a narrow 5–4 majority that the Court invalidated a set of Pennsylvania restrictions on access to abortion in *Thornburgh v. American College of Obstetricians and Gynecologists*.[179] Justice Blackmun's opinion for the Court strongly defended the *Roe* doctrine and the initial implication, stating that "the constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy."[180] Justice Blackmun further asserted:

> Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute . . . . [D]isagreements . . . do not . . . relieve us of our duty to apply the Constitution faithfully.[181]

The dissenters attributed the defensive nature of the majority's opinion to sensitivity over the inexhaustible criticism over the initial implication:

> The decision today appears symptomatic of the Court's own insecurity over its handiwork in *Roe v. Wade* and the cases following that decision. Aware that in *Roe* it essentially created

178. *Id*. at 453–54 (O'Connor, J., dissenting).
179. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).
180. *Id*. at 759.
181. *Id*. at 771–72.

> something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in *Roe v. Wade*, the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*.[182]

While *City of Akron* may have put the *Roe* majority on notice that the interpretive attack was about to shift from the application to the core of the implication, *Thornburgh* was the first case in which all dissenters attacked the initial implication itself. Chief Justice Burger's dissent argued that "[t]he soundness of our holdings must be tested by the decisions that purport to follow them. If . . . today's holding really mean[s] what [it] seem[s] to say, I agree we should reexamine *Roe*."[183] Similarly, Justices White and Rehnquist stated that "the time has come to recognize that *Roe v. Wade* . . . 'departs from a proper understanding' of the Constitution and [should be overruled]."[184] The justices argued that the text of the U.S. Constitution contains no reference to abortion, pregnancy, or reproduction more generally,[185] and even if abortion could be considered "liberty" under the Due Process Clause, it was not so fundamental that "restrictions upon it call into play anything more than the most minimal judicial scrutiny."[186] Justice O'Connor's dissent was equally virulent, focusing on the standard of review and the "outmoded trimester framework" established in *Roe* as she did in *Akron*.[187] The dissenting justices, then, appeared ready to attack both the grounding of the implication on orthodox interpretational grounds, as well as the standard of review at the core of the *Roe* decision.

2. Doctrinal Retreat: Webster v. Reproductive Health Services

The *Roe* opponents finally gained an interpretive majority in the 1989 decision in *Webster v. Reproductive Health Services*,[188] where a majority of justices, while avoiding overruling *Roe* outright, explicitly rejected the applicability of *Roe*'s trimester test, which would have dictated the level

182. *Id*. at 813–14 (White, J., dissenting, joined by Rehnquist, J.).
183. *Id*. at 785 (Burger, C.J., dissenting).
184. *Id*. at 788 (White, J., dissenting).
185. *Id*. at 789 (White, J., dissenting).
186. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 790 (1986).(White, J., dissenting).
187. *Id*. at 828 (O'Connor, J., dissenting).
188. Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) .

of judicial scrutiny and related presumptions of constitutionality or unconstitutionality and, instead, adopted Justice O'Connor's "undue burden" test. However, disagreement remained amongst the new majority as to the validity of the initial implication. Although various justices were prepared to overrule *Roe*,[189] Chief Justice Rehnquist's opinion for the Court specified that the facts of *Webster* differed from *Roe* such that the case "affords us no occasion to revisit the holding of *Roe*."[190] The resulting opinions contributed to what was a fractured and jumbled interpretive approach, with no common interpretive ground amongst the majority and a strong dissent from the minority.[191]

Although the core implication itself remained,[192] the *Roe* doctrine was modified, with the Chief Justice in dicta explicitly rejecting the trimester framework as "hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does."[193] Rehnquist revisited his dissent in *Thornburgh* and, relying on interpretive orthodoxy, held that the "key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle."[194]

The strong criticism of *Roe's* strict scrutiny standard signaled a stronger interpretive disagreement among the justices. Claims that a fundamental right has been infringed are always assessed against a strict-scrutiny standard.[195] Thus, when the Court's rejected of the strict-scrutiny standard in the abortion context, it signaled a rejection of the *Roe* Court's assessment that the right to an abortion was a fundamental liberty. The result of *Webster* was to both weaken the implication of a right to abortion generally, as well as to signal a retreat from the *Roe* Court's more expansive interpretive approach to a constitutional jurisprudence less reliant on implication and more reliant on constitutional text and history.

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189. JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 80–81 (2007).

190. *Webster*, 492 U.S. at 521 (1989) (Opinion of the Court).

191. On the fractured nature of the decision, see, for example, A.I.L. Campbell, *The Constitution and Abortion*, 53 MOD. L. REV. 238 (1990); Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989).

192. However, note Justice Scalia's attack on the implication more generally in his separate opinion. *Webster*, 492 U.S. at 532–37 (Scalia, J., concurring).

193. *Id.* at 518 (Opinion of the Court).

194. *Id*.

195. *See*, *e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Kramer v. Union Free School District, 395 U.S. 621, 626–27 (1969); Shapiro v. Thomson, 394 U.S. 618, 634 (1969).

3. Interpretive Resolution? The Casey *Compromise*

As a solution to the interpretive controversy, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[196] was a resounding failure. *Casey* involved a Pennsylvania statute that imposed significant restrictions on abortions through informed consent, parental consent, spousal notification, and record-keeping requirements; importantly, *Casey* presented the Court with an opportunity to directly overrule *Roe* and clarify the interpretive disagreement that had plagued the implied right since its initial implication.[197] The justices originally agreed in conference to overrule *Roe* 5–4,[198] with Chief Justice Rehnquist's draft majority opinion going to the core of the interpretive disagreement and expunging the implication of a right to an abortion as derived from the implied right of privacy from the Constitution. Rehnquist followed his approach in *Webster* and argued that nothing in the text or history of the Constitution indicated that the document extended so far.[199] Justice Blackmun's dissent upheld and defended *Roe* in its entirety.

Three justices were uncomfortable with the approaches of Chief Justice Rehnquist and Justice Blackman and sought to effectuate a compromise. These justices, Justices O'Connor, Kennedy and Souter, authored a joint opinion which declined to overrule *Roe*, instead upholding the "central right recognized by *Roe*."[200] Notwithstanding the noted strength of the arguments against the constitutional foundations of the initial implication,[201] the joint opinion held that the principle of *stare decisis* mandated the upholding of the core of the *Roe* implication.[202] However, the joint opinion attacked the standard of review that *Roe* had set down as constitutionally required, and explicitly abandoned *Roe's* trimester framework, claiming it was a rigid, non-essential holding of *Roe*, and instead favoring Justice O'Connor's "undue burden" test.[203]

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196. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

197. *Id.* at 833, 877.

198. JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 152–54 (2007).

199. *Id.*

200. *Casey*, 505 U.S. at 878 (Opinion of the Court). Note that the Bush Administration explicitly asked the Court to overturn *Roe.* On this, and the Administration's deliberate attempt to stack the Court for this purpose, see generally JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

201. *Casey*, 505 U.S. at 853.

202. *Id.* at 871 (Opinion of the Court) ("[T]he immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding.").

203. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

Despite upholding the core implication of a right to an abortion and the broad and sweeping language stating the importance of reproductive freedom for women's privacy, autonomy, and equality, the joint opinion marked a significant retreat from the doctrine set down in *Roe*. While emphasizing the "essential holding" of *Roe*,[204] that the Due Process Clause of the U.S. Constitution impliedly protects a woman's fundamental right to an abortion pre-viability, the joint opinion held that although the state cannot proscribe abortion pre-viability, it has a sufficient interest in protecting the health of the mother and the potentiality of human life to regulate abortion so long as the state does not place an "undue burden" on a woman's right to an abortion.[205] The opinion also reiterated that a state may proscribe post-viability abortion completely so long as there is an exception for the health of the mother.[206] Under this ruling, the joint opinion upheld all but the spousal notification provisions in the Pennsylvania legislation, arguing that only the notification provision was an undue burden on a right to an abortion, as it placed a "substantial obstacle in the path of a woman seeking an abortion."[207]

The *Casey* decision, then, does not reflect a unified interpretive approach. Like the unanimous decision of the High Court in *Lange*, the joint opinion reaffirmed *Roe*; and like the decision in *Lange*, the opinion in *Casey* substantially modified, if not weakened, the initial implication of the right.[208] However, unlike *Lange*, where the reinterpretation of the implied freedom was unanimous, in *Casey* the interpretive disagreement among the Supreme Court justices was obvious, and although Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, concurred in the core aspects of the joint judgment,[209] his opinion explicitly criticized the initial implication as lacking in orthodox

204. *Id*. at 833.
205. *Id.* at 878–79.
206. *Id.*
207. *Id*. at 878.
208. *See* Lawrence v. Texas, 539 U.S. 558, 588, 595 (2003) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *see also* Martin H. Belsky, *Privacy: The Rehnquist Court's Unmentionable "Right"*, 36 TULSA L.J. 43, 47–50 (2000); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 676 (2004); Hilary Guenther, *The Development of the Undue Burden Standard in* Stenberg v. Carhart*: Will Proposed RU-486 Legislation Survive?*, 35 IND. L. REV. 1021, 1021 (2002); Jenny R. Kramer, *Fourteenth Amendment—Due Process—Compliance with Supreme Court Jurisprudence in the Post* Roe *and* Casey *Era*, 11 SETON HALL CONST. L.J. 529, 531 (2001); Suzanne E. Skov, Stenberg v. Carhart*: The Abortion Debate Goes Technical*, 14 J. CONTEMP. LEGAL ISSUES 235, 235 (2004).
209. That is, the upholding of the various Pennsylvania laws. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 979 (1992) (Rehnquist, C.J., joined by White, J., Scalia, J., and Thomas, J., concurring in part and dissenting in part).

interpretive methodology and stated that on this basis *Roe* should be overturned.[210] Justices Blackmun and Stevens, while concurring with the upholding of the "essential holding" of *Roe*, dissented from the excising of the trimester framework and adoption of the undue burden standard, arguing that the new standard was manipulable, thus undermining the need for strict scrutiny of the fundamental right to an abortion.[211] Justice Scalia, in a separate opinion, savaged the undue burden test on the same interpretive grounds that motivated the joint justices to retreat from the trimester framework—that it lacked foundation in the Constitution: "The ultimately standardless nature of the 'undue burden' inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis."[212]

*D. Interpretive Disagreement and Its Consequences Post-*Casey[213]

Although *Casey* is now widely accepted as authoritative, it remains the subject of strong interpretive disagreement.[214] There is a very real fear that new appointees to the Court will facilitate the reconsideration and expungement of the *Roe* implied right entirely.[215] The *Casey* compromise

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210. *Id.* at 944 (Rehnquist, C.J., joined by White, J., Scalia, J., and Thomas, J., concurring in part and dissenting in part).

211. *Id.* at 930 (Blackmun, J., concurring in part and dissenting in part); *id.* at 914 (Stevens, J., concurring in part and dissenting in part).

212. *Id.* at 987 (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., concurring in part and dissenting in part). For scholarly criticisms of the undue burden standard, see, for example, Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675 (2004); Elizabeth A. Cavendish, Casey *Reflections*, 10 AM. U. J. GENDER SOC. POL'Y & L. 305 (2002); Hilary Guenther, *The Development of the Undue Burden Standard in* Stenberg v. Carhart*: Will Proposed RU-486 Legislation Survive?*, 35 IND. L. REV. 1021 (2002); Sabina Zenkich, *X Marks the Sport While* Casey *Strikes Out: Two Controversial Abortion Decisions*, 23 GOLDEN GATE U. L. REV. 1001 (1993).

213. The phrase is not overly dramatic in the context of the debate. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., joined by Brennan, J., and Marshall, J., concurring and dissenting in part) ("I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court."); Andrew A. Adams, *Aborting* Roe*: Jane Roe Questions the Viability of* Roe v. Wade, 9 TEX. REV. L. & POL. 325, 329 (2005) (labeling *Roe* an "abomination"); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003) (claiming that *Casey* is "'[t]he Worst'—worse, even, than its nearest rivals, *Dred Scott v. Sandford*, *Roe v. Wade*, and *Stenberg v. Carhart*").

214. *See, e.g.*, Witte v. United States, 515 U.S. 389, 406 (1995) (Scalia, J., concurring, joined by Thomas, J.); United States v. Virginia, 518 U.S. 515, 569 (1996) (Scalia, J., dissenting); *Stenberg*, 530 U.S. 918, 952 (Rehnquist, C.J., dissenting); *id.* at 955 (Scalia, J., dissenting); *id.* at 980 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting); *see also* McCorvey v. Hill, 385 F.3d 846, 852–53 (5th Cir. 2004) (Jones, J., concurring).

215. *See generally* JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE

has failed to act as the interpretive bridge that the joint opinion writers envisaged. While the joint opinion managed to prevent reconsideration of *Roe* in the short-term, the attempt to accommodate different interpretive views has created an unstable jurisprudence that exposes both *Casey* and *Roe* to the ongoing danger of reconsideration.

This situates the implied abortion right jurisprudence in a very different position than the Australian implied freedom. Whereas in Australia it is the *Lange* Court's unanimous commitment to text and structure and the resulting paucity of interpretive resources that has affected the development of the implied freedom, in the United States the *Casey* Court's *lack of commitment* to the grounding of the implication as well as the self-conscious modifications of the relevant standard of review—against which restrictive legislation will be judged—has had the consequence of fracturing any development of the implied right. Continuing doubts over the grounding of the implied right and the instability of the protective standard have led to stagnation, manipulation, and a fragmented abortion right jurisprudence.

1. *The Continuing Doubt Over the Grounding of the Right and Its Consequences*

Although the authors of *Casey*'s joint opinion reaffirmed the *Roe* Court's holding that the "liberty" in the Fourteenth Amendment's Due Process Clause was the basis for the implied right, it seriously undermined this determination and the consequent security of the right in two ways: by over-reliance on *stare decisis*, and by undergirding the liberty justification with an equal protection rationale.

a. Over-Reliance on Stare Decisis

First, the joint opinion openly expressed doubts as to how they would have decided the issue *de novo*, stating that it was only the added force of the doctrine of *stare decisis* and a need for institutional integrity that compelled the Court to uphold the implication from the Due Process Clause.[216] The concern, of course, is that the three determinative justices in *Casey* did not state whether, as a matter of constitutional interpretation,

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STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

216. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992) (Opinion of the Court) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

Roe was correct or incorrect as a matter of principle. This uncritical adherence to precedent highlights the doubts over the textual and historical foundations of the implied right, and, consequently, results in a dearth of interpretive resources by which the right can be developed in subsequent cases. With no interpretive "touchstone" to refer to, the right necessarily becomes stagnant and, indeed, manipulable to each individual justice's predilections as to the appropriate grounding of the implication. Further, the *stare decisis* rationale has left the Court open to the criticism that it has threatened its own legitimacy by failing to carefully consider a matter that is practically impossible to remedy through legislative action.[217]

b. Equal Protection Rationale

Second, although recognizing that the right is derived from the "liberty" of the Due Process Clause, the Court referred specifically to the effect of abortion laws on the status of women, arguing that, "[a]n entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions."[218] As David Strauss has argued, the joint opinion, as well as the separate opinions of Justices Stevens and Blackmun, referred to the status of women as a justification for the perpetuation of the right to an abortion.[219] That is, while the justices specified that the implication was grounded in individual liberty and reproductive autonomy (i.e. the Due Process Clause), their rationale (albeit unformed and unclear) for the implication was a concern for the position of women and a concern that the political process would subordinate women (i.e., Equal Protection Clause concerns). As with the reliance on *stare decisis*, the unprincipled and unjustified rationalization for upholding the initial implication leaves the implication, in its current form, subject to judicial manipulation and peculiarly vulnerable to reconsideration; it is simply not possible for the right to develop coherently while its underlying *raison d'etre* is consistently undermined and challenged.

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217. An additional point could be made that in the context of the Supreme Court's history of overruling key constitutional doctrines, the *stare decisis* argument is disingenuous. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); West Coast Hotel Co. v. Parrish, 300 U.S 379 (1937) (overruling *Lochner v. New York*, 198 U.S. 45 (1905)).

218. Referred to in David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 3 (1992).

219. *Id*. at 1–3; *see also Casey*, 505 U.S. at 852 (Opinion of the Court); *id.* 926–28 (Blackmun, J., concurring in part and dissenting in part).

c. Consequences

The consequence of the *Casey* Court's inability to clearly affirm the liberty grounding of the implied right or to clearly re-situate the right in the Equal Protection Clause has left the right stagnant and susceptible to manipulation. Without a firm grounding, defenders of the right to an abortion are naturally self-conscious about the basis of the right, and they are left defending the initial implication by whatever means they can. This makes it impossible for the right to cultivate the clear and developed jurisprudence necessary to respond to various claims of unconstitutionality. Further, opponents of the abortion right are able to constantly question and reassess the basis for the implication, thereby preventing any significant permanent development in the abortion jurisprudence more generally.

This tension is evident in the two key post-*Casey* cases of *Stenberg v. Carhart*[220] and *Gonzales v. Carhart*,[221] where the intra-Court dispute as to the foundation of the implied right continued. In *Stenberg*, for example, while the majority opinion of Justice Breyer specified that the Court would not revisit the legal principles establishing the implied right set down in *Casey*, Justice Kennedy's dissenting opinion implicitly attacked the basis of the right. Justice Kennedy, who co-authored the joint opinion in *Casey*, stated:

> When the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion . . . . The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential.[222]

For Justice Kennedy, while there may exist a right to an abortion in the Constitution, it appears that he does not consider that right to be fundamental in the sense of other rights derived from the "liberty" of the Due Process Clause. The unsettled nature of the initial implied right has enabled Justice Kennedy and the other dissenting justices to continue to challenge the very existence of the right, rather than simply challenging the application of the right to specific circumstances. The *Roe* opponents in *Stenberg* thus avoided dissent on questions of application, and thereby

220. Stenberg v. Carhart 530 U.S. 914 (2000).
221. Gonzales v. Carhart, 550 U.S. 124 (2007).
222. *Stenberg*, 530 U.S. at 956–57 (2000) (Kennedy, J., dissenting, joined by Rehnquist, C.J.).

forced a subsequent defense of the implication in *Roe* by those justices supporting the implication. The anti-*Roe* justices in *Stenberg* also avoided doctrinal discussions that could have been employed in later cases to develop the right itself.

The interpretive tension over the grounding of the implied right was also noticeable in *Gonzales*, where the minority opinion of Justice Ginsburg was highly responsive to claims that the implication was contrary to interpretive orthodoxy. Noting the general uncertainty over the continued existence of the implied right to abortion, "*Casey*'s principles, confirming the continuing vitality of the 'essential holding of *Roe*,' are merely 'assume[d]' for the moment . . . rather than 'retained' or 'reaffirmed,'"[223] Justice Ginsburg proceeded to defend the constitutional right to an abortion. However, Justice Ginsburg's dissent departed from the traditional "liberty" defense of the implication and instead seemed to reinterpret the basis for the implication on an equal protection footing. She stated, picking up on the comments in *Casey*, that the implied right was not founded in "some generalized notion of privacy; rather [it] center[s] on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[224] Ginsburg, then, is seemingly recasting the basis for the implication in the hope of finding a more secure locale for the right to an abortion.

The *Casey* joint opinion argued that "[l]iberty finds no refuge in a jurisprudence of doubt,"[225] yet the "compromise" of relying on precedent rather than reaffirming the basis for the implied right by principled argument has simply perpetuated doubts over the grounding of the implication. No constitutional doctrine can develop consistently when faced with continuous doubts over its existence and validity. Not only are supporting justices continually forced to opine in a protectionist manner, but the doubts leave supporting justices self-conscious about developing the doctrine by reference to the rationale of the initial implication. The result is a lack of interpretive resources to which justices may refer in developing the right in response to the particular case before them. The reliance on *stare decisis* in *Casey* only served to heighten and perpetuate these difficulties. While the focus remains on the basis of the implication, the right itself can never develop in a coherent and consistent manner.

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223. *Gonzales*, 550 U.S. at 187 (Ginsburg, J., dissenting).
224. *Id.* at 172.
225. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 844 (1992).

2. The Protective Framework and Standards of Review: Uncertainty and Outcomes

The protective frame of the implied right to an abortion has been continuously and consistently attacked and revised. The uncertainty surrounding both the applicable standard of review, as well as the identification of viability as the crucial point by which to measure acceptable state regulation, has had serious consequences for the development of the implied right.

a. The Undue Burden Test

A fundamental difficulty with the implied abortion right is the lack of textual context or traditional understandings to which the Court can refer in developing the protective framework of the right. Indeed, one of the most problematic aspects of the *Roe* decision was the establishment of the trimester framework—depending upon the stage of the pregnancy—as the determining factor in analyzing the level of permissible regulation of the abortion right.[226] Not only had the trimester framework faced strong interpretive criticism that it was quasi-legislative and unrooted in the text or historical foundations of the Constitution, it had also proved unsatisfactory in practice and was never consistently applied.[227]

The *Casey* joint opinion sought to respond to these interpretive criticisms by substituting an "undue burden" standard of review for the trimester-based strict scrutiny standard of set forth in *Roe*.[228] The *Casey* joint opinion argued that *Roe's* trimester framework had "misconceive[d] the nature of the pregnant woman's interest" pre-viability by construing the right as too absolute.[229] Despite Justice O'Connor's pre-*Casey* argument that the undue burden test should apply throughout the entirety of the pregnancy,[230] the *Casey* joint opinion held that the standard would

226. Roe v. Wade, 410 U.S. 113, 164–65 (1973) (Opinion of the Court). On the problems created by the trimester framework, *see Casey*, 505 U.S. at 845 (Opinion of the Court).

227. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (Rehnquist, C.J., joined by White, J., and Kennedy, J.); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting) (claiming that the trimester framework has "no justification in law or logic"); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381–82 (1985).

228. *Casey*, 505 U.S. at 872–75, 878 (Opinion of the Court)*; cf. id.* at 914 (Stevens, J., concurring and dissenting in part).

229. *Id.* at 873; *see also* Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 682 (2004).

230. *See* City of Akron, 462 U.S. 416, 452 (O'Connor, J., dissenting).

apply only to regulations restricting abortions pre-viability; post-viability the state could regulate to proscribe abortion completely.[231]

As to where the "undue burden" test derived from and how it would apply, the joint justices offered no guidance, stating only that "[n]ot all government intrusion is of necessity unwarranted"[232] and that only where the 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" is there an undue burden on the right to an abortion.[233] The only elucidation of the joint opinion on what a "substantial obstacle" is was itself uninformative: "In our considered judgment, an undue burden is an unconstitutional burden."[234]

While the doctrinal shift to an undue burden test was intended to be responsive to orthodox interpretive critiques of the trimester framework, the new undue burden standard has itself been criticized as lacking a constitutional foundation, and for the difficulty of its application-in-fact.[235] In a vicious attack on the undue burden standard, Justice Scalia charged that the standard was a "verbal shell game [to] conceal raw judicial policy choices,"[236] and that it is "inherently manipulable and will prove hopelessly unworkable in practice."[237] Chief Justice Rehnquist ominously warned that "it is a standard which is not built to last."[238] The same orthodox interpretive concerns that led to the overturning of the trimester framework, then, are equally applicable to the undue burden standard.

The undue burden test is as equally ungrounded in text or history as was the trimester framework and, since *Casey*, has itself faced criticism for its lack of content. The consequences for the doctrinal development of

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231. *Casey*, 505 U.S. at 860, 870–71; *see also* Washington v. Glucksberg, 521 U.S. 702, 784 (1997) (Souter, J., concurring in the judgment). There was some authority for this apparently novel test; *see, e.g.*, Maher v. Roe, 432 U.S. 464, 473–74 (1997) (Opinion of the Court); *id*. at 489 (Brennan, J., dissenting, joined by Blackmun, J., and Marshall, J.); Bellotti v. Baird, 443 U.S. 622, 640, 648 (1979).

232. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 875 (1992).

233. *Id*. at 877.

234. *Id*.

235. *Id.* at 964–65 (Rehnquist, C.J., concurring and dissenting in part, joined by White, J., Scalia, J. and Thomas, J.); *id.* at 985–93 (Scalia, J., concurring and dissenting in part, joined by Rehnquist, C.J., White, J., and Thomas, J.); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 687–89 (2004). Some of these criticisms appear to have been borne out. *See* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 218–19 (6th Cir. 1997) (Boggs, J., dissenting); Hilary Guenther, *The Development of the Undue Burden Standard in* Stenberg v. Carhart*: Will Proposed RU-486 Legislation Survive?*, 35 IND. L. REV. 1021, 1021 (2002).

236. *Casey*, 505 U.S. at 987 (Scalia, J., concurring in part and dissenting in part).

237. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 986 (1992)

238. *Id.* at 965 (Rehnquist, C.J., concurring and dissenting in part, joined by White, J., Scalia, J., and Thomas, J.).

the implied right have been significant. With an unclear and ungrounded standard of review, it is not plausible that a consistent jurisprudence will emerge from the Court. Furthermore, the manipulability of the standard opens the Court to criticism that the implied right is or is not applied in accordance with the moral preferences of the justices, rather than well-reasoned and well-grounded doctrine. The vulnerability of the standard is particularly visible in the decisions of *Stenberg* and *Gonzales*.

i. Stenberg v. Carhart

In *Stenberg*,[239] a majority of justices criticized the undue burden standard, although no alternative standard of review emerged.[240] Further, the justices' application, and indeed modification, of the *Casey* standard indicates the incredible malleability of the undue burden test. Without any rationalization, the majority stated that a Nebraska law banning partial birth abortions constituted an undue burden on the right to an abortion because it did not contain an exception for the health of the mother.[241]

The application of a health exception requirement to pre-viability regulation represents a significant development on *Casey*, which did not impose a health exception requirement pre-viability even though it required such an exception in post-viability cases.[242] By crafting an exception to the *Casey* rule, the Court has essentially modified the undue burden standard, giving itself considerably more scope to strike down regulations than under an unadulterated undue burden standard.[243] However, the majority failed to acknowledge that their reasoning represents even an evolution of *Casey*, instead preferring to maintain that a pre-viability health exception is implicit within the *Casey* decision.[244]

239. Stenberg v. Carhart, 530 U.S. 914 (2000).

240. *See, e.g.*, Hilary Guenther, *The Development of the Undue Burden Standard in Stenberg v. Carhart: Will Proposed RU-486 Legislation Survive?*, 35 IND. L. REV. 1021, 1033–34 (2002).

241. *Stenberg*, 530 U.S. at 937–38 (Opinion of the Court); *id.* at 950 (O'Connor, J., concurring). This was a relatively uncontroversial holding. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 79 (1976).

242. There may be a limited suggestion in *Casey* that the health exception applies prior to viability, but the point is not decided. *See Casey*, 505 U.S. 833, 880 (1992) (O'Connor, J., Kennedy, J., and Souter, J.); *cf. Stenberg*, 530 U.S. 914, 1011–13 (2000) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). For additional commentary, see also Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 700 (2004); Hilary Guenther, *The Development of the Undue Burden Standard in* Stenberg v. Carhart*: Will Proposed RU-486 Legislation Survive?*, 35 IND. L. REV. 1021, 1028 (2002).

243. *Stenberg*, 530 U.S. at 1011 n.20 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); *see also* Aimee Gauthier, Stenberg v. Carhart*: Have the States Lost Their Power to Regulate Abortion?*, 36 NEW. ENG. L. REV. 625, 666 (2002).

244. *Stenberg*, 530 U.S. at 930.

Made up of supporters of a woman's right to an abortion, the majority in *Stenberg* took a protective approach. Unable to openly question the basis of the judgment they sought to transform, the justices instead manipulated the standard of review, thereby impeding any principled development of the implied right.

ii. Gonzales v. Carhart

In the latest abortion decision, the Court appears to have retreated not only from the *Stenberg* expansion of *Casey* but also from the standard outlined in *Casey* itself. Although the Court purported to apply the undue burden standard, the standard of review for abortion restrictions appears to have been demoted from the highest level of review, the strict scrutiny standard to the lowest level of review, the rational basis test, without any explanation or explication of rationale. The majority opinion written by Justice Kennedy stated that "[w]here [the state] has a *rational basis* to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its *legitimate interests* in regulating the medical profession."[245] In applying the newly demoted standard to Nebraska's prohibition of partial birth abortions, the Court asserted:

> Considerations of marginal safety, including the balance of risks, are within the legislative competence *when the regulation is rational and in pursuit of legitimate ends*. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.[246]

The protective frame of the abortion right, then, has significantly contracted under the undue burden standard, which purported to act as a strict scrutiny standard. Justice Scalia's warning in *Casey* has proved correct: the failure of the joint opinion in *Casey* to ground the framework of the right in the constitutional text or history has resulted in a test that is both manipulable and unprincipled. The lack of interpretive resources guiding the development of the undue burden standard has meant that application of the test to specific abortion prohibitions has been patchy and inconsistent. As noted above, this was the critique leveled at the *Roe*

245. Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (Opinion of the Court) (emphasis added).
246. *Id.* at 166 (emphasis added).

majority's trimester framework. However, the consequences for the implied right have proven significantly more dire for the rights-holders than under the trimester framework: the right to an abortion has shifted from a fundamental right accorded strict scrutiny, to one that may be regulated with little constitutional restriction.

b. Viability

In addition to the instability inherent in the undue burden test, the *Casey* compromise, and consequently the implied right itself, appears shaky as a result of the joint opinion establishing viability as the "critical fact."[247] The most destabilizing element of viability is the lack of a strong legal justification for nominating it as the point at which the state may restrict access to abortion.[248] A potential life is no more or less potential on either side of viability, yet the Court maintains that the state's interest is controlled by that distinction.[249] As the Court has noted, "legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[250] Viability cannot, of course, be justified by reference to constitutional terms or traditions.[251] Indeed, the only justification for making this division that the Court has advanced is the somewhat tautological observation that viability marks "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb."[252]

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247. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 836, 860 (1992); *see also* Washington v. Glucksberg, 521 U.S. 702, 784 (1997) (Souter, J., concurring in judgment).

248. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 794 (1986) (White, J., dissenting, joined by Rehnquist, J.); *Casey*, 505 U.S. 833, 989 n.5 (1992) (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White, J., and Thomas, J.). For a suggestion that Justice Blackmun regarded viability as an arbitrary point while drafting the *Roe* opinion, see, for example, Roy Lucas, *Forgotten Supreme Court Abortion Cases: Drs. Hawker & Hurwitz in the Dock and Defrocked*, 30 PEPP. L. REV. 641, 665 (2003).

249. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting, joined by White, J., and Rehnquist, J.). *See also Thornburgh*, 476 U.S. 747, 795 (1986) (White, J., dissenting, joined by Rehnquist, J.).

250. *Casey*, 505 U.S. at 870.

251. If any such point was traditionally recognized, it was "quickening." *See* Roe v. Wade, 410 U.S. 113, 132–39 (1973).

252. *Casey*, 505 U.S. 833, 870 (Opinion of the Court); *id.* at 929–30 (Blackmun, J., concurring and dissenting in part); *see also Roe*, 410 U.S. 113, 163 (1973). For criticism of the failure to adequately justify the division, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 159 (1982), and John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973). Note that the joint opinion did advance a rather unconvincing secondary justification for retaining viability, stating that "there is no line other than viability which is more workable." *Casey*, 505 U.S. at 870.

Moreover, the Court has always recognized that viability is difficult to determine and incapable of rigid definition.[253] However, it held in *Casey* that "[l]iberty must not be extinguished for want of a line that is clear."[254] The Court has also acknowledged that improvements in technology will continue to shrink the period between conception and viability, though it maintains that this will not affect its reasoning.[255] It is questionable whether this prediction is correct: just how much can the window during which a woman is free to obtain an abortion shrink before the right becomes meaningless?[256]

Without a convincing justification, without the possibility of definitive determination, and without any hope that it will cease its corrosive march towards the moment of conception, viability will inevitably need to be reconsidered by the Court.[257] That reconsideration, or its avoidance, cannot but significantly destabilize the development of a coherent and comprehensive abortion rights jurisprudence.

E. Preliminary Conclusions

Judicial self-consciousness has pervaded the development of the abortion right implied by *Roe*, most specifically in the attempt in *Casey* to restrict the protection of the right and thereby head-off the incessant criticism of the initial implication. The consequences of this disagreement-response cycle have been significant. With respect to the abortion jurisprudence itself, the instincts of *Roe* supporters have led them to support more protective views of the implied right, for example, regarding parental notice and consent.[258] The problem is, of course, that with the supporters of an abortion right so focused on retaining and defending the right to an abortion, there is little scope for the development of a coherent jurisprudence, and there is a tendency for the supporters to be hostile to

253. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 64 (1976); Colautti v. Franklin, 439 U.S. 379, 387–88 (1979); Webster v. Reprod. Health Servs., 492 U.S. 490, 519–20 (Renhquist, C.J., joined by White, J., and Kennedy, J.); *id.* at 525 (O'Connor, J.); *see also* Bruce Ching, *Inverting the Viability Test for Abortion Law*, 22 WOMEN'S RTS. L. REP. 37, 44 (2000).

254. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992).

255. *Id.* at 860; *see also* Bruce Ching, *Inverting the Viability Test for Abortion Law*, 22 WOMEN'S RTS. L. REP. 37, 41 (2000).

256. Certainly, the following passage would need to be reconsidered: "The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Casey*, 505 U.S. at 870 (Opinion of the Court).

257. Bruce Ching, *Inverting the Viability Test for Abortion Law*, 22 WOMEN'S RTS. L. REP. 37, 45 (2000).

258. *See supra* notes 174–77 and accompanying text.

any state regulation. Justice White described this phenomenon in *Thornburgh*, where he stated:

> The decision today appears symptomatic of the Court's own insecurity over its handiwork in *Roe v. Wade* and the cases following that decision. Aware that in *Roe* it essentially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in *Roe v. Wade*, the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*.[259]

That this phenomenon is linked to the defense of *Roe* is evidenced by the fact that when the abortion right itself has not been threatened, the *Roe* supporters on the Court have been willing to uphold, for example, laws regarding fetuses as persons and fetal murder.[260] The joint opinion in *Casey* noted that the Court's expansive defense of the initial implication has actually served the contradictory purpose of casting doubt over *Roe*.[261] However, the justices' approach in the joint opinion to the interpretive disagreement surrounding *Roe* was not the same as that of the High Court in *Lange*, where the grounding of the right was recast on a more secure doctrinal footing. The joint justices in *Casey* sought to protect the initial implication by narrowing the potential application of the right to various state regulations of abortion. That is, by increasing the scope of potential state interests, the *Casey* joint justices were acting to protect the heart of the implied right of abortion itself. The protective compromise, however, has backfired; whether consciously or not, the modified standard of review has proved malleable and weak, and it has enabled anti-*Roe* justices to whittle down the right from something fundamental to something less. So long as the interpretive disagreement continues, affording justices from both sides the opportunity to attack doctrinal developments, the implied right will never develop a sustainable or coherent jurisprudence.

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259. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 813–14 (1986) (White, J., dissenting, joined by Rehnquist, J.).

260. *See* Richard Stith, *Location and Life: How* Stenberg v. Carhart *Undercut* Roe v. Wade, 9 WM. & MARY J. WOMEN & L. 255, 265–66 (2003).

261. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 845 (1992) (Opinion of the Court).

IV. DOCTRINAL CONSEQUENCES AND BROADER RAMIFICATIONS

A. Linking Consequences to Implications

This Article demonstrates that the development of both the U.S. implied right to an abortion and the Australian implied freedom of political communication have been adversely affected by the interpretive controversy surrounding their initial implication. Of course, controversy accompanies judicial determination of the limits of any rights; indeed, controversy is inherent within the nature of rights themselves whether express or implied. One could argue that, contrary to the analysis in this Article, implied rights are no more peculiarly vulnerable to interpretive disagreement and the subsequent doctrinal consequences than express rights.

Even if it were empirically possible to test such an argument, the relative intensity of the disagreement is far less important for the argument in this Article than the effects of that disagreement. Implied rights *do* suffer from unique problems that demonstrably stem from their origins as implications, and any interpretation of implied rights is likely to be vulnerable to revisions simply because various aspects of text, context, and historical understanding will be advanced as reason to doubt that interpretation.[262] As a result, there will always exist a certain self-consciousness about the vulnerability of the initial implication and the existence of the right. And, at least in the context of the implied abortion right and implied freedom, which both have doubtful textual and historical origins, a paucity of interpretive resources are available to guide the development of a given implication. It is these factors, which are unique to implied rights, that combine to affect the development of implied rights.

1. Judicial Self-Consciousness

In both the United States and Australia, judicial self-consciousness about the initial implication has had significant consequences for the development of the implied right and implied freedom respectively. In Australia, the High Court's initial implication from broad concepts, unrooted in the text or the traditional history of the framer's intent, received scathing criticism from within the Court itself and from commentators. In a direct response to these criticisms, the Court reformulated the basis of the implied freedom, anchoring it in the text and

262. *See generally* Stone, *Interpretive Disagreement*, *supra* note 15, at 44 (2005).

structure of the Constitution, and thereby bringing it within more traditionally accepted methods of constitutional argument. However, while text and structure have acted as a clear interpretive solution for the grounding of the implication, judicial self-consciousness still pervades the High Court when interpreting the implied freedom. As a consequence of the interpretive disagreement over the initial implication, the justices are reluctant to move beyond the confines of the text and employ extra-constitutional ideas and values necessary to develop various aspects of the implied freedom, such as the coverage of "political communication" and the relevant standard of review.

In the United States, judicial self-consciousness in the Supreme Court has manifested in a very different manner, although with equally significant consequences for the development of the implied right to abortion. Following the interpretive disagreement to the initial implication, rather than developing a unified response either reinforcing the Due Process Clause grounding of the implication or reformulating the basis of the implication in the Equal Protection Clause, the Court fractured. The proponents of the implication aggressively protected and, where possible, expanded the scope of the right. The critics, however, responded by attacking, first the application of the right, and subsequently, core aspects of the implication itself. Self-consciousness prompted the attempted interpretive resolution in *Casey*; however, the resolution itself was fraught with the same difficulties as the initial implication, that is the failure to ground the right and the protective frame in text and history.

Consequently, in both jurisdictions, the Australian High Court and U.S. Supreme Court were driven to respond to the interpretive disagreement over the initial implication. However, neither court has successfully answered the most significant arguments against the initial implication—that the implications cannot be sufficiently grounded in the text, context, or orthodox historical understanding so as to alleviate the disagreement as to the existence of the implied rights. These arguments are perpetual, and suggest that implied rights will always be accompanied by unresolved disagreement over their existence. Because of the inevitable self-consciousness over disagreement as to implied rights, one preliminary conclusion is that implications are an especially weak form of rights protection, as it appears the judiciary can never fully disengage from the initial interpretive controversy, which necessarily stagnates the development of the right itself. This is so whether the implication survives subsequent judicial scrutiny by a bare majority, as in *Casey*, or has unanimous support, as in *Lange*.

2. Paucity of Interpretive Resources

In addition to judicial self-consciousness, the development of implied rights are hindered by a paucity of accepted interpretive resources by which developments may be supported. This is evident in both jurisdictions. In the United States, the Supreme Court has developed and modified key elements of the implied right, such as viability, standards of review, the health exception, without ever linking those factors to the initial implication or to any text or history undergirding the initial implication. Conscious of avoiding any reconsideration of the initial implication, and aware that the implication itself is open to attack on orthodox interpretive grounds, the Court has simply avoided any significant delineation of the interpretive methodology employed to develop the implied right.

Similarly, in Australia, although the High Court has clearly located the implied freedom in the text of the Australian Constitution, the unrelenting adherence to text alone has deprived the Court of the interpretive tools necessary to develop the implied freedom in a clear and principled manner. While interpretations of the Australian Constitution will be most secure when supported by textual provisions, text alone is an insecure basis for the recognition and development of a constitutional right. In short, whether the implication is located in the text or in the ether, the lack of interpretive resources to which the courts can refer necessarily impedes any coherent development of implied rights, resulting in a manipulable, unprincipled, and fragmented jurisprudence.

B. Broader Ramifications

Following *ACTV*, some commentators anticipated that implied constitutional rights would give Australia "everything a written Bill of Rights could give us."[263] The argument was that implied constitutional rights not only acted as an effective substitute for express constitutional rights but also were preferable to express rights because implied rights would be unlimited by text,[264] and therefore any debate over rights would focus on the substantive values of the right rather than the technical meaning of the words.[265] The failure of these arguments as a matter of

263. Michael Detmold, *The New Constitutional Law*, 16 SYDNEY L. REV. 228, 248 (1994).

264. This is listed as an argument put against an Australian bill of rights in GEORGE WILLIAMS, A BILL OF RIGHTS FOR AUSTRALIA? (2000).

265. CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13 (1969) (arguing that the structural method "frees us to talk sense" when compared with the textual method,

prediction is indicative of the deeper problem of interpretive disagreement more generally.

Implications are, and will continue to be, an especially weak form of rights protection because, as outlined above,[266] there will always be significant interpretive arguments that count against any implication. That is, it is the contested nature of constitutional interpretation itself that fuels the disagreement about implied rights, and the unrelenting doubts over the textual and historical foundations of the implications will inevitably have a continuing effect on the content of the rights, and, subsequently, on the effectiveness of the right as a protective mechanism. The history of both the implied freedom of political communication and the implied abortion right demonstrates that the post-implication interpretive disagreement has peculiarly significant effects on the content of and protection afforded by the right, suggesting that where the existence of a right is subject to attack, that right will inevitably be a weak form of rights protection. This at least suggests that these rights-distortions are a factor that should be considered when assessing the utility of implied rights as a means of protecting fundamental values.

CONCLUSION

In arguing that interpretive disagreement has significant doctrinal consequences for implied fundamental rights, this Article has sought to contribute to the ongoing debate across constitutional democracies as to how fundamental rights are best protected. In this context, the significant disadvantage of reliance on implied rights is that rights implications will generally rest upon contested methods of constitutional interpretation, either generally or specifically in application. Both the Australian implied freedom of political communication and the U.S. implied abortion right demonstrate that the subsequent debate over the implication itself, the consequent judicial self-consciousness over that initial implication, and the paucity of interpretive resources with which doctrinal developments could be supported, have an adverse effect on the development of implied rights. In both jurisdictions, despite different judicial reactions to the initial interpretive controversy, the jurisprudence that has emerged from the implied right and freedom has been manipulable, unprincipled and fragmented.

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which "in some cases, forces us to blur the focus and talk evasively").

266. *See supra* notes 24–56 and 139–80 and accompanying text.

As a matter of constitutional theory, whether the demonstrated weakness of implied rights is undesirable is only a concern if stronger constitutional rights are preferred. In Australia, where the culture of rights is especially weak, it may be that this form of rights protection is acceptable. However, in the strongly rights-protective culture of the United States, it may be that modifications need to be made to assumptions about the effectiveness of implied rights as a form of strong rights protection specifically, and the viability of pursuing rights protection through interpretive devices and judicially created rules more generally.