The Rhetoric of Neutrality and The Reality of Disparity: Unmasking Judicial Opinions in the Wake of *Dobbs*

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Abstract

This Article examines how the Supreme Court's rhetoric in Dobbs v. Jackson Women's Health Organization masks profound disparate impacts through ostensibly neutral legal reasoning. Through analysis of the enthymemes—arguments with unstated premises—in Dobbs, I demonstrate how the Court's opinion naturalizes controversial value judgments while presenting them as objective legal principles. The Article identifies four key enthymematic structures: the historical rights enthymeme, the categorical choice enthymeme, the stare decisis enthymeme, and the public controversy enthymeme. These rhetorical devices allow the Court to present the elimination of abortion rights as the natural outcome of neutral legal analysis rather than a significant shift in constitutional interpretation. I argue that this masked reasoning has particularly severe consequences for women from marginalized communities. The Article proposes strategies for rhetorical resistance, including exposing unstated premises, centering affected communities in legal discourse, and developing alternative narratives that highlight abortion's intersection with economic and racial justice. This analysis contributes to scholarly understanding of how judicial rhetoric can perpetuate inequality while maintaining an appearance of neutrality.

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Introduction

In the aftermath of *Dobbs v. Jackson Women's Health Organization*, I find the legal community at a critical juncture, confronting not only the immediate consequences of a landmark decision overturned, but also the deeper implications of how judicial opinions shape—and often obscure—the real-world impacts of the law. In this paper, I argue that to truly understand and effectively resist regressive legal decisions, we must move beyond traditional modes of legal analysis and embrace a more rhetorically conscious, impact-focused approach to examining judicial opinions. By doing so, we can expose the often-hidden disparities created by facially neutral laws and decisions, and work towards a more just and equitable legal system.

The Supreme Court's decision in *Dobbs*, which effectively overturned *Roe v. Wade* and eliminated the federal constitutional right to abortion, provides a stark illustration of the disconnect between the rhetoric of judicial neutrality and the reality of disparate impact. Justice Alito's majority opinion, cloaked in the language of historical analysis and constitutional interpretation, presents itself as a neutral application of legal principles. Yet beneath this veneer of objectivity lies a complex web of unstated premises, selective historical narratives, and ideological commitments that have profound, and profoundly unequal, consequences for different segments of society.

I contend that to effectively resist such decisions and their impacts, legal scholars, practitioners, and activists must develop and deploy new tools of rhetorical analysis and resistance. We must learn to read between the lines of judicial opinions, to expose the enthymemes—the unstated premises and assumed values—that undergird legal reasoning. Moreover, I argue that we must

refocus our attention on whom the law affects, centering the voices and experiences of marginalized communities in our legal discourse and scholarship.

Drawing on critical legal studies, feminist legal theory, and rhetorical analysis, I offer a framework for engaging in this type of resistant reading and writing. Using *Dobbs* as a central case study, I will examine how the opinion's facially neutral language masks its disparate impact on women, particularly women of color and those from lower socioeconomic backgrounds. By unpacking the rhetorical strategies employed in the majority opinion and contrasting them with the lived realities of those most affected by the decision, I aim to bridge the gap between abstract legal principles and concrete social impacts.

The rhetoric of judicial opinions, as exemplified by *Dobbs*, raises important questions about the nature of legal reasoning and the role of the judiciary in a democratic society. While the myth of neutral legal reasoning persists, a close examination of the rhetorical strategies employed in judicial opinions reveals a more complex reality.[1] Judges, even at the highest levels of the judiciary, are engaged in a process of persuasion, using various rhetorical tools to justify their decisions and shape public understanding of the law.

This recognition of the rhetorical nature of judicial opinions does not necessarily undermine their authority or legitimacy. Rather, it invites us to engage more critically with legal texts, to unpack the unstated premises and assumptions that underlie judicial reasoning,[2] and to consider the broader implications of legal decisions beyond their immediate doctrinal effects.

For legal scholars and practitioners, this perspective suggests the need for a more rhetorically informed approach to legal analysis. Rather than taking judicial opinions at face value, we must learn to read them as rhetorical artifacts, attentive to the ways in which language, narrative, and argumentative structure shape legal outcomes.[3] This approach can help us to identify potential points of critique and resistance, even in the face of seemingly unassailable legal logic.[4] The recognition of judicial opinions as rhetorical constructs invites a more nuanced understanding of legal reasoning, one that acknowledges the interplay between logic, persuasion, and societal context.

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[1] Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1560–62 (1990).

[2] Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 Mich. L. Rev. 2008, 2009–10 (2002).

[3] *Id.*

[4] *See* Barbara A. Biesecker, *Rethinking the Rhetorical Situation from Within the Thematic of Différance,* 22 Phil. & Rhetoric 110, 110–30 (1989). Biesecker's work on rhetorical situations provides a theoretical framework for understanding judicial opinions as rhetorical artifacts. While her focus is not specifically on legal texts, her insights into the constitutive nature of rhetoric and the importance of différance in shaping meaning are highly relevant to legal discourse. Her approach can be productively extended to the study of judicial opinions and legal argumentation. The recommendation to read legal texts as rhetorical artifacts builds on Biesecker's emphasis on the contextual and performative aspects of rhetoric, while the focus on identifying points of critique and resistance aligns with her interest in the transformative potential of rhetorical analysis. *See also*, James Boyd White, The Legal Imagination: Studies in the Nature of Legal Thought and Expression 758 (1973). White's seminal work on law as a rhetorical and cultural practice provides additional support for this approach, emphasizing the importance of understanding legal texts as part of a broader cultural conversation.

By examining the enthymematic structures embedded within legal texts, scholars can uncover the unstated premises and value judgments that underlie judicial decision-making. This rhetorical lens allows for a critical examination of how legal arguments are constructed, how they create identification with certain audiences, and how they navigate complex social and political issues. And it highlights the ways in which legal discourse both reflects and shapes societal norms, revealing the law as a dynamic, interpretive practice rather than a set of fixed, objective rules. For practitioners, this perspective emphasizes the importance of crafting arguments that not only adhere to logical structures but also resonate with the values and assumptions of their intended audience. It underscores the need for lawyers to be adept not just in formal logic, but in the art of persuasion and the nuances of rhetorical strategy. This approach can lead to more effective advocacy, as well as a deeper understanding of how legal change occurs through the gradual shift of shared premises and the reframing of legal issues.

Moreover, recognizing the rhetorical nature of judicial opinions[5] underscores the importance of diverse voices in the legal profession.[6] If judges are engaged in a process of persuasion rather than purely objective analysis, then the perspectives and experiences brought to bear on legal questions become crucially important. This recognition lends support to efforts to increase diversity in the judiciary and legal academia, as well as to amplify marginalized voices in legal discourse.[7]

For the broader public, understanding the rhetorical dimensions of judicial opinions can foster a more informed and engaged citizenry. By demystifying legal reasoning and exposing its persuasive elements, we can encourage more robust public debate about the role of the judiciary and the content of our laws.[8] This is particularly important in an era of increasing political polarization and declining trust in institutions, including the Supreme Court.[9] Scholars have argued that transparency in judicial decision-making processes can help rebuild public trust and legitimacy in the legal system.[10]

As we move forward in our analysis of *Dobbs* and its implications, it is crucial to keep this rhetorical perspective in mind. The opinion's seemingly neutral language and formalist reasoning should not obscure the profound moral and political choices embedded within it. By unpacking the rhetorical strategies at play, we can begin to engage more critically with the decision and its consequences, opening up new avenues for resistance and change.

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[5] Chemerinsky, *supra* note 2, at 2010–11.

[6] *See generally* Richard Delgado & Jean Stefancic, Critical Race Theory, Fourth Edition: An Introduction (2023).

[7] Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 410–11 (2000).

[8] *See* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. & Human. 201, 204–05 (1990).

[9] *See e.g.* Claudia Deane, *Americans' Deepening Mistrust of Institutions*, Pew (Oct. 17, 2024), https://www.pew.org/en/trend/archive/fall-2024/americans-deepening-mistrust-of-institutions [https://perma.cc/KEV9-PV5H].

[10] Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 286 (2003).

Ultimately, I argue that such rhetorical resistance is not merely an academic exercise, but a crucial component of the broader struggle for social justice and liberation. By exposing the ways in which seemingly neutral legal language can perpetuate and exacerbate existing inequalities, we can begin to imagine and work towards a legal system that truly serves all members of society. In doing so, I take up the challenge posed by critical legal scholars to not only interpret the law, but to actively participate in its transformation.[11]

In the sections that follow, I will first examine the rhetorical strategies employed in the *Dobbs* opinion, paying particular attention to its use of enthymematic argumentation and historical narrative. I will then explore the concept of facially neutral laws and their disparate impacts, using *Dobbs* as a lens through which to view this broader phenomenon. Next, I will propose strategies for rhetorical resistance, emphasizing the importance of centering affected communities in legal discourse. Finally, I will consider the implications of this approach for legal education and practice, arguing for a fundamental shift in how we teach, study, and engage with the law.

Through this analysis, I aim to contribute to a growing body of scholarship that seeks to bridge the gap between critical legal theory and practical advocacy, between the ivory tower and the streets. By developing more sophisticated tools for analyzing and resisting judicial rhetoric, I hope to equip scholars, practitioners, and activists with new weapons in the ongoing struggle for justice and liberation.

I. The Rhetoric of Judicial Opinions

In examining the rhetoric of judicial opinions, particularly in the context of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, we confront the persistent myth of neutral legal reasoning. This myth, deeply ingrained in legal education and practice, posits that judicial decisions are the product of objective analysis, untainted by personal bias or ideological commitments. Yet, as legal scholars have long recognized, judicial opinions are inherently rhetorical constructs, carefully crafted to persuade their audiences through various argumentative strategies and devices.[12] Gerald Wetlaufer argues compellingly that "law is rhetoric" and that legal discourse is inherently persuasive rather than purely descriptive or analytical.[13] This rhetorical nature of legal reasoning is often obscured by the law's claims to objectivity and neutrality, creating a tension between the law's rhetorical practices and its professed ideals.

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[11] As I embark on this analysis, I remain cognizant of my own positionality within the legal academy and the broader social hierarchy. I grapple with the paradox of engaging in activism from within the privileged confines of legal scholarship. Yet it is precisely this tension that drives my inquiry and fuels my commitment to using the tools at my disposal to support and amplify the voices of those engaged in liberation struggles on the ground.

[12] Wetlaufer, *supra* note 1.

[13] *Id.* at 1555.

James Boyd White has shown that law is fundamentally a "branch of rhetoric," and that it constructs meaning through language and argumentation.[14] But legal rhetoric serves a profound constitutive function that extends far beyond mere persuasion or argumentation, actively shaping both doctrinal development and broader sociocultural understandings of law's role in society.[15] Legal discourse does not simply describe or reflect existing social realities, but rather participates in their very construction through complex processes of meaning-making and cultural negotiation.[16] This constitutive power manifests not only in formal legal outcomes, but in the way legal language and reasoning come to structure social relationships, institutional arrangements, and cultural narratives about justice, rights, and civic obligation.[17] The situated and contextual nature of legal argumentation is readily apparent to practicing attorneys, who must constantly modulate their rhetorical strategies based on audience, forum, and circumstance—whether arguing before a trial court, drafting an appellate brief, or negotiating with opposing counsel.[18] This unavoidable dialectical dimension of legal practice suggests that legal reasoning cannot be reduced to formal logic or abstract rules, but must be understood as fundamentally embedded within particular social, institutional, and cultural frameworks that shape both its operation and effects. The recognition of law's rhetorical and constitutive dimensions thus opens up crucial questions about power, legitimacy, and the relationship between legal discourse and social change that purely formalist accounts tend to obscure or ignore.[19]

Within the complex landscape of legal rhetoric, the enthymeme stands as perhaps the most subtle yet powerful persuasive device employed in judicial reasoning, deriving its unique force not from explicit logical chains but from the unstated premises and shared assumptions between judicial authors and their diverse audiences. While conventional approaches to legal analysis tend to focus primarily on surface-level arguments and explicitly stated rationales, enthymematic reasoning operates in a more nuanced register, shaping doctrinal development through premises that remain formally unstated yet prove essential to the argument's coherence and persuasive effect.[20] This implicit dimension of legal argumentation has been notably understudied in traditional legal scholarship, which often privileges more readily apparent forms of judicial reasoning while overlooking the crucial role that unstated premises

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[14] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 684 (1985).

[15] James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism 23 (1990).

[16] *Id.*

[17] *See* Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 4–5 (1983).

[18] Wetlaufer, *supra* note 1, at 1560.

[19] Austin Sarat & Thomas R. Kearns, The Rhetoric of Law: A Project in Historical Interpretation 7 (Legal Stud. F. 3, 5–6 1983).

[20] Susan Tanner, *Deciphering Dobbs: Syllogism and Enthymeme in Contemporary Legal Discourse*, *in* Rhetorical Traditions & Contemporary Law 102, 102–03 (Elizabeth Britt et al. eds., 2024); *see also* Richard A. Posner, How Judges Think 106–08 (2008).

play in guiding legal conclusions.[21] The prevalence of enthymemes in judicial opinions suggests that legal reasoning depends as much on shared background assumptions and implicit value judgments as it does on formal logic or explicit doctrinal rules.[22] Understanding how enthymemes function in legal discourse thus becomes essential for fully appreciating both the rhetorical strategies employed by courts and the deeper structures of legal argumentation that shape doctrinal development. This recognition of the enthymeme's central role challenges traditional models of legal reasoning that emphasize only explicit logical structures while ignoring the implicit premises that often do the real work of legal justification and persuasion.[23]

A. The Enthymeme in Legal Reasoning

The enthymeme, as conceptualized by Aristotle, represents a form of rhetorical syllogism where one or more premises remain unstated.[24] Unlike formal syllogisms that require explicit articulation of all premises and conclusions, enthymemes derive their persuasive power precisely from what remains unsaid. In his *Rhetoric*, Aristotle characterizes the enthymeme as the "substance of rhetorical persuasion," recognizing its unique ability to engage audiences in the construction of meaning.[25] This engagement occurs when audiences supply missing premises based on shared cultural knowledge, values, or assumptions.

Consider a simple everyday example. Imagine a friend telling you, "John is a great employee—he always arrives early." This statement contains an implicit enthymeme with unstated premises. The unstated major premise might be "People who arrive early are good employees." The conclusion—"John is a great employee"—appears logical and self-evident precisely because the audience is invited to supply these unspoken assumptions. Most listeners would not even pause to examine these hidden premises, which is exactly how enthymemes work. They derive their persuasive power from the audience's unconscious acceptance of unstated assumptions, making the argument seem natural and beyond dispute. This seemingly simple rhetorical move demonstrates how enthymemes operate in everyday reasoning: by leaving crucial premises unspoken, they engage the audience in constructing the argument's logic, thereby making the conclusion feel more compelling and intuitive.

In legal discourse, enthymemes serve several crucial functions that distinguish them from pure logical syllogisms. First, they allow judges to present

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[21] Wetlaufer, *supra* note 1, at 1568 (observing that "*the legal scholar adopts a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain*," thereby privileging the most overt forms of doctrinal reasoning).

[22] Tanner, *supra* note 20, at 106–07.

[23] João Maurício Adeodato, *The Rhetorical Syllogism (Enthymeme) in Judicial Argumentation*, 12 Int'l J. for the Semiotics of L. 135, 135 (1999) ("the judicial discursive structure seems to be rather enthymematic than syllogistic, because not all the effectively used norms are revealed, many of them staying not only out of question but also hidden.").

[24] *See generally* Aristotle, Rhetoric (W. Rhys Roberts trans., Dover Publications 2004) (c. 350 B.C.E.).

[25] *Id.*

controversial value judgments as natural or self-evident by leaving them unstated. Second, they create identification between the court and its audience by relying on shared premises that need not be explicitly defended. Third, they provide flexibility in legal reasoning by allowing for the distortion of arguments and the strategic omission of premises that might prove problematic if directly stated.[26]

The power of enthymemes in legal argumentation stems from their ability to make arguments appear more persuasive than they might if all premises were explicitly stated. The force of argument often depends on the unstated premises that the audience is called upon to supply.[27] This observation proves particularly relevant in constitutional interpretation, where courts must navigate complex—and sometimes controversial—questions of rights, liberties, and governmental powers.

B. Enthymematic Structure in Constitutional Interpretation

Constitutional interpretation provides particularly fertile ground for enthymematic reasoning due to the fundamental tension between the document's fixed text and the need to apply its principles to continuously evolving societal circumstances. The inherent ambiguity and open-textured nature of many constitutional provisions create interpretive spaces that courts necessarily fill through reliance on unstated premises and shared understandings when determining the scope of constitutional rights and the limits of governmental authority.[28] This endemic ambiguity extends beyond mere textual uncertainty to encompass deeper questions about the nature of constitutional meaning itself, requiring courts to engage in complex acts of translation between past and present that inevitably draw upon unstated assumptions about constitutional purpose, structure, and values.[29]

The prevalence of enthymematic reasoning in constitutional jurisprudence reflects both practical necessity and theoretical sophistication in judicial decision-making. Courts must somehow bridge the temporal gap between eighteenth-century text and twenty-first-century problems while maintaining

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[26] *See generally* Fabrizio Macagno & Giovanni Damele, *The Dialogical Force of Implicit Premises: Presumptions in Enthymemes*, 35 Informal Logic 365 (2013) (discussing the effect of hidden premises in arguments).

[27] *Id.* at 367.

[28] Bobbitt's work on constitutional interpretation provides insight into this dynamic. *See* Philip Bobbitt, Constitutional Interpretation 12–14 (1991). Bobbitt identifies six modalities of constitutional argument, each of which relies heavily on unstated premises about the nature of constitutional meaning and authority. His analysis reveals how the open texture of constitutional language necessarily invites interpreters to employ enthymematic reasoning when bridging historical text and contemporary application. This observation aligns with more recent scholarship examining how courts navigate the tension between textual fixity and evolving circumstances. *See also* Jack M. Balkin, Living Originalism 3–5 (2011) (arguing that constitutional interpretation inherently involves translation between past and present); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1171–73 (1993) (developing a theory of how courts maintain interpretive fidelity while adapting constitutional meaning to new contexts).

[29] *See* Lessig, *supra* note 28, at 1171–73.

the fiction of constitutional continuity and coherence.[30] This interpretive challenge becomes particularly acute when courts confront novel issues that the Constitution's framers could not have anticipated, from electronic surveillance to artificial intelligence. In such cases, enthymematic reasoning allows courts to draw upon unstated premises about constitutional purposes and principles to fashion doctrinally coherent responses to unprecedented challenges.[31] The unstated premises in these constitutional enthymemes often reflect deeply held cultural and legal values about the proper relationship between individual liberty and government power, the nature of democratic self-governance, the rule of law, and the role of the judiciary in the constitutional order.[32]

Moreover, the multi-layered nature of constitutional interpretation particularly lends itself to enthymematic reasoning because courts must simultaneously address multiple audiences with varying levels of legal sophistication and different stakes in constitutional outcomes. When writing constitutional opinions, courts must speak to other judges, practicing lawyers, legal scholars, political actors, and the broader public, each bringing different background assumptions and interpretive frameworks to their reading of constitutional texts.[33] Enthymematic reasoning allows courts to craft arguments that operate at multiple levels simultaneously, with unstated premises that might be obvious to legal specialists while remaining opaque to general readers, thus preserving both technical precision and rhetorical flexibility. This multi-vocal quality of constitutional enthymemes serves important institutional purposes, allowing courts to maintain their legitimacy across diverse constituencies while gradually evolving constitutional doctrine to meet changing social needs.[34]

The use of enthymematic reasoning in constitutional interpretation also reflects deeper truths about the nature of constitutional meaning and authority. By leaving crucial premises unstated, constitutional enthymemes invite their audiences to participate in the construction of constitutional meaning, fostering a form of democratic constitutionalism that extends beyond mere

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[30] *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 Mich. L. Rev. 165, 169–72 (2008) (arguing that today, different interpretive methods are best suited for some categories of cases but not for others, and that methods should be used on a case-by-case basis).

[31] *See* David A. Strauss, *The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture*, 102 Marq. L. Rev. 979, 981–82 (2019). ("Precedent, for example, even if limited to judicial precedent and certainly if conceived more broadly, does not dictate a single direction for the law. Among the possible paths that precedent leaves open, a judge—or another official or a citizen—has to choose on the basis of a moral judgment of some kind. Sometimes it might even be necessary to depart from the path that precedent identifies, because, even giving the lessons of the past full credit, they are simply unacceptable."); David A. Strauss, *Do We Have a Living Constitution?*, 59 Drake L. Rev. 973, 984 (2011) ("The important point is that moral judgments are not the only factor. In the common law approach, the role of those judgments is limited by the demand that decisions be justified by reference to precedent. This is, I believe, the way the Constitution changes-or, if you prefer, the way constitutional law or the requirements imposed by the Constitution change-in our system.").

[32] Robert Post, *Theories of Constitutional Interpretation*, 30 Representations 13, 18–20 (1990).

[33] *See* White, *supra* note 14, at 691 (arguing that the law is constitutive and that "[t]he law is not merely a bureaucracy or a set of rules, but a community of speakers of a certain kind: a culture of argument, perpetually remade by its participants").

[34] Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 367–70 (2009).

textual exegesis to encompass shared cultural understandings about fundamental values and principles.[35] This participatory dimension of constitutional interpretation helps explain why certain unstated premises in constitutional arguments can become so contentious—they often reflect competing visions of the constitutional order itself.[36] The heated debates over originalism versus living constitutionalism, for instance, often turn less on explicit interpretive arguments than on unstated assumptions about the nature of constitutional authority and the proper role of courts in a democratic society.[37]

The reliance on enthymematic reasoning in constitutional interpretation highlights the inherently conservative nature of constitutional change. By leaving crucial premises unstated, courts can gradually shift constitutional meaning while maintaining an appearance of doctrinal consistency and historical continuity.[38] This rhetorical strategy allows courts to respond to evolving social needs and values while preserving the legitimacy that comes from apparent adherence to established constitutional principles. The unstated premises in constitutional enthymemes thus serve as crucial bridges between past and present, enabling courts to maintain what Bruce Ackerman has called the "myth of rediscovery"—the notion that constitutional innovation represents not change but merely the recognition of principles that were always implicit in the constitutional order.[39] This rhetorical strategy proves particularly powerful in constitutional adjudication because it allows courts to adapt constitutional meaning to contemporary circumstances while maintaining the fiction of interpretive consistency and historical continuity.[40] When courts employ enthymemes in determining the scope of constitutional rights, they frequently leave unstated crucial premises about the nature of rights, the role of historical practice, and the proper approach to constitutional interpretation itself, allowing these fundamental assumptions to shape outcomes without explicit acknowledgment or defense.[41] This implicit dimension of constitutional reasoning becomes particularly evident in cases involving unenumerated rights or novel applications of established principles, where courts must somehow reconcile innovation with tradition, change with continuity. The power of constitutional enthymemes in these contexts stems from their ability to present doctrinal evolution as discovery rather than creation, allowing courts to

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[35] *See* White, *supra* note 14, at 690) ("Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity . . . for oneself, for one's audience . . . One creates, or proposes to create, a community of people, talking to and about each other.").

[36] Balkin, *supra* note 28, at 3–5.

[37] *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1, 69–70 (2009).

[38] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA – 2005-06 Brennan Center Symposium Lecture*, 94 Calif. L. Rev. 1323, 1328–30 (2006).

[39] Bruce Ackerman, We the People: Foundations 17–18 (1991).

[40] *See, e.g.*, Siegel, *supra* note 38, at 1328–30. (Courts often shape precedent gradually, responding to and anticipating political considerations so as to appear consistent. "The pragmatic political considerations that shaped development of the unique physical characteristics argument also shaped its practical reach. Practices said to be covered by the unique physical characteristics qualification fluctuated over time, as debate shifted ground.")

[41] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 879–80 (1996).

maintain their institutional legitimacy while gradually adapting constitutional law to meet evolving social needs and values.[42]

The enthymematic nature of constitutional reasoning becomes particularly apparent in cases involving fundamental rights, where courts must often navigate between competing conceptions of liberty, equality, and governmental power.[43] By leaving crucial premises unstated about the proper level of generality at which to define rights or the relevant historical traditions to consider, courts can maintain flexibility in constitutional interpretation while appearing to engage in straightforward application of established principles.[44] This rhetorical strategy allows courts to respond to changing social circumstances and evolving understandings of constitutional values without explicitly acknowledging the extent to which they are engaging in constitutional innovation.[45] The "myth of rediscovery" thus operates as a kind of necessary fiction in constitutional law, enabling courts to maintain the paradoxical task of preserving constitutional meaning while adapting it to meet the needs of a changing society.[46]

Courts frequently employ enthymemes when determining the scope of constitutional rights, often leaving unstated crucial premises about the nature of rights, the role of historical practice, and the proper approach to constitutional interpretation itself. For instance, in cases involving the right to privacy, courts often rely on unstated assumptions about the relationship between privacy and other constitutional values, such as liberty or autonomy.[47] These assumptions shape the court's analysis and the ultimate scope of the right, even though they are rarely made explicit in the court's reasoning. Similarly, when courts consider the extent of the government's power to regulate economic activity, they often rely on unstated premises about the proper role of government in the economy and the balance between individual liberty and collective welfare. These premises, deeply rooted in political and economic theory, exert a powerful influence on the court's decision-making, even though they remain beneath the surface of the court's explicit reasoning.[48]

The Supreme Court's use of enthymemes in constitutional cases often serves to naturalize particular interpretive approaches while obscuring their controversial nature. For instance, when the Court employs originalist methodology, it frequently relies on unstated premises about the relevance of historical practices to modern constitutional meaning. These premises, such as the idea that the original understanding of the Constitution should be the

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[42] Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 57–59 (1997).

[43] Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 73–75; *see* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1491–92 (2002) (analyzing the historical and theoretical tensions between liberty and equality and arguing that the judicial role in protecting both requires courts to navigate the limits of governmental power).

[44] *See* Michael H. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 669–72 (1997).

[45] *See generally* Wetlaufer, *supra* note 1.

[46] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 459 (1989).

[47] Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev 1410, 1410–11 (1974).

[48] *See generally* Strauss, *supra* note 41.

primary guide for interpretation, are often left undefended in the Court's reasoning.[49] This reliance on unstated premises allows the Court to present its interpretive approach as a neutral, almost inevitable application of the Constitution's true meaning, rather than as a contested methodological choice. By leaving these premises unstated, the Court can avoid directly engaging with critiques of originalism or alternative interpretive approaches, such as living constitutionalism or pragmatism.

Similarly, when the Court applies the tiers of scrutiny framework in equal protection cases, it often relies on enthymematic reasoning to justify its choice of the level of scrutiny to apply. The Court's decisions about whether to apply strict scrutiny, intermediate scrutiny, or rational basis review frequently depend on unstated assumptions about the nature of the classification at issue and its relationship to legitimate government interests.[50] These assumptions, which often involve complex judgments about social reality and the effects of government classifications, are rarely fully articulated in the Court's opinions. Instead, the Court often simply announces its choice of the level of scrutiny, leaving the underlying reasoning unstated. This enthymematic structure allows the Court to present its equal protection analysis as a straightforward application of established doctrine, obscuring the complex value judgments and empirical assessments that underlie its reasoning.

The use of enthymemes in constitutional interpretation is not limited to the Supreme Court. Lower federal courts and state courts also frequently rely on enthymematic reasoning when interpreting both the federal and state constitutions.[51] This reliance on unstated premises and shared understandings is often necessary for courts to make sense of the broad, often ambiguous

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[49] *See generally* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453 (2013).

[50] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996), which illustrates how unstated premises shape the selection of scrutiny levels. In this case challenging the male-only admissions policy of the Virginia Military Institute (VMI), the Court applied intermediate scrutiny to gender-based classifications. The underlying enthymematic reasoning reveals several crucial unstated premises: first, that gender classifications are not as inherently suspect as racial classifications (hence not triggering strict scrutiny), but are nonetheless problematic enough to warrant more than minimal rational basis review; second, that gender classifications often reflect outdated stereotypes that merit heightened judicial skepticism; and third, that intermediate scrutiny can effectively address systemic gender discrimination without completely prohibiting all gender-based distinctions. The Court's opinion leaves these premises largely unexamined, presenting the choice of intermediate scrutiny as a neutral, almost self-evident approach. Justice Ginsburg's majority opinion asserts that gender-based classifications must serve "important governmental objectives" and be "substantially related" to those objectives—a standard that appears neutral but actually embeds profound assumptions about gender equality. The unstated premise is that while absolute equality might not be required, significant disparities demand judicial intervention. This enthymematic structure allows the Court to strike down VMI's male-only policy without explicitly declaring gender a suspect classification, demonstrating how courts can reshape social norms through carefully constructed legal reasoning that leaves key assumptions unspoken.

[51] *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006) (surveying strict scrutiny decisions in the lower federal courts and finding that nearly one-third of challenged laws survive, thereby demonstrating that these courts, no less than the Supreme Court, resolve constitutional questions through context-dependent judgements that rely on shared but unstated premises—i.e., enthymemes—even though the article itself never uses that term).

language of constitutional provisions.[52] For instance, when a state court interprets its state constitution's due process clause, it often relies on unstated assumptions about the nature of the rights protected by due process and their relationship to other constitutional values. These assumptions, which may be rooted in the state's particular constitutional history or in broader theories of constitutional interpretation, shape the court's analysis and the ultimate scope of the rights protected.

The enthymematic structure of constitutional interpretation[53] has significant implications for the legitimacy and transparency of judicial decision-making. On one hand, the use of enthymemes allows courts to draw on shared understandings and cultural values in interpreting the Constitution, potentially increasing the public's acceptance of their decisions. Shared assumptions, social norms, and cultural values provide a common language through which the court can engage with the public's collective constitutional understandings.[54] By tapping into this collective understanding, courts can potentially ground their decisions in a sense of shared constitutional meaning, increasing their legitimacy and persuasive power.

However, the reliance on unstated premises in constitutional interpretation also raises significant concerns about transparency and accountability. When courts leave key aspects of their reasoning unstated, it becomes more difficult for the public, litigants, and other branches of government to evaluate the soundness and coherence of their decisions.[55] This opacity can undermine the public's trust in the judiciary and raise questions about the legitimacy of judicial review. Moreover, the use of enthymemes can allow courts to obscure the value judgments and policy choices that inevitably inform constitutional interpretation. By presenting their decisions as the straightforward application of neutral principles and declining to defend their assumptions, courts

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[52] *See generally* Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987) (confronting the problem of ambiguous text and arguing that the distinct methods of constitutional interpretation are interconnected and can point towards, or at least not be inconsistent with, the same result).

[53] In addition to constitutional interpretation, statutory interpretation is another area of law where enthymematic reasoning plays a significant role. When courts interpret statutes, they often rely on unstated premises and shared understandings about the purpose of the law, the intentions of the legislature, and the role of the judiciary in the interpretive process. These unstated premises shape the court's analysis and the ultimate meaning given to the statutory language, even though they are rarely made explicit in the court's reasoning. *See generally* William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

One common enthymeme in statutory interpretation involves the use of canons of construction. These canons, such as the plain meaning rule, the rule against surplusage, and the ejusdem generis rule, are often applied by courts as if they were neutral, quasi-scientific tools for discerning the meaning of statutory language. *See generally* Scott J. Shapiro, Legality (2011). However, the application of these canons often involves unstated assumptions about the proper role of the judiciary, the relative importance of text and purpose in statutory interpretation, and the appropriate tools for discerning legislative intent. By presenting these canons as neutral interpretive principles, courts can obscure the value judgments and policy choices that inform their statutory analysis.

[54] *See generally* Richard A. Primus, *Public Consensus as Constitutional Authority*, 78 Geo. Wash. L. Rev. 1207 (2010).

[55] *See generally* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 Yale L.J. 449 (1989).

can avoid directly engaging with the contested moral and political questions that often underlie constitutional disputes.

The enthymematic structure of constitutional interpretation also has implications for the role of precedent and the development of constitutional doctrine over time. When courts rely on unstated premises in their constitutional decisions, those premises can become embedded in the fabric of constitutional law, shaping future cases even though they were never explicitly articulated.[56]

This process of implicit constitutional change can lead to the gradual evolution of constitutional meaning, as new unstated premises and shared understandings replace old ones. However, it can also lead to doctrinal confusion and inconsistency, as different courts rely on different unstated premises in interpreting the same constitutional provisions.

Moreover, the reliance on enthymematic reasoning in constitutional interpretation can make it difficult for courts to respond to changing social and political realities. When constitutional doctrine is built on a foundation of unstated premises and shared understandings, it can be difficult for courts to adapt that doctrine to new circumstances without explicitly acknowledging and defending the underlying assumptions.[57] This can lead to a kind of constitutional ossification, as outdated assumptions and understandings continue to shape constitutional law long after they have lost their persuasive power or descriptive accuracy.

Despite these challenges, the use of enthymemes in constitutional interpretation is likely to remain a central feature of judicial reasoning. The broad, open-textured language of many constitutional provisions, combined with the need to apply them to ever-changing social and political realities, makes some reliance on unstated premises and shared understandings inevitable. The key, then, is for courts to be more transparent about the role of enthymemes in their reasoning, explicitly acknowledging the unstated premises and value judgments that inform their decisions.[58] Robust public debate on constitutional interpretation is not merely an academic exercise, but a fundamental democratic practice that serves several critical functions. First, it challenges the notion that constitutional meaning is the exclusive domain of judges and legal experts, instead recognizing the Constitution as a living document that derives its legitimacy from the ongoing engagement of the people it governs. Popular constitutionalism—the idea that constitutional interpretation is a collective enterprise involving not just courts but also social movements, political actors, and ordinary citizens—provides a crucial counterweight to judicial supremacy.[59] By inviting broader public scrutiny, we create a more dynamic constitutional dialogue that can expose hidden assumptions, challenge

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[56] *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997 (1994).

[57] *See generally* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995).

[58] *See generally* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

[59] Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027, 1028–31 (2012); *see generally* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

entrenched power structures, and ensure that constitutional interpretation reflects the lived experiences of diverse communities. This participatory approach recognizes that the Constitution's meaning evolves through ongoing social negotiations, not through the unilateral pronouncements of a single institution. Moreover, public debate can surface perspectives that might otherwise be marginalized in formal legal discourse, bringing to light the real-world implications of constitutional interpretations. As Robert Post argues, constitutional meaning is not simply declared but is continuously constructed through complex interactions between courts, political institutions, and the broader public.[60] By opening up constitutional reasoning to wider scrutiny, we create a more inclusive and responsive constitutional framework—one that can adapt to changing social realities while maintaining a connection to fundamental principles of justice and equality.

Moreover, a greater recognition of the enthymematic structure of constitutional interpretation can help to demystify the process of constitutional decision-making, highlighting the ways in which courts draw on shared understandings and cultural values in interpreting the Constitution. This recognition can help to bridge the gap between the courts and the public, fostering a greater sense of shared ownership and participation in the process of constitutional interpretation.[61]

The use of enthymemes in constitutional interpretation is a central feature of judicial reasoning, reflecting the inherent challenges of applying broad constitutional principles to complex social and political realities. While the reliance on unstated premises and shared understandings can raise concerns about transparency and accountability, it also allows courts to tap into the collective constitutional understandings of the public, potentially increasing the legitimacy and persuasive power of their decisions. By explicitly acknowledging the role of enthymemes in their reasoning and opening up their decisions to greater public scrutiny and debate, courts can help to foster a more inclusive and participatory process of constitutional interpretation. Ultimately, a greater recognition of the enthymematic structure of constitutional interpretation can help to deepen our understanding of the complex interplay between law, politics, and culture in shaping the meaning of the Constitution over time.

II. *Dobbs* and the Power of Enthymematic Reasoning

In examining the rhetoric of judicial opinions, particularly in the context of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, I am confronted with the persistent myth of neutral legal reasoning.

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[60] *See e.g.,* Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 10–11 (2003); Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.–C.L. L. Rev. 373, 379 (2007) ("Democratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.")

[61] *See generally* Siegel, *supra* note 38.

This myth, deeply ingrained in legal education and practice, posits that judicial decisions are the product of objective analysis, untainted by personal bias or ideological commitments. But this myth is just that—an ideal that few, if any legal scholars think reflect reality, a reality where rhetorical strategies play a crucial role in shaping legal outcomes and public perception. This insight is not novel; legal scholars have long recognized the profound influence of rhetoric in judicial decision-making and legal discourse. Gerald Wetlaufer, argues that "law is rhetoric" and that legal discourse is inherently persuasive rather than purely descriptive or analytical.[62] Wetlaufer contends that the rhetorical nature of legal argumentation is often obscured by the law's claims to objectivity and neutrality, creating a tension between the law's rhetorical practices and its professed ideals.[63]

This is not a bug, but a feature of legal discourse. As James Boyd White posits, law is fundamentally a "branch of rhetoric." that constructs meaning through language and argumentation.[64] White emphasizes the constitutive power of legal rhetoric, arguing that it shapes not only legal outcomes but also social realities and cultural understandings.[65] Any practicing attorney will be quick to agree about the importance of audience and context in legal argumentation, suggesting that legal reasoning is inherently dialectical and situated within particular social and cultural frameworks.[66]

Often the rhetoric of the law is analyzed through the arguments that are made.[67] And yet, potentially more important to audience reception are the arguments that are not made—the quasi-logical arguments through the use of the enthymeme—the rhetorical cousin to the syllogism. The relative neglect of the enthymeme in legal scholarship represents a missed opportunity to fully grasp the subtle ways in which judicial opinions shape legal doctrine and public understanding of the law. By leaving crucial premises unstated, enthymemes can make arguments appear more persuasive and self-evident than they might otherwise be, potentially masking contestable assumptions or value judgments[68] and reinforcing the mythos of neutrality and objectivity.

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[62] Wetlaufer, *supra* note 1, at 1554.

[63] *Id.* at 1555.

[64] White, *supra* note 14, at 684.

[65] *Id.* at 688–691.

[66] For an extended discussion of the importance of audience to all writing, *see* Chaïm Perelman, The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications 1–8 (1979).

[67] While scholars have made significant contributions to our understanding of legal rhetoric, there remains a critical gap in the literature regarding specific rhetorical devices employed in judicial opinions. In particular, the enthymeme—a form of syllogism in which one premise is implied rather than explicitly stated—has been understudied as a rhetorical tool in legal discourse. Although Aristotle identified the enthymeme as the "substance of rhetorical persuasion," Aristotle, *supra* note 24, at 3, its role in shaping judicial opinions and legal arguments has not received sufficient attention from legal scholars. This oversight is particularly striking given the enthymeme's potential to obscure underlying assumptions and ideological commitments within seemingly neutral legal reasoning.

[68] *See* Jeffrey Walker, *The Body of Persuasion: A Theory of the Enthymeme*, 56 College English 46, 51–53 (1994) (discussing the persuasive power of enthymemes in general rhetorical contexts). A more thorough examination of enthymematic reasoning in judicial opinions could provide valuable insights into the rhetorical strategies employed by courts and the implicit values and assumptions that underlie legal decision-making.

The notion of judicial neutrality has long been a cornerstone of American legal theory. The ideal of "neutral principles" in constitutional law suggests that judicial decisions should be based on reasoning that transcends the immediate result.[69] This concept has been influential in shaping the self-perception of the judiciary and the public's understanding of the legal system. However, critical legal scholars have convincingly argued that true neutrality in legal reasoning is not only unattainable but may also serve to obscure the inherently political nature of judicial decision-making.[70]

In the context of Supreme Court opinions, the myth of neutrality takes on particular significance. These decisions, which often have far-reaching consequences for millions of Americans, are presented as the product of dispassionate legal analysis. Yet, as I will demonstrate through an examination of the *Dobbs* opinion, they are deeply imbued with rhetorical strategies that serve to justify particular ideological positions while maintaining the appearance of objectivity.

One of the most potent rhetorical tools employed in judicial opinions is enthymematic argumentation. An enthymeme, as conceptualized by Aristotle, is the quasi-logical counterpart to the syllogism in which one of the premises is implied rather than explicitly stated.[71] In the context of legal reasoning, enthymemes allow judges to present their arguments as logically sound while leaving crucial assumptions unstated. This technique is particularly effective because it engages the audience in the process of argument construction, making them more likely to accept the conclusion.[72]

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* serves as a compelling case study in the use of enthymematic reasoning to reshape constitutional rights. The opinion employs several interconnected enthymemes that work together to justify its dramatic departure from established precedent while maintaining an appearance of logical inevitability. By dissecting these enthymemes, we can uncover the unstated premises that significantly influence the Court's reasoning and assess their implications for constitutional law.

In *Dobbs*, Justice Alito's majority opinion employs enthymematic argumentation to great effect. Consider, for instance, his historical argument against the recognition of abortion as a constitutional right. Alito writes, "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[73]

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[69] *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

[70] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, (1976).

[71] *See* Aristotle, *supra* note 24, at 101–04.

[72] Walker, *supra* note 68, at 53.

[73] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250 (2022).

This statement contains several enthymemes.[74] First, there is the unstated premise that rights must be "deeply rooted in the Nation's history and traditions" to be constitutionally protected.[75] While the test itself, derived from *Washington v. Glucksberg*, is explicitly stated, its application to abortion rights relies on enthymematic argumentation that shapes the Court's analysis in significant ways.[76] Let's unpack the main enthymemes in the opinion.

A. The Historical Rights Enthymeme

The cornerstone of Justice Alito's majority opinion is an enthymematic argument about the relationship between historical practice and constitutional rights. We can reconstruct this argument as follows:

1. **Major Premise (Stated):** Rights not explicitly mentioned in the Constitution must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" to receive constitutional protection under the Due Process Clause of the Fourteenth Amendment.
2. **Minor Premise (Unstated):** A right is deeply rooted in our nation's history only if it has been legally recognized in all circumstances across all time.
3. **Additional Unstated Premise:** Historical practices during periods of explicit discrimination provide legitimate guidance for determining modern constitutional rights.
4. **Conclusion:** Therefore, abortion is not a constitutionally protected right.

This enthymematic structure allows the Court to frame its decision as a natural outcome of historical analysis, presenting the revocation of abortion rights as a restoration of constitutional fidelity rather than a substantive change. However, this reasoning masks several controversial assumptions embedded in the unstated premises, which, if brought to light, might challenge the validity of the Court's conclusion.

The major premise is explicitly stated and draws from the "deeply rooted" standard articulated in *Washington v. Glucksberg*.[77] In that case, the Court held

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[74] For a more robust analysis of the enthymematic structure in *Dobbs*, *see generally* Tanner, *supra* note 20.

[75] *Dobbs*, 597 U.S. at 231. Note that the distinction here is that Alito seems to be arguing that *Glucksberg* must be applied to all rights, not just to determine whether a new right should be acknowledged.

[76] *Id.* at 237–39; *see also Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

[77] In *Glucksberg*, 521 U.S. 702 (1997), the Supreme Court considered whether the Due Process Clause of the Fourteenth Amendment protects a right to assisted suicide. The Court employed a two-step analysis to determine whether an asserted right qualifies as a fundamental liberty interest deserving of substantive due process protection. First, it requires a "careful description of the asserted fundamental liberty interest." *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Second, it examines whether that interest is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty

that for a right to be protected under substantive due process, it must be deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty. By applying this standard, the Court seeks to anchor constitutional protections in historical precedent, thereby limiting judicial discretion and purportedly adhering to original constitutional meanings.

However, the application of this standard to abortion rights raises questions. The Constitution does not explicitly mention many rights that are nonetheless considered fundamental, such as the right to marry, to use contraception, or to raise one's children. These rights have been recognized through the Court's interpretation of the Constitution's broad principles, particularly those related to liberty and privacy. By emphasizing a strict historical test, the Court potentially narrows the scope of rights protected under the Due Process Clause.

The unstated minor premise ("A right is deeply rooted in our nation's history only if it has been legally recognized in all circumstances across all time.") asserts that a right is deeply rooted only if it has been consistently legally recognized throughout American history in all circumstances. This premise imposes a stringent standard that few rights could meet, especially those that have evolved over time or were previously suppressed due to societal norms or discriminatory laws. For example, the right to interracial marriage recognized in *Loving v. Virginia* was not historically accepted; laws prohibiting such

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nor justice would exist if [it] were sacrificed." *Id.* at 721–22 (internal quotation marks omitted) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

In *Glucksberg*, the Court concluded that the asserted right to assisted suicide was not a fundamental liberty interest because "more than 700 years of Anglo-American common-law tradition" condemned suicide and assisted suicide as criminal acts. *Id.* at 711. The Court emphasized that this historical approach ensures that substantive due process does not become a mechanism for judges to impose their own moral convictions under the guise of constitutional interpretation. *Id.* at 720–21.

The "deeply rooted" standard articulated in *Glucksberg* has been influential but also controversial. Some scholars argue that this standard is overly restrictive and fails to account for the dynamic nature of constitutional rights. *See* Laurence H. Tribe, The Invisible Constitution 32–33 (2008) (asserting that a rigid historical approach neglects the Constitution's capacity to adapt to contemporary values). For instance, rights such as interracial marriage, recognized in *Loving v. Virginia*, 388 U.S. 1 (1967), and same-sex intimate conduct, recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), were not historically protected but were nonetheless deemed fundamental as societal understandings evolved. *See Loving*, 388 U.S. at 6–7 (overturning anti-miscegenation laws despite their historical prevalence); *Lawrence*, 539 U.S. at 571–72 (noting that historical condemnation of same-sex relations does not justify infringing on personal liberty).

Furthermore, the Court's reliance on historical traditions has been criticized for potentially entrenching outdated and discriminatory practices. *See* Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 380–81 (2011) (discussing how reliance on historical practices can perpetuate past injustices). In *Dobbs*, the application of the *Glucksberg* standard to abortion rights has been contested on the grounds that it ignores the broader context of women's rights and the historical marginalization of women in legal and political spheres. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1735–36 (2008) (arguing that historical abortion regulations were rooted in patriarchal views that should not dictate contemporary rights). Critics argue that strict adherence to historical practices may reinforce injustices that the Constitution aims to remedy. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1503–04 (1999) (contending that substantive due process must evolve to protect rights essential to liberty and justice in modern society).

marriages were prevalent for much of American history.[78] Similarly, the right to same-sex intimacy, affirmed in *Lawrence v. Texas*, and the right to same-sex marriage, recognized in *Obergefell v. Hodges*, lacked historical legal recognition.[79] These rights were acknowledged by the Court as fundamental despite their absence from historical legal acceptance, reflecting an understanding that constitutional protections can and should evolve with societal progress. By insisting on continuous historical recognition, the Court's unstated premise effectively excludes rights that have emerged as society's understanding of liberty and equality has expanded. This approach overlooks the dynamic nature of constitutional interpretation, which allows for the development of rights in response to changing societal values and norms.

The additional unstated premise ("Historical practices during periods of explicit discrimination provide legitimate guidance for determining modern constitutional rights.") assumes that historical practices during periods of explicit discrimination are legitimate guides for determining modern constitutional rights. This is particularly problematic when considering that, for much of American history, women were denied basic political and legal rights. They could not vote, own property independently, or participate fully in civic life. Legal systems and societal structures were explicitly patriarchal, marginalizing women's autonomy and agency.[80]

Relying on legal traditions established during such times to define contemporary rights raises significant concerns. It risks perpetuating outdated and discriminatory norms that the Constitution has since been interpreted to reject. The Fourteenth Amendment's Equal Protection Clause and the Nineteenth Amendment's extension of voting rights to women reflect a constitutional commitment to overcoming past injustices and expanding the promise of equality.

By treating historical discrimination as a neutral or authoritative basis for constitutional interpretation, the Court's reasoning fails to account for the evolution of societal values and the progress made toward gender equality. This reliance on discriminatory historical practices undermines the legitimacy of using history as the sole determinant of modern rights and ignores the Constitution's role as a living document designed to promote justice and liberty for all.

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[78] *See Loving*, 388 U.S. at 6 n.5 (1967) (noting that "[a]t least 41 States and the District of Columbia have at one time or another enacted statutes prohibiting interracial marriages").

[79] *See Lawrence*, 539 U.S. at 568 (2003) (acknowledging that laws prohibiting same-sex relations have "ancient roots"); *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) ("[I]t was not until the mid-20th century that federal and state courts began to question and strike down laws that imposed criminal penalties for private consensual same-sex conduct.").

[80] *See generally* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 952–63 (2002) (describing how, well into the twentieth century, women were denied the franchise, barred from independent property ownership, and excluded from full civic participation under a legal order that constitutionally entrenched the family as a patriarchal institution); *see generally* Linda K. Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship 9–12 (1998) (detailing pervasive legal disabilities—including coverture, disenfranchisement, and exclusion from jury service—that marginalized women's autonomy and agency in the United States before the twentieth century reform era).

The Court's historical approach, as framed by the enthymeme, has significant implications for the recognition and protection of constitutional rights. By anchoring rights exclusively in historical acceptance, the Court limits the Constitution's ability to address contemporary issues and adapt to societal changes. This rigid interpretation contrasts with a more flexible understanding of the Constitution as a living document that can accommodate new understandings of rights and liberties.

Furthermore, the historical approach may inadvertently entrench past injustices. Many rights now considered fundamental were once suppressed or unrecognized due to prevailing prejudices and discriminatory laws. If the Court were to apply the same stringent historical test to other rights, protections against racial discrimination, gender inequality, and violations of personal autonomy could be jeopardized.

A nuanced examination of the history of abortion laws reveals that the legal status of abortion has varied significantly over time.[81] In the early years of the United States, abortion before "quickening" (the first detectable fetal movement) was generally not criminalized.[82] It was not until the mid-19th century that states began enacting more restrictive abortion laws, influenced by a combination of medical advancements, social attitudes, and professionalization efforts within the medical community.[83]

These restrictive laws were often intertwined with discriminatory attitudes toward women and efforts to control reproductive autonomy.[84] The criminalization of abortion served to reinforce traditional gender roles and limit women's participation in public life.[85] By the time the Fourteenth Amendment was adopted, restrictive abortion laws were becoming more common, but this historical context reflects a period of explicit discrimination rather than a consensus on the moral or legal status of abortion.[86] Understanding this history challenges the notion that there is an unbroken tradition of prohibiting

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[81] *See generally* James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900 (1978) (providing a comprehensive history of abortion laws in the United States).

[82] *See id*. at 3–4 (noting that early American abortion laws did not criminalize abortion before quickening); *see also* Commonwealth v. Bangs, 9 Mass. (8 Tyng) 387, 388 (1812) (indicating that pre-quickening abortion was not indictable under common law).

[83] *See* Mohr, *supra* note 81, at 200–05 (discussing the rise of restrictive abortion laws in the mid-19th century); Kristin Luker, *Abortion and the Politics of Motherhood* 23–25 (1984) (examining the influence of medical professionals on abortion legislation); *see also* Gonzales v. Carhart, 550 U.S. 124, 132 (2007) (acknowledging the historical shift in abortion laws during the 19th century).

[84] *See* Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 277–78 (1992) (arguing that 19th-century abortion laws were influenced by discriminatory attitudes toward women); Linda Gordon, Woman's Body, Woman's Right: Birth Control in America 41–42 (1976) (discussing societal efforts to control women's reproductive autonomy).

[85] *See* Siegel, *supra* note 84, at 278–79 (explaining how criminalization reinforced traditional gender roles); Rosalind P. Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* 89–90 (rev. ed. 1990) (analyzing the impact of abortion laws on women's societal roles).

[86] *See* Mohr, *supra* note 81, at 209–10 (noting the proliferation of restrictive abortion laws by the 1860s); Siegel, *supra* note 84, at 277 (highlighting the discriminatory context during the adoption of the Fourteenth Amendment).

abortion that can legitimately inform contemporary constitutional interpretation. It suggests that historical practices were shaped by discriminatory beliefs and social structures that the Constitution now seeks to dismantle.[87]

The Court's reliance on history in *Dobbs* thus raises concerns about selective interpretation. Historical records are complex and often contradictory, reflecting a diversity of views and practices. By emphasizing certain historical periods or legal traditions while ignoring others, the Court may present a skewed narrative that supports a predetermined conclusion. And the interpretation of historical practices without considering their context can lead to misguided conclusions. Laws and societal norms from the past were influenced by factors that may no longer be relevant or acceptable, such as racism, sexism, and other forms of discrimination. A critical approach to history recognizes these limitations and avoids treating historical practices as infallible guides for contemporary constitutional interpretation. It requires an acknowledgment of the evolving nature of societal values and the role of the Constitution in promoting justice and protecting individual rights against outdated norms.

An alternative to the strict historical approach is the doctrine of "living constitutionalism," which interprets the Constitution as a dynamic document that must be understood in the context of present-day realities. This perspective allows for the recognition of new rights and the expansion of existing ones as society progresses. Under this approach, the principles enshrined in the Constitution—such as liberty, equality, and justice—are applied to contemporary issues in a way that honors the document's enduring values while adapting to modern circumstances. This method acknowledges that the framers could not have anticipated all future developments and that the Constitution's broad language is designed to be flexible. Justice Brennan argued that the genius of the Constitution lies in its adaptability and its capacity to meet the needs of a changing society.[88] By embracing a more expansive interpretation, the Court can ensure that constitutional protections remain relevant and effective.

In *Dobbs*, the Court's insistence on continuous historical recognition as a prerequisite for constitutional protection imposes a rigid and exclusionary

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[87] The Constitution has been interpreted over time to expand the protection of individual rights, often in response to societal changes and growing recognition of injustices. The Court has played a crucial role in this evolution, recognizing rights that promote liberty and equality even when they lack deep historical roots. For instance, the right to privacy, although not explicitly mentioned in the Constitution, has been recognized as fundamental in cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), which protected the use of contraception by married couples. This right was extended in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), to unmarried individuals, reflecting an evolving understanding of personal autonomy. Similarly, the Court has recognized rights related to personal identity and relationships, as in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), which acknowledged the rights of LGBTQ+ individuals despite historical legal prohibitions against same-sex relationships and marriage.

These developments illustrate that the Constitution's protection of rights is not static but responsive to contemporary understandings of liberty and justice. A strict historical approach, as employed in *Dobbs*, risks freezing constitutional protections in a bygone era, ignoring the progress made toward a more inclusive and equitable society.

[88] *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986) ("The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in its adaptability to the crises of human affairs.").

standard that disregards the evolution of rights and societal values. It overlooks the Constitution's capacity to adapt and expand to meet the needs of a changing society. Moreover, relying on historical practices from periods of explicit discrimination undermines the legitimacy of using history as the sole guide for constitutional interpretation. It perpetuates outdated norms and ignores the progress made toward equality and justice.

B. The Public Controversy Enthymeme

The opinion's opening declaration that "abortion presents a profound moral issue on which Americans hold sharply conflicting views"[89] sets up another significant enthymematic structure. This reasoning suggests that moral disagreement diminishes the constitutional protection of a right and that such matters should be left to the democratic process.

Reconstructed Argument:

1. **Major Premise (Stated):** Abortion involves profound moral disagreement among Americans.
2. **Unstated Premise:** The existence of moral disagreement suggests the absence of constitutional protection for the right in question.
3. **Additional Unstated Premise:** Constitutional rights should be determined by reference to public consensus rather than protecting individual liberties against majority views.
4. **Conclusion:** Therefore, abortion regulation should be left to the democratic processes of the states.

This enthymematic structure proves powerful because it presents a contentious philosophical position about the relationship between moral disagreement and constitutional rights as if it were self-evident. The unstated premises about how moral controversy should affect constitutional interpretation remain unexamined yet fundamentally shape the Court's approach.

The major premise acknowledges that abortion is a morally divisive issue.[90] This is an observable fact, as public opinion on abortion has been polarized for decades.[91] However, the presence of moral disagreement alone does not inherently inform the constitutional analysis of a right. In constitutional jurisprudence, many rights protect individuals from the tyranny of the majority, particularly in areas where moral views are contested.[92] The First Amendment, for example, safeguards freedom of speech and religion precisely

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[89] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 223 (2022). The Court begins its opinion by acknowledging the moral controversy surrounding abortion, framing it as a central issue in the case.

[90] *Id.*

[91] *See, e.g.*, Pew Research Center, *America's Abortion Quandary*, 11 (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [https://perma.cc/5C66-VBYX] (noting persistent divisions in public opinion on abortion over the years).

[92] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (protecting individual rights against majority rule).

because these areas often involve unpopular or controversial expressions and beliefs.[93]

The unstated premise implies that moral disagreement undermines the existence of a constitutional right.[94] This notion is not supported by constitutional principles, which often function to protect minority rights against majority preferences.[95] The Court has historically recognized that constitutional rights are not subject to public consensus.[96] In *West Virginia State Board of Education v. Barnette*, the Court upheld the right of Jehovah's Witnesses to refuse to salute the flag, despite widespread public support for compulsory participation.[97] Justice Jackson famously stated, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . [and] to place them beyond the reach of majorities and officials."[98] By suggesting that moral controversy diminishes constitutional protection, the Court's reasoning contradicts this fundamental principle.[99]

The additional unstated premise posits that constitutional rights should be determined by public consensus rather than by safeguarding individual liberties.[100] This premise shifts the role of the Court from protecting rights to reflecting popular opinion.[101] This approach undermines the judiciary's function as a check on majoritarian impulses.[102] The framers designed the Constitution to establish enduring principles that protect individual rights, even when they conflict with the will of the majority.[103] Allowing moral disagreement to dictate the scope of rights risks eroding these protections.[104]

The Public Controversy Enthymeme, if accepted, could have far-reaching consequences for constitutional rights. Issues such as free speech, religious

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[93] U.S. Const. amend. I; *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) (protecting flag burning under the First Amendment despite its offensiveness to many).

[94] The unstated premise suggests that moral disagreement affects the existence of constitutional rights, a notion not explicitly addressed in the opinion.

[95] *See Barnette*, 319 U.S. at 638 (emphasizing that fundamental rights are not subject to the outcome of elections).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] By implying that abortion should be left to the states due to moral disagreement, the Court departs from the principle that constitutional rights protect individuals irrespective of public opinion.

[100] The premise that rights depend on public consensus contradicts the Constitution's role in safeguarding minority rights against majority preferences.

[101] *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (highlighting the judiciary's role in interpreting the Constitution independently of popular will).

[102] *See* The Federalist No. 78 (Alexander Hamilton) (stressing the judiciary's role as a barrier against legislative overreach).

[103] *See* U.S. Const. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (establishing the principle of judicial review to uphold constitutional limits).

[104] Allowing moral disagreement to define constitutional rights undermines the judiciary's responsibility to protect fundamental liberties.

freedom, and equal protection[105] often involve deep moral disagreements.[106] If moral controversy were sufficient to negate constitutional protection, many fundamental rights could be jeopardized.[107] Further, relying on democratic processes to resolve rights issues ignores the reality that legislatures are subject to political pressures and may not adequately protect minority interests.[108] The judiciary plays a crucial role in upholding constitutional principles against such pressures.[109]

An alternative approach recognizes that moral disagreement necessitates a robust protection of rights. In *Lawrence v. Texas*, addressing the issue of same-sex intimacy, Justice Kennedy emphasized that the Constitution protects personal decisions relating to marriage, procreation, and family relationships from unwarranted government intrusion, regardless of moral disagreement.[110] This perspective aligns with the view that constitutional rights serve as a bulwark against the imposition of majority morality on individuals' personal choices.

The Public Controversy Enthymeme in *Dobbs* illustrates how the Court's unstated premises can subtly shift the foundational principles of constitutional law. By implying that moral disagreement diminishes constitutional protection, the Court alters the traditional understanding of judicially-enforced rights as safeguards against majority rule. Unpacking this enthymematic reasoning

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[105] The formalist objection that abortion restrictions do not violate equal protection because "men typically cannot get abortions" exemplifies the enthymematic reasoning central to this analysis. This counterargument contains an unstated premise that equal protection requires exact physiological equivalence between classes—a premise that feminist legal theory has systematically dismantled. As MacKinnon persuasively argues, the "sameness" approach to equality fundamentally misapprehends how sex-based subordination operates: "Pregnancy and abortion are specific to women not because the sexes are different in reproductive capacity, but because of the way men relate to women with respect to that difference." Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 Buff. L. Rev. 11, 22–24 (1985). The enthymeme of biological difference thus conceals the social construction of inequality beneath a veneer of natural distinction.

As I discuss more fully in Part C, reframing abortion within the broader category of medical decision-making exposes yet another enthymeme at work in the *Dobbs* reasoning—the unstated premise that abortion can be categorically isolated from other bodily autonomy and medical choice protections, rather than recognized as part of an interconnected web of liberties. This enthymematic structure enables the Court to treat abortion as an anomaly rather than a coherent extension of established autonomy rights, thereby obscuring the gendered dimensions of reproductive healthcare regulation. When viewed within its proper medical decision-making context, the Court's "dissociation of concepts" becomes evident as a powerful rhetorical move that redefines the parameters of constitutional protection to exclude rights primarily affecting women, without explicitly acknowledging the equal protection implications of this categorical exclusion.

[106] *See Obergefell v. Hodges*, 576 U.S. 644, 656–57 (2015) (recognizing same-sex marriage amid moral disagreements); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 621–25 (2018) (addressing conflicts between religious freedom and anti-discrimination laws).

[107] Fundamental rights could be compromised if moral controversy were deemed sufficient to negate constitutional protection.

[108] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that more exacting judicial scrutiny is appropriate when legislation appears to conflict with specific prohibitions of the Constitution).

[109] The judiciary serves as a guardian of constitutional rights, particularly for minorities who may lack political power.

[110] *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law.").

reveals the importance of critically examining the underlying assumptions in judicial opinions. It underscores the need for the Court to remain vigilant in protecting individual liberties, particularly in areas of profound moral disagreement.

C. The Categorical Choice Enthymeme

A third crucial enthymematic structure in *Dobbs* concerns how the Court frames the right at issue. This framing represents a powerful rhetorical choice that shapes the entire analysis by categorizing abortion rights in isolation from broader rights of bodily autonomy or medical decision-making.

Reconstructed Argument:

1. **Major Premise (Stated):** Each claimed right must be analyzed independently based on its specific characteristics.
2. **Unstated Premise:** Abortion rights should be analyzed in isolation from broader rights of privacy, bodily autonomy, or medical decision-making.
3. **Additional Unstated Premise:** Rights unique to women should be evaluated differently than rights affecting all people.
4. **Conclusion:** The right to abortion is fundamentally different from other recognized privacy rights and thus does not warrant constitutional protection.

This enthymematic structure is particularly powerful because it naturalizes a specific way of categorizing rights while obscuring its contested nature. By framing abortion as categorically distinct from other medical decisions or bodily autonomy rights, the Court engages in what philosopher Chaïm Perelman terms a "dissociation of concepts"—a rhetorical move that redefines the parameters of the debate to favor a particular outcome.[111]

The major premise asserts that each claimed right must be analyzed independently based on its specific characteristics.[112] This approach suggests a disaggregation of rights, treating each as an isolated entity rather than part of an interconnected web of liberties. While specificity can be valuable in legal analysis, over-fragmentation risks neglecting the broader principles underlying constitutional protections. In previous cases, the Court has recognized that certain rights, though not explicitly mentioned in the Constitution, emerge from the penumbras and emanations of other guaranteed rights.[113] For example, the right to privacy articulated in *Griswold v. Connecticut* encompassed

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[111] *See* Chaïm Perelman & Lucie Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation 412–15 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) (1958) (introducing the concept of "dissociation of concepts" in argumentation).

[112] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 235–36 (2022) (emphasizing the need to analyze rights specifically and not to extend them beyond their historical recognition).

[113] *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (recognizing that certain rights are implied by the explicit guarantees of the Bill of Rights).

decisions about contraception within marriage, drawing from various amendments that collectively protect personal autonomy.[114] By insisting on analyzing abortion independently, the Court departs from this holistic approach, setting the stage to exclude abortion from the umbrella of protected privacy rights.[115]

The unstated premise that abortion rights should be analyzed in isolation from broader rights of privacy or bodily autonomy is a critical rhetorical move. This premise is not self-evident and requires justification, yet such justification remains unarticulated in the majority opinion.[116] Historically, the Court has linked abortion rights to the right of privacy and bodily autonomy. In *Roe v. Wade*, the Court situated the right to choose abortion within the realm of personal liberty protected by the Due Process Clause.[117] Similarly, *Planned Parenthood v. Casey* reaffirmed this connection, emphasizing the importance of autonomy and the ability to define one's own concept of existence.[118] By isolating abortion from these broader rights, the Court effectively narrows the scope of constitutional protection.[119] This move allows the Court to treat abortion as an anomaly rather than a natural extension of established liberties, facilitating its conclusion that abortion does not merit constitutional safeguarding.

An additional unstated premise suggests that rights unique to women should be evaluated differently than rights affecting all people. This premise raises significant equal protection concerns. By treating a right that primarily affects women as distinct and less deserving of protection, the Court risks perpetuating gender discrimination.[120] The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying any person the equal protection of the laws.[121] The Court has previously recognized that laws discriminating based on gender are subject to heightened scrutiny.[122] By implicitly suggesting that rights affecting women can be treated differently without explicitly addressing the equal protection implications, the Court sidesteps a crucial aspect of constitutional analysis.[123]

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[114] *Id*. at 485–86 (finding that the right to marital privacy is protected by the Constitution).

[115] *See Dobbs*, 597 U.S. at 255–57 (distinguishing abortion from other privacy rights recognized by the Court).

[116] The majority opinion does not explicitly justify why abortion should be isolated from broader privacy rights, leaving this premise unstated. *See generally id.*

[117] Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right of privacy encompasses a woman's decision to terminate her pregnancy).

[118] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (affirming the central holding of *Roe* and emphasizing personal autonomy).

[119] *See Dobbs*, 597 U.S. at 255–57 (rejecting the notion that the right to abortion is part of a broader right to privacy).

[120] *See* Siegel, *supra* note 84, at 350–51 (arguing that abortion restrictions can perpetuate gender inequality).

[121] U.S. Const. amend. XIV, § 1.

[122] For example, in *United States v. Virginia*, the Court applied heightened scrutiny in invalidating the male-only admissions policy of the Virginia Military Institute, emphasizing that gender-based classifications must serve important governmental objectives and be substantially related to achieving those objectives. 518 U.S. 515, 533 (1996).

[123] The majority opinion in *Dobbs* does not address the Equal Protection Clause in its analysis.

In *Dobbs*, the Court dissociates[124] abortion from other privacy and autonomy rights, presenting it as fundamentally different due to its impact on "potential life" or the "unborn human being."[125] The Court states:

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being."[126]

By emphasizing this distinction, the Court redefines the right to abortion not as a matter of personal autonomy but as an issue involving the state's interest in protecting potential life.[127] This reframing shifts the analytical focus away from the woman's rights and towards the fetus, altering the balance that *Roe* and *Casey* sought to strike.[128]

The categorical isolation of abortion rights has significant implications. It undermines the coherence of privacy and bodily autonomy jurisprudence by creating exceptions based on contested moral views.[129] This approach opens the door for states to regulate or prohibit practices that some groups find morally objectionable, even when they implicate fundamental personal liberties.[130] Moreover, isolating abortion from other rights erodes the principle that constitutional protections should not be contingent upon the popularity or moral acceptability of the exercise of those rights.[131] Rights often protect minority interests against majority sentiments.[132] By allowing moral disagreement to

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[124] Perelman's concept of dissociation involves separating elements that are traditionally linked to redefine a concept in a way that supports a particular argument. *See* Perelman & Olbrechts-Tyteca, *supra* note 111, at 413 (explaining how dissociation separates linked concepts to redefine them).

[125] *Dobbs*, 597 U.S. at 257.

[126] *Id.* (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

[127] *See Dobbs*, 597 U.S. at 262–63 (emphasizing the state's interest in protecting fetal life).

[128] *Compare Roe*, 410 U.S. at 162–64 (balancing the woman's rights with the state's interests), *with Dobbs*, 597 U.S. at 292 (prioritizing the state's interest).

[129] *See* Laurence H. Tribe, American Constitutional Law 1343–44 (2d ed. 1988) (discussing the dangers of allowing moral views to dictate constitutional rights).

[130] *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (discussing why moral disapproval is not a sufficient justification for infringing on individual liberties).

[131] The *Dobbs* majority's reliance on the Public Controversy Enthymeme—that moral disagreement signals the absence of constitutional protection—is contradicted by the Court's reasoning in *Obergefell v. Hodges*, 576 U.S. 644 (2015). In *Obergefell*, the Court recognized profound moral disagreement over same-sex marriage but expressly held that such controversy cannot justify denying constitutional rights, emphasizing that fundamental liberties exist precisely to shield individual freedoms from majoritarian opposition. *Id.* at 677 ("It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry."); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[132] *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 135–36 (1980) (emphasizing the role of constitutional rights in protecting minorities).

justify the denial of constitutional protection, the Court weakens the safeguard that rights provide against majoritarian oppression.[133]

The Court's approach also raises concerns about gender equality.[134] By treating a right that exclusively affects women as less deserving of protection, the decision may perpetuate systemic gender discrimination.[135] It ignores the reality that denying access to abortion disproportionately impacts women's health, economic status, and social equality.[136] Justice Ginsburg, in her jurisprudence, emphasized the interconnectedness of reproductive autonomy and gender equality.[137] Limiting women's control over reproductive decisions constrains their ability to participate fully and equally in society.[138] By failing to acknowledge these gendered dimensions, the Court's reasoning neglects a critical aspect of constitutional equality.[139]

An alternative to the Court's categorical isolation is a more integrative approach that recognizes the interrelated nature of constitutional rights.[140] This method acknowledges that rights often overlap and reinforce one another, contributing to a comprehensive protection of individual liberty.[141] For instance, the right to bodily integrity has been recognized in cases prohibiting forced medical treatment and upholding the right to refuse life-saving interventions.[142] These cases highlight the principle that individuals have autonomy over their bodies, a principle that logically extends to decisions about pregnancy. By situating abortion within this broader framework, the Court could have engaged in a more nuanced analysis that balances the state's interests with the individual's rights without isolating abortion as an exception.[143]

The Categorical Choice Enthymeme in *Dobbs* illustrates how rhetorical framing and unstated premises can shape constitutional interpretation. By categorically isolating abortion from other privacy and autonomy rights, the Court constructs an argument that appears logical but rests on contested

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[133] *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7–12 (1996) ("The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights" . . . arguing that these provisions are meant to incorporate "moral principles . . . as limits on government's power," thereby shielding vulnerable groups from the preferences of electoral majorities.).

[134] *See Dobbs*, 597 U.S. at 360–61 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (noting the impact on women's rights).

[135] *See* Siegel, *supra* note 84, at 371–72 (discussing how abortion restrictions can reinforce gender stereotypes).

[136] *See* Lisa C. Ikemoto, *Abortion, Contraception, and the ACA: The Realignment of Women's Health*, 55 How. L.J. 731, 748–49 (2012) (examining the disproportionate effects on women).

[137] *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 382–83 (1985).

[138] *See id*. at 385–86 (arguing that reproductive choice is essential to women's equality).

[139] *See Dobbs*, 597 U.S. at 364 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (criticizing the majority for ignoring gender equality concerns).

[140] *See* Tribe, *supra* note 77, at 31–33 (advocating for an interpretive approach that considers the Constitution's underlying principles).

[141] *See Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015) (recognizing that rights relating to personal identity and autonomy are interconnected).

[142] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990) (acknowledging a competent person's right to refuse medical treatment).

[143] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion) (emphasizing the need to balance state interests with individual rights).

assumptions.[144] This approach obscures the interconnectedness of rights and the implications for gender equality, allowing the Court to sidestep critical constitutional questions.[145] Unpacking these enthymematic structures reveals the underlying choices that influence judicial reasoning and highlights the importance of transparency and critical examination in constitutional discourse.[146]

D. The Stare Decisis Enthymeme

The Court's treatment of precedent in *Dobbs* represents another significant enthymematic structure.[147] Stare decisis, the doctrine of adhering to established precedent, is a foundational principle that promotes legal stability and predictability.[148] The Court's reasoning in overturning *Roe v. Wade*[149] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[150] relies on enthymematic logic that allows it to depart from precedent while presenting the decision as a principled correction of past errors.[151]

Reconstructed Argument:

1. **Major Premise (Stated):** Stare decisis is not an inexorable command; precedents may be overruled when they are egregiously wrong.[152]

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[144] *Cf.* Cass R. Sunstein, The Partial Constitution 99–100 (1993) (highlighting how framing affects constitutional interpretation).

[145] *See Dobbs*, 597 U.S. at 369–72 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[146] *See* Richard H. Fallon Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107, 1162 (2008) (contending that stare decisis gives Justices "a power . . . to determine which initially erroneous precedents to enforce and which to overrule," so their case-by-case judgments lay bare the normative choices embedded in constitutional reasoning).

[147] *See generally Dobbs*, 597 U.S. The Court's decision in *Dobbs* represents a pivotal moment in constitutional law, particularly concerning the application of stare decisis.

[148] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles."). Thus, stare decisis is not merely a reflection of the correctness of prior decisions but as an institutional commitment to legal stability, predictability, and legitimacy. The doctrine serves as a safeguard against judicial arbitrariness and preserves continuity, ensuring the law does not fluctuate with changing court majorities. Justice Alito's approach in *Dobbs* departs significantly from this understanding, suggesting instead that stare decisis can be overridden primarily because a prior decision is deemed incorrect. *See, e.g.*, 597 U.S. at 231. This perspective diminishes the independent value stare decisis holds in the judicial system. For example, in *Planned Parenthood v. Casey*, the Court recognized that reliance interests—specifically women's reliance on abortion rights to structure their lives—should weigh heavily in maintaining established precedent. *See* 505 U.S. 833, 855–56 (1992). By contrast, *Dobbs* minimizes these reliance interests, prioritizing historical practices that themselves emerged in periods of explicit gender discrimination. *See, e.g.*, *Dobbs*, 597 U.S. at 231. Thus, Justice Alito's conception not only breaks from precedent but also disrupts the very rationale underpinning stare decisis.

[149] 410 U.S. 113 (1973).

[150] 505 U.S. 833 (1992).

[151] In *Dobbs*, the majority frames its overruling of *Roe* and *Casey* as correcting a profound constitutional error. *See Dobbs*, 597 U.S. at 231 ("We hold that *Roe* and *Casey* must be overruled . . . *Roe* was egregiously wrong from the start.").

[152] *Dobbs*, 597 U.S. at 218 ("stare decisis is not an inexorable command . . .") (internal quotation marks omitted) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

2. **Unstated Premise:** The *Glucksberg* test, developed for recognizing *new* rights, can be used to eliminate previously recognized rights.[153]
3. **Additional Unstated Premise:** Fifty years of reliance on a constitutional right can be outweighed by historical practices predating that right's recognition.[154]
4. **Conclusion:** Therefore, *Roe* and *Casey* must be overruled.

This enthymematic structure allows the Court to present its departure from precedent as a straightforward application of established principles while masking the revolutionary nature of its approach.[155]

The major premise acknowledges that stare decisis is not absolute.[156] The Court has overruled precedents in the past when they were deemed incorrect or unworkable, as in *Brown v. Board of Education*, which overturned *Plessy v. Ferguson*.[157] The Court sets forth factors to consider when deciding whether to overrule a precedent, including the quality of reasoning, workability, consistency with other decisions, reliance interests, and changes in law or facts.[158] It argues, "proper application of stare decisis required an assessment of the strength of the grounds on which *Roe* was based."[159]

This is a different understanding of stare decisis than I teach my law students. Stare decisis is generally understood as an independent reason to be consistent with prior rulings, one that does not depend on the strength of those prior rulings. Yes, if those rulings were wrong, there are reasons independent of stare decisis to overrule them – but stare decisis does not take this into account. In *Dobbs*, the Court argues that *Roe* and *Casey* were egregiously wrong from the start, lacked solid reasoning, and have proven unworkable due to the contentious nature of abortion jurisprudence.[160] In this sense, the Court abandoned its "precedent about precedent": it did not apply the precedent the Court established in *Casey* regarding how to think about stare decisis.[161] In arguing that *Roe* and *Casey* were wrong from the start, the Court sidestepped the question of whether it should be bound by its prior rulings by relitigating *Roe*.[162]

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[153] The Court applies the *Glucksberg* test, traditionally used for recognizing new fundamental rights, to assess the validity of the abortion right established in *Roe* and reaffirmed in *Casey*. *See id.* at 238–40.

[154] The majority minimizes the reliance interests developed over nearly five decades, emphasizing historical practices instead. *See id.* at 287–90.

[155] By presenting its decision as a routine application of legal principles, the Court masks the transformative impact of overturning long-standing precedent.

[156] *See Payne*, 501 U.S. at 828 ("Stare decisis is not an inexorable command; rather, it is a principle of policy . . .") (internal quotation marks omitted) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

[157] Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896), which had established the "separate but equal" doctrine.

[158] *See Dobbs*, 597 U.S. at 268 (listing factors relevant to stare decisis analysis).

[159] *Id.* at 234.

[160] *Id.* at 268 (asserting that *Roe* was "egregiously wrong and deeply damaging").

[161] Note, *The Paradox of Precedent About Precedent*, 138 Harv. L. Rev. 797, 801 (2025).

[162] The majority's reliance on a historically selective and problematic narrative directly supports their narrowed interpretation of stare decisis. The Court's thin historical account—characterized by omissions and distortions, such as neglecting the nuances of early common

The unstated premise involves the application of the *Glucksberg* test, which requires that a right be "deeply rooted in this Nation's history and tradition" to be recognized under substantive due process.[163] *Glucksberg* dealt with whether the Due Process Clause protected the right to physician-assisted suicide, a right not previously recognized.[164] By applying the *Glucksberg* test to eliminate an existing right, the Court takes an unprecedented step.[165] Traditionally, the test is used to evaluate claims for new rights, not to reassess rights that have been established and relied upon for decades.[166] This application transforms the test into a tool for retracting rights, a move that remains unstated and unexplored in the opinion.[167]

The assumption that the *Glucksberg* test, originally designed to evaluate whether to recognize new fundamental rights, is the appropriate framework for reassessing a long-established constitutional right is a fraught one.[168] This application invites the audience to accept, without explicit justification, that a test developed for identifying previously unrecognized rights should be used to potentially eliminate a right that has been recognized and reaffirmed by the Court for nearly half a century.[169] As Reva Siegel notes, this approach obscures the significant shift in jurisprudential approach that this application represents, masking it in originalism[170] Essentially, Alito treats Roe as if the case were a matter of first impression.

The Court's use of the Glucksberg test also involves an unstated assumption about the nature of constitutional interpretation itself.[171] It implicitly argues for a form of originalism that prioritizes historical practices at the time of the Constitution's ratification or the Fourteenth Amendment's adoption,

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law approaches to abortion—enables the majority to present Roe as egregiously erroneous. This incomplete historical framework thus provides the rhetorical justification for overruling established precedent under the guise of correcting historical error, rather than openly acknowledging the drastic shift in legal interpretation. Consequently, the weak historical analysis is not merely incidental but essential to the Court's redefinition of stare decisis, serving as a critical tool to obscure the radical nature of their decision. See Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 Sup. Ct. Rev. 111, 176 (2022); see also Polina Shvanyukova, *Writing History in a Supreme Court Ruling: Evaluative Language in the Majority Opinion Concerning Dobbs v. Jackson*, 63 HERMES – J. Language & Commc'n Bus. 19, 19–20 (2023) (using Appraisal Theory to demonstrate how the majority's selective evaluative wording constructs a partisan historical narrative that rhetorically legitimates overruling *Roe*).

[163] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (requiring that a fundamental right be "deeply rooted in this Nation's history and tradition.") (internal quotation marks omitted) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[164] *Id*. at 705–06 (addressing whether the Due Process Clause includes a right to physician-assisted suicide).

[165] The application of *Glucksberg* to negate an existing right is unprecedented, as the test has traditionally been used to evaluate new claims. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 331–32 (2022) (Thomas, J., concurring) (suggesting reevaluation of substantive due process precedents).

[166] *Cf.* Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (noting that history and tradition guide but do not set the outer boundaries of substantive due process).

[167] The majority does not explicitly address the novel use of *Glucksberg* to overturn established rights, leaving the move unexplored.

[168] *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Tex. L. Rev. 1127, 142–43 (2022).

[169] *Id*. at 143–44.

[170] *Id*. at 144.

[171] *Dobbs*, 597 U.S. at 236–41.

rather than considering evolving understandings of liberty and privacy.[172] This methodological choice is not explicitly defended in the opinion, but rather presented as a natural approach to constitutional interpretation.[173] This enthymematic structure allows the Court to sidestep direct engagement with competing theories of constitutional interpretation that might give greater weight to evolving societal norms or the practical consequences of overturning long-established precedents.[174]

Furthermore, the Court's historical analysis contains several enthymematic elements. The majority opinion states, "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[175] This assertion contains multiple unstated premises. First, there is the implicit assumption that the relevant historical period for determining these traditions ends before the recognition of abortion rights in *Roe v. Wade*.[176] This temporal framing effectively excludes half a century of legal precedent and social change from consideration and allows the Court to present its analysis as comprehensive while engaging in a highly selective reading of American legal history.[177]

The additional unstated premise suggests that historical practices predating a right's recognition can outweigh significant reliance interests developed over half a century.[178] This premise minimizes the importance of reliance on constitutional rights in structuring personal and societal expectations.[179] In *Casey*, the Court emphasized the importance of stare decisis and the reliance interests at stake with abortion rights.[180] Women had organized their lives around the availability of abortion as a fallback in case of unintended pregnancy.[181] Overturning *Roe* would disrupt those expectations and undermine

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[172] *Id.*

[173] *Id.*

[174] The strategy also allows the court to side-step engagement with the disparate effect the decision will have on racial groups. *See*, Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv. L. Rev. 2025, 2092–93 (2021).

[175] *Dobbs*, 597 U.S. at 250.

[176] *See id.* at 248–50.

[177] *See* Siegel, *supra* note 168, at 1130 (noting that the majority "defined women's liberties in terms of nineteenth-century norms" and thereby "upended a half-century of abortion law"), 1135 (observing that although *Dobbs* is "full of 'history and tradition' talk," it pointedly omits "the history and traditions of the last half-century"), 1180 (characterizing the Court's choice of a "history-and-traditions" test as "a dramatic shift in governing law" that bypasses fifty years of precedent), 1184 (explaining that the opinion "did not focus on . . . the last half-century . . . but instead focused on the mid-nineteenth century"), 1191 (concluding that *Dobbs* rests on a "whitewashed and selective account" of American legal history that excludes modern social change).

[178] *See Dobbs*, 597 U.S. at 287–89 (downplaying reliance interests in favor of historical analysis).

[179] Reliance interests are crucial in stare decisis because they reflect how individuals and society organize their lives based on legal frameworks. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (plurality opinion).

[180] *Id.* at 856 (emphasizing that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives").

[181] *Id.* (recognizing that people have organized intimate relationships and made choices in reliance on the availability of abortion).

the Court's legitimacy because it disrupts established expectations and may undermine the perceived legitimacy of the Court as an impartial arbiter. By dismissing these reliance interests, the Court in *Dobbs* shifts the weight back to historical practices, even when those practices reflect outdated or discriminatory norms.[182] This approach raises concerns about the stability of constitutional rights and the potential for other established rights to be undermined.[183]

The Court's reasoning in *Dobbs* departs from the traditional application of stare decisis.[184] Overruling a precedent requires more than a belief that the prior decision was wrong; it necessitates a compelling justification that considers the societal impact and reliance interests.[185] Justice Kagan, in her dissent in *Janus v. American Federation of State, County, and Municipal Employees*, warned against the dangers of discarding precedent without strong justification, noting that such actions threaten the Court's role as a stable and neutral arbiter.[186] The decision in *Dobbs* risks eroding public confidence in the Court by appearing to be driven by changing judicial philosophies rather than principled legal reasoning.[187]

The approach taken in *Dobbs* raises concerns about the security of other substantive due process rights.[188] If historical practices can override established rights, protections for contraception (*Griswold v. Connecticut*),[189] interracial marriage (*Loving v. Virginia*),[190] and same-sex intimacy (*Lawrence v. Texas*)[191] could be vulnerable.

Justice Thomas, in his concurring opinion, explicitly calls for reconsideration of these precedents, suggesting that they lack a basis in the Constitution's text and history.[192] This prospect underscores the far-reaching implications of the Court's reasoning and the importance of the unstated premises in its

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[182] By prioritizing historical practices over contemporary reliance interests, the Court risks reinstating outdated norms. *See Dobbs*, 597 U.S. at 287–88. (dismissing the "novel and intangible" reliance interests that *Casey* had recognized and stating that courts are better suited to guard "concrete" interests such as property and contract rights, thereby redirecting constitutional analysis away from contemporary lived realities and back toward historical practice).

[183] This shift raises concerns about the potential erosion of other rights that lack deep historical roots but have become integral to modern society.

[184] Traditionally, the Court exercises caution in overruling precedent, particularly when significant reliance interests are at stake. *See Payne*, 501 U.S. at 827.

[185] *See Dobbs*, 597 U.S. at 262–64 (discussing the factors for overruling precedent but focusing on the perceived errors in *Roe* and *Casey*).

[186] Janus v. AFSCME, 585 U.S. 878, 955–56 (2018) (Kagan, J., dissenting) ("The majority overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to. Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate.").

[187] The appearance of decisions driven by judicial philosophy rather than legal necessity can undermine trust in the judiciary. Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 Colum. L. Rev. 821, 835 (1961) (observing that when judges elevate their own ideological preferences over "principled reasoning," they risk undermining the separation of powers and threatening the judiciary's credibility and public confidence).

[188] *See Dobbs*, 597 U.S. at 330–32 (Thomas, J., concurring) (calling for reconsideration of all substantive due process precedents).

[189] 381 U.S. 479 (1965) (recognizing the right to privacy in marital relations, including the use of contraception).

[190] 388 U.S. 1 (1967) (striking down laws prohibiting interracial marriage).

[191] 539 U.S. 558 (2003) (invalidating laws criminalizing consensual same-sex intimacy).

[192] *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (suggesting that these precedents are "demonstrably erroneous").

enthymematic structure.[193] But, application of Glucksberg could have even further reaching ramifications. Thomas discusses forced sterilization, which could potentially be brought back under this regime. As could a denial of fertility treatments.

The Stare Decisis Enthymeme in *Dobbs* demonstrates how the Court's unstated premises facilitate a departure from established precedent while maintaining an appearance of adherence to legal principles Because the argument rests on unstated premises, the Court facilitates a significant shift in legal doctrine without fully addressing the implications. By applying the *Glucksberg* test in a novel way and minimizing reliance interests, the Court reshapes the doctrine of stare decisis to justify overturning *Roe* and *Casey*.[194]

Unpacking this enthymematic reasoning reveals the significant shifts in legal interpretation and the potential consequences for constitutional rights.[195] It highlights the need for transparent and rigorous analysis when considering the weight of precedent and the stability of the legal system.[196]

E. Enthymeme, Syllogism and Formalism

In addition to these specific rhetorical strategies, the *Dobbs* opinion employs a broader rhetorical framework that I would characterize as "formalist." Legal formalism, with its emphasis on rule-based decision-making and the internal logic of legal doctrine, has long been a dominant mode of legal reasoning in American jurisprudence.[197] While pure formalism has been widely critiqued in legal academia,[198] its rhetorical power remains strong, particularly in judicial opinions. The formalist rhetoric in *Dobbs* manifests in several ways. First, there is the opinion's insistence on a strict textual and historical approach to constitutional interpretation. By emphasizing the absence of an explicit right to abortion in the Constitution and the purported lack of historical support for such a right, the opinion presents its conclusion as the result of a straightforward application of legal principles rather than a value judgment.[199]

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[193] The potential reevaluation of fundamental rights underscores the profound impact of the Court's reasoning in *Dobbs*.

[194] The novel application of the *Glucksberg* test and the minimization of reliance interests reshape stare decisis to support the Court's outcome *See* Siegel, *supra* note 168, at 1137, 1182.

[195] This shift may signal a new approach to constitutional interpretation that could affect a range of established rights.

[196] Transparent and thorough analysis is essential to ensure that changes in legal doctrine are grounded in sound reasoning and maintain the judiciary's integrity.

[197] *See* Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 544 (1988) (defining formalism as a commitment to decide cases by authoritative rules whose validity does not depend on the decisionmakers' moral or policy judgments).

[198] *See, e.g.*, *id.* at 511–12 (explaining that judges often invoke formalist language to signal neutrality and reinforce institutional legitimacy); Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 199–206 (1992) (documenting the rise of classical formalism in late-nineteenth-century American law and its enduring influence even after realist critiques).

[199] The formalist rhetorical framework employed by the *Dobbs* majority, characterized by its strict adherence to textual and historical methodologies, is not unique to this decision. Rather, formalism pervades many judicial opinions, particularly those addressing contentious constitutional questions. *See* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of*

Second, the opinion employs what legal scholar Pierre Schlag calls "normative legal thought"—a branch of legal theory in which arguments that appear to describe what the law is are shot through with unacknowledged value-laden claims about what the law should be, so that the line between description and prescription all but disappears.[200] Normative legal theorists like Schlag argue that law and other social sciences are inherently normative.[201] This approach combines normative assertions about what the law should be with analytical claims about what the law is, often blurring the distinction between the two.[202] In *Dobbs*, this manifests in the seamless transition from historical analysis to normative claims about the proper scope of constitutional rights.

Finally, the opinion's formalist rhetoric is evident in its treatment of precedent. While acknowledging the importance of stare decisis, the opinion presents its overruling of *Roe* and *Casey* as the correction of a legal error rather than a shift in constitutional interpretation. This framing allows the Court to present its decision as a return to proper legal reasoning rather than a departure from established law.

The formalist rhetoric employed in *Dobbs* serves several purposes. It lends an air of objectivity and inevitability to the opinion's conclusions, potentially deflecting criticism of the Court as engaging in "judicial activism." It also provides a framework for dismissing arguments based on the real-world impacts of the decision, framing these concerns as outside the proper scope of constitutional analysis. However, this formalist approach comes at a cost. By focusing narrowly on textual interpretation and historical analysis,[203] the opinion largely sidesteps engagement with the complex social, ethical, and public health dimensions of abortion rights. This rhetorical strategy allows the Court to present its decision as a matter of legal technique rather than a profound shift in the constitutional landscape with far-reaching consequences for millions of Americans.

In the next section, I will explore how the rhetorical strategies employed in *Dobbs* intersect with the broader phenomenon of facially neutral laws and their disparate impacts. By examining how the opinion's language and reasoning mask the unequal effects of overturning *Roe*, we can begin to develop strategies for exposing and challenging the hidden disparities created by judicial decisions.

This analysis of the rhetoric of judicial opinions, particularly as exemplified in *Dobbs*, sets the stage for a broader discussion of how legal language can

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Collapse), 95 Iowa L. Rev. 195, 199–204 (2009); Schauer, *supra* note 197, at 510–11 (discussing the prevalence and persistence of formalist reasoning in American jurisprudence). Recognizing the ubiquity of formalism in judicial discourse underscores the broader necessity for rhetorical resistance—namely, exposing and interrogating enthymematic reasoning to reveal underlying assumptions and value judgments concealed by purported neutrality.

[200] Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L. Rev. 801, 812–814 (1991).

[201] *Id.* at 811.

[202] *Id.* at 811–13.

[203] And a narrow historical analysis at that. One that selectively omits the Founding era and the last fifty years and ignores the history of marginalized people and a history of oppression and domination. *See* Siegel, *supra* note 168, at 1187–91.

perpetuate or challenge existing power structures. By developing our capacity to critically engage with legal texts, we can work towards a more just and equitable legal system—one that recognizes the inherently rhetorical nature of law while striving for outcomes that serve all members of society.

As we proceed, it is important to acknowledge that this rhetorical approach to legal analysis is itself not neutral. It is rooted in critical perspectives on law and society, and it aims explicitly at challenging existing power structures and advancing the cause of social justice.[204] However, I argue that this perspective is necessary if we are to fully grapple with the complex realities of law in society and work towards meaningful change. By embracing a rhetorically informed approach to legal analysis, we open up new possibilities for understanding and engaging with the law. We move beyond the constraints of formalist legal reasoning to consider the broader social, political, and ethical implications of judicial decisions. In doing so, we take an important step towards a more critical, engaged, and ultimately more just legal practice.

F. The Formal Gender Equality Enthymeme

A further critical enthymeme underpinning the reasoning in *Dobbs* revolves around an unstated and problematic conception of gender equality rooted in a "sameness" framework. Feminist legal scholars have long critiqued the limitations of formal equality doctrines, particularly as they relate to biological differences and reproductive capacities.[205] The *Dobbs* majority opinion implicitly invokes an equality framework predicated on treating men and women identically, disregarding essential biological and social differences—most notably, the reality of pregnancy and reproductive autonomy—and thus dismisses equal protection concerns.[206]

This Gender Equality enthymeme can be reconstructed as follows:

Reconstructed Argument:

1. **Major Premise (unstated):** Gender equality requires that men and women be treated identically under the law ("sameness" conception).
2. **Additional Unstated Premise:** In evaluating equality, when one group (men) does not have or require a particular right, their absence of that right becomes the normative baseline for assessing equal treatment.
3. **Conclusion:** Because men do not and cannot need abortions, denying abortion rights to women constitutes equal, neutral, and fair treatment under the law.

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[204] *See*, e.g. Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Problematizing Aristotle: Renovating and Remodeling Traditional Legal Rhetoric*, in Critical and Comparative Rhetoric 44 (2023).

[205] *See*, *e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281 (1991); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175 (1982).

[206] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext to 'effect an invidious discrimination against members of one sex or the other.'") (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n. 20 (1974)).

This enthymematic structure is especially pernicious because it disguises inequality behind a veneer of formal neutrality. By setting men's lack of a need for abortion as the standard of equality, the Court implicitly positions women's biological differences as legally irrelevant or as a disadvantage that women alone must bear. Such reasoning ignores how substantive gender equality necessarily involves consideration of women's unique reproductive capacities and the societal burdens that accompany them.[207]

Feminist critiques, articulated by scholars such as Catharine MacKinnon, Wendy Williams, and Reva Siegel, have consistently demonstrated that this "sameness" conception of equality systematically disadvantages women by failing to account for biological and social realities.[208] Instead of promoting genuine equality, the sameness standard normalizes male experiences as the default legal standard, effectively rendering women's distinct experiences and needs invisible or deviant. In the abortion context, this standard inevitably imposes disparate burdens upon women—particularly women of color and those in lower socioeconomic strata—who disproportionately bear the physical, social, economic, and emotional costs of pregnancy and childbearing.[209]

This formalist approach further ignores the Court's own precedent recognizing that laws may violate equal protection even when they target conditions unique to one sex. In *Frontiero v. Richardson*, Justice Brennan acknowledged how ostensibly neutral classifications can perpetuate "romantic paternalism" that, "in practical effect, put women, not on a pedestal, but in a cage.[210] The unstated premise in abortion restrictions—that the state may regulate female reproductive capacity in ways unimaginable for male bodies—reveals not natural difference but rather what Ann Scales identifies as the use of biological differences as a justification for inequality.[211] The enthymematic structure of this argument functions precisely by obscuring its most contestable premise: that biological difference legitimates differential treatment, rather than demanding heightened scrutiny of laws that uniquely burden one sex's bodily autonomy and economic freedom.[212] The Court accomplishes this sleight of hand first by implicitly assuming that laws cannot violate equal protection if they operate on conditions unique to only one sex, and then by assuming that one group's (men's) lack of needing a right to an abortion is the baseline standard against which all groups' rights should be judged.

By relying implicitly on the Gender Equality enthymeme, the *Dobbs* Court evades addressing the real, gendered impacts of eliminating abortion protections. This rhetorical choice masks the inherently unequal consequences under a formally neutral legal standard. In doing so, the Court exemplifies

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[207] Siegel, *supra* note 84, at 377.

[208] MacKinnon, *supra* note 205, at 1281–85; Williams, *supra* note 205, at 377–78.

[209] *See generally* Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood (2020); Khiara M. Bridges, Poverty of Privacy Rights, (2017).

[210] 411 U.S. 677, 685 (1973).

[211] *See* Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L.J. 375, 435–36 (1981).

[212] *See generally* Christine Littleton, *Reconstructing Sex Equality*, 75 Cal. L. Rev. 1279 (1987); Siegel, *supra* note 84.

precisely the rhetorical maneuvering that facially neutral laws often use to conceal disparate impacts—a topic explored more fully in the subsequent section.

Thus, by recognizing and exposing this unstated Formal Gender Equality enthymeme, we more clearly see how judicial rhetoric can obscure profound inequalities behind claims of neutrality, directly setting the stage for the analysis of facially neutral laws and their disparate impacts in Section IV.

IV. Facially Neutral Laws and Disparate Impact

The concept of facially neutral laws—those that appear nondiscriminatory on their surface but may have disproportionate effects on certain groups—is central to understanding the subtle ways in which legal systems can perpetuate inequality. In this section, I will explore the phenomenon of facially neutral laws and their disparate impacts, using the *Dobbs* decision as a lens through which to examine this broader issue. I will also delve into how the opinion's focus on fetal interests, rather than maternal impacts, represents a significant shift from the more balanced approach in *Roe*.

A. Definition and Examples of Facially Neutral Laws

Facially neutral laws are those that do not explicitly discriminate against any particular group but may nonetheless may have a disproportionate impact on certain populations.[213] These laws maintain an appearance of equality while potentially reinforcing or exacerbating existing social disparities. The concept of facial neutrality is closely tied to the Equal Protection Clause of the Fourteenth Amendment, which prohibits states from denying any person within their jurisdiction the equal protection of the laws.

Examples of facially neutral laws with disparate impacts abound in American legal history. In the realm of voting rights, for instance, literacy tests, poll taxes, and grandfather clauses were ostensibly neutral measures that disproportionately disenfranchised African American voters.[214] In the

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[213] *See*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322–24 (1987) (Facially neutral laws and practices may result in discriminatory effects due to unconscious biases, leading to a disproportionate impact on certain racial groups.); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 Cal. L. Rev. 77, 83 (2000) (Even without explicit discriminatory intent, laws that are neutral on their face can perpetuate inequality by disproportionately affecting marginalized populations.); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1725–27 (2000) (Facially neutral policies can produce racially disparate outcomes due to systemic biases embedded within institutions, affecting certain populations more than others.). But *see*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the Constitution.").

[214] Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L. Rev. 727, 735–36 (1998).

criminal justice system, sentencing guidelines for crack and powder cocaine, while facially neutral, resulted in significantly harsher penalties for Black defendants.[215]

The challenge posed by facially neutral laws lies in their ability to maintain systems of inequality while appearing to conform to principles of equal treatment. This phenomenon has been extensively studied in the context of racial discrimination, but it applies equally to other forms of systemic inequality, including those based on gender, disability, and other protected characteristics.

B. The Problem of Disparate Impact

The disparate impact doctrine, which emerged from the Supreme Court's decision in *Griggs v. Duke Power Co.* (1971), recognizes that practices that are facially neutral but result in disproportionate effects on protected groups can constitute unlawful discrimination. However, the application of this doctrine has been limited, particularly in constitutional law. *Washington v. Davis* (1976) established that, for the purposes of the Equal Protection Clause, plaintiffs must prove discriminatory intent rather than merely demonstrating disparate impact.

This focus on intent rather than effect has made it increasingly difficult to challenge facially neutral laws that perpetuate systemic inequalities. As legal scholar Reva Siegel has argued, this approach fails to account for the ways in which discriminatory attitudes can be encoded in ostensibly neutral policies and practices.[216]

The problem of disparate impact is particularly acute in the context of reproductive rights. Policies that restrict access to abortion and other reproductive health services, while often framed in neutral terms of fetal protection or medical regulation, disproportionately affect women, especially those from marginalized communities.[217] These impacts extend beyond the immediate question of abortion access to encompass broader issues of economic opportunity, educational attainment, and public health.[218]

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[215] Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime. Crime & Delinquency*, 40 Sage J. 475, 488 (1994).

[216] Siegel, *supra* note 168, at 1130.

[217] Laws restricting access to reproductive care disproportionately affect women, especially those from marginalized communities. Recent data reveals the complex demographics of abortion patients: Black and Latinx individuals each represent 29–30 percent of abortion patients, highlighting the significant impact on communities of color. Guttmacher Institute, *Reasons for Abortion*, Fact Sheet (June 2024). Critically, 41 percent of people obtaining abortions had an income below the federal poverty level, with an additional 30 percent having incomes between 100–199 percent of the federal poverty level. *Id.* The Turnaway Study provides crucial insight into the long-term consequences of abortion denial, demonstrating that women denied abortions were three times more likely to be below the federal poverty line and four times more likely to be unemployed compared to those who obtained abortion care. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Pub. Health 407, 412–15 (2018).

[218] The socioeconomic consequences of restricted reproductive choices are profound. The abortion landscape has shifted dramatically since the Dobbs decision, with the number of clinician-provided abortions increasing by 11 percent from 2020 to 2023, reaching an estimated 1,037,000 procedures. Guttmacher Institute, *supra* note 217. More than half of those

C. How Dobbs Exemplifies This Issue

The *Dobbs* decision, in overturning *Roe v. Wade*, provides a stark illustration of how facially neutral legal reasoning can mask profoundly unequal impacts. While the majority opinion frames its analysis in terms of constitutional interpretation and historical tradition, the practical effects of the decision fall disproportionately on women, particularly those from disadvantaged backgrounds.

The opinion's emphasis on the lack of explicit constitutional protection for abortion rights, coupled with its historical analysis of abortion regulation, presents a facade of neutrality. Justice Alito writes, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."[219] This framing suggests that the Court is simply applying neutral principles of constitutional interpretation, rather than making a value judgment about the relative rights of women and fetuses.

However, this ostensibly neutral approach obscures the gendered nature of the abortion question. By treating abortion as a gender-neutral medical procedure, the opinion makes men's lack of needing abortions the baseline against which equality is measured and fails to grapple with the unique burdens that unwanted pregnancies and forced childbirth impose on women. This elision of gender is particularly striking given the opinion's acknowledgment of the "modern developments" that have changed the context of abortion, including "the development of adoption laws and procedures, and the growth of foster care and family leave." These developments, while important, do not fundamentally alter the gendered nature of pregnancy and childbirth.

Moreover, the opinion's historical analysis, while presented as an objective inquiry into legal traditions, fails to account for the historical context of abortion restrictions. Many of the laws cited in the opinion were enacted during periods when women lacked basic political and economic rights, including the right to vote. By treating these historical prohibitions as evidence of a longstanding tradition against abortion rights, the opinion implicitly endorses a legal framework that was deeply rooted in gender inequality.

The disparate impact of the *Dobbs* decision extends beyond its immediate effect on abortion access. By removing federal constitutional protection for abortion rights, the decision opens the door to a patchwork of state regulations that will disproportionately affect low-income women and women of color. These groups, who already face significant barriers to healthcare access,

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obtaining abortions (55 percent) had previously given birth, underscoring the complex personal circumstances driving these decisions. *Id.* The Turnaway Study provides critical evidence of the long-term economic impacts, revealing that women denied abortions experienced significant economic hardship, with reduced educational attainment and increased likelihood of remaining in poverty. Foster et al., *supra* note 217, at 412–15. The out-of-state travel burden has intensified, with the proportion of abortion patients traveling to other states increasing from 9 percent in 2020 to 17 percent in 2023—representing over 166,000 patients. Guttmacher Institute, *supra* note 217.

[219] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022).

will be most impacted by the need to travel across state lines for abortion services or to carry unwanted pregnancies to term.[220]

Furthermore, the decision's potential implications for other privacy-based rights, including contraception and same-sex marriage, suggest that its disparate impacts may extend far beyond the immediate question of abortion. While the majority opinion attempts to cabin its reasoning to the specific issue of abortion, the underlying logic—that rights must be deeply rooted in history and tradition to receive constitutional protection—could potentially be applied to other areas of personal autonomy that disproportionately affect marginalized groups. Justice Thomas's concurrence in Dobbs explicitly demonstrated this potential for broader rights erosion, through reconsideration of other substantive due process precedents, including those protecting contraception (*Griswold*), same-sex intimacy (*Lawrence*), and same-sex marriage (*Obergefell*).[221] Reva Siegel argues that such reasoning can rapidly transform from a seemingly narrow legal principle to a broad mechanism of social control, particularly targeting women's reproductive capabilities,[222] which threatens not just abortion rights, but the fundamental principle of bodily autonomy, potentially subjecting women to heightened surveillance and legal scrutiny throughout pregnancy and potentially even beyond. Thomas's concurrence underscores the vulnerability of established privacy rights, suggesting a judicial willingness to systematically dismantle protections for personal and intimate decisions that have been considered settled law for decades.

D. The Shift in Focus: Fetal Interests vs. Maternal Impact

A crucial aspect of the *Dobbs* decision that warrants closer examination is its marked shift in focus from the balanced approach of *Roe v. Wade* to a heightened emphasis on fetal interests at the expense of maternal impacts. This shift represents not only a change in legal reasoning but also a profound realignment of how the Court conceptualizes the abortion issue.

In *Roe*, the Court explicitly acknowledged the competing interests at stake in the abortion debate. Justice Blackmun's opinion recognized both the woman's right to privacy, which it found encompassed the abortion decision, and the state's interests in protecting potential life and maternal health.

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[220] By removing federal constitutional protection for abortion rights, the decision opens the door to a patchwork of state regulations that will disproportionately affect low-income women and women of color. The impact is stark: as of March 2024, fourteen states have total abortion bans, eliminating the sixty-three clinics that previously existed in those states. Guttmacher Institute, *supra* note 217. Medication abortions have become increasingly critical, accounting for 63 percent of clinician-provided abortions in states without total bans in 2023, up from 53 percent in 2020. *Id.* The Turnaway Study demonstrates the profound economic consequences of abortion denial, showing that women forced to carry pregnancies to term experience long-term economic setbacks, including reduced earning potential and increased likelihood of poverty. Foster et al., *supra* note 217, at 412–15. Moreover, payment challenges persist, with 53 percent of patients paying out of pocket and only 30 percent using Medicaid for abortion care. Guttmacher Institute, *supra* note 217.

[221] *Dobbs,* 597 U.S. 215 (Thomas, J., concurring)

[222] Siegel, *supra* note 77, at 1641–45.

The trimester framework established in *Roe* was an attempt to balance these competing interests, allowing for greater state regulation as the pregnancy progressed and the state's interest in potential life became more compelling.

The Court in *Roe* stated: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[223] This approach recognized the complex nature of the abortion issue and attempted to craft a solution that respected both women's autonomy and the state's interest in fetal life.

In contrast, the *Dobbs* opinion largely sidesteps the question of women's bodily autonomy and the real-world impacts of forced pregnancy and childbirth. Instead, it focuses heavily on the state's interest in protecting fetal life, which it presents as the primary consideration in abortion regulation. Justice Alito writes, "What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and Casey rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"[224]

This shift in focus has several important implications. By emphasizing fetal interests over maternal impacts, the *Dobbs* opinion implicitly devalues women's bodily autonomy and right to make decisions about their own healthcare. This represents a significant departure from the recognition of women's privacy rights in *Roe*. The focus on fetal life presents abortion as a simple moral question rather than a complex issue involving bodily autonomy, public health, and social equity. This framing ignores the multifaceted reasons why women seek abortions and the diverse contexts in which these decisions are made.

By concentrating on fetal interests, the opinion pays insufficient attention to the physical and mental health risks associated with forced pregnancy and childbirth. This oversight is particularly glaring given the United States' high maternal mortality rates, especially among women of color.[225] The opinion's focus on fetal life also fails to adequately consider the socioeconomic impacts of unwanted pregnancies on women, including effects on education, career advancement, and economic stability. The Court's intensified focus on fetal interests directly exacerbates the disparate impacts on women, particularly marginalized women, by subordinating maternal health, economic stability, and social equality to the abstract state interest in potential life. This rhetorical shift, by positioning fetal rights as paramount, masks and deepens existing gendered inequalities—compounding the disproportionate burdens borne by women who already face significant barriers to reproductive healthcare access.

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[223] Roe v. Wade, 410 U.S. 113, 154 (1973).

[224] *Dobbs*, 597 U.S. at 257.

[225] *Data from the Pregnancy Mortality Surveillance System*, Ctrs. For Disease Control & Prev., (Jan. 30, 2025), https://www.cdc.gov/maternal-mortality/php/pregnancy-mortality-surveillance-data/index.html?cove-tab=1 [https://perma.cc/ZT4D-546K] (showing that maternal mortality rates for Black women are more than twice as high as the national average, and more than three times as high as those of White women).

Moreover, by prioritizing fetal interests, the opinion opens the door for states to impose expansive restrictions on abortion, potentially including in cases of rape, incest, or serious health risks to the mother. This potential for far-reaching limitations on abortion access underscores the profound shift in legal reasoning represented by the *Dobbs* decision, moving away from the more balanced approach of *Roe* and towards a framework that could significantly curtail reproductive rights.

The contrast between *Roe*'s balanced approach and *Dobbs*'s fetal-centric focus is stark. In *Roe*, the Court recognized that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[226] This recognition allowed for a nuanced approach that weighed fetal interests against women's rights. *Dobbs*, on the other hand, seems to elevate fetal interests to a status that potentially outweighs all other considerations. This shift is not merely a matter of legal doctrine; it represents a fundamental reframing of the abortion issue that has profound implications for women's rights and public health policy. By focusing primarily on fetal interests, the *Dobbs* opinion provides a legal framework that could justify wide-ranging restrictions on abortion access, potentially including in cases where continued pregnancy poses serious health risks to the mother.[227]

Moreover, this fetal-centric approach fails to grapple with the complex realities of pregnancy and childbirth in contemporary society. It does not account for the diverse reasons why women seek abortions, including financial instability, lack of partner support, existing childcare responsibilities, or health concerns. By reducing the abortion question to a matter of fetal protection, the opinion overlooks the myriad ways in which forced pregnancy and childbirth can impact women's lives, health, and futures.

The focus on fetal interests also raises troubling questions about the status of pregnant women under the law. If fetal interests can override women's fundamental rights to bodily autonomy and medical decision-making, what other restrictions on pregnant women's behavior might be justified? This line of reasoning could potentially lead to increased surveillance and regulation of pregnant women's activities, further eroding their autonomy and privacy rights.

Furthermore, the emphasis on fetal interests in *Dobbs* represents a departure from the Court's typical approach to balancing competing rights and interests. In other areas of constitutional law, the Court has generally been reluctant to allow speculative state interests to override established individual rights. The willingness to do so in the context of abortion suggests an exceptionalism that is difficult to reconcile with broader principles of constitutional interpretation.

The shift from *Roe*'s balanced approach to *Dobbs*'s fetal-centric focus also has implications for how we understand the role of the Court in adjudicating

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[226] *Roe*, 410 U.S. at 158.

[227] And in fact, the lack of distinction between a fetus—which, under most definitions, has not achieved personhood—and a woman—who has lived a life; made plans for her future; and upon whom some may rely for love, affection, and financial resources—does a disservice to the idea of personhood.

complex social issues. *Roe*'s trimester framework, while criticized for its specificity, represented an attempt to craft a nuanced solution to a contentious social problem.[228] *Dobbs*, in contrast, adopts a more absolutist approach that leaves little room for balancing competing interests or adapting to changing social circumstances.

This change in focus underscores the importance of critically examining the rhetorical strategies employed in judicial opinions. The *Dobbs* majority presents its fetal-centric approach as a neutral application of constitutional principles, but a closer examination reveals it to be a significant departure from previous approaches to abortion rights that carries profound implications for women's autonomy and equality.

The *Dobbs* decision's shift in focus from a balanced consideration of maternal and fetal interests to a primary emphasis on fetal protection represents a significant and troubling development in abortion jurisprudence. This change not only undermines women's reproductive rights but also sets a precedent for privileging speculative state interests over established individual rights. As we grapple with the implications of *Dobbs*, it is crucial to recognize and critically examine this shift in focus, understanding it as part of a broader pattern of facially neutral reasoning that can mask profoundly unequal impacts.

The analysis of *Dobbs* through the lens of facially neutral laws and disparate impact reveals the complex ways in which legal reasoning can perpetuate systemic inequalities. While the opinion presents itself as a neutral application of constitutional principles, its practical effects fall disproportionately on women, particularly those from marginalized communities. This disparity is further exacerbated by the opinion's focus on fetal interests at the expense of maternal impacts, representing a significant departure from the more balanced approach of *Roe v. Wade*.

As we move forward, it is crucial to develop strategies for exposing and challenging the disparate impacts of facially neutral laws and judicial opinions. This requires not only a critical examination of legal texts but also a broader consideration of the social, economic, and health impacts of legal decisions. By centering the experiences of those most affected by these laws and decisions, we can work towards a more equitable and just legal system.

In the next section, I will propose strategies for rhetorical resistance to judicial opinions like *Dobbs*, emphasizing the importance of centering affected communities in legal discourse and developing new frameworks for understanding and challenging facially neutral laws with disparate impacts.

IV. Strategies for Rhetorical Resistance

In light of the analysis of the *Dobbs* decision and its exemplification of how facially neutral laws can have disparate impacts, it is crucial to develop

[228] Trimesters may seem like an odd choice from a legal perspective, but that is the point. They were rooted in real-life consequences. There is a difference in viability that, at the time of the *Roe* decision, mapped broadly onto trimesters. Viability may not be an important legal concept, but it is an important practical one.

effective strategies for rhetorical resistance. This section will explore various approaches to challenging and reframing judicial opinions, with a particular focus on centering the voices and experiences of affected communities.

A. Exposing Unstated Premises in Judicial Opinions

One of the most potent tools for rhetorical resistance is the systematic exposure of unstated premises in judicial opinions. As discussed earlier, enthymemes—arguments with unstated premises—are frequently employed in legal reasoning to make arguments seem more persuasive and inevitable than they actually are. By bringing these hidden assumptions to light, we can challenge the seeming neutrality and objectivity of judicial opinions.

In the context of *Dobbs*, a critical approach to exposing unstated premises requires careful examination and questioning of several key assumptions underlying the Court's reasoning. One such assumption is the idea that rights must be "deeply rooted in history and tradition" to be constitutionally protected. This premise, central to the Court's application of the *Glucksberg* test in *Dobbs,* merits rigorous scrutiny. It raises fundamental questions about the nature of constitutional rights and the Court's role in interpreting them. If we accept this premise, how do we account for the evolution of societal norms and values over time? Does this approach effectively freeze constitutional interpretation at a particular historical moment, potentially enshrining outdated prejudices and inequalities? Moreover, whose history and whose traditions are we considering? The history of legal rights in the United States is largely a history of gradual expansion, often in the face of entrenched opposition. Many rights we now consider fundamental were not "deeply rooted in history and tradition" at the time they were recognized. Consider the right to marry across racial lines, which was explicitly prohibited in numerous states until *Loving v. Virginia* in 1967.[229] Prior to this landmark decision, interracial marriage was banned in forty-one states, reflecting a deeply entrenched historical tradition of racial segregation and discrimination. Yet the Supreme Court recognized the fundamental right to marry as transcending these historical limitations, holding that marriage is a basic civil right essential to individual liberty. Similarly, the right to use contraception, first recognized in *Griswold v. Connecticut*, challenged long-standing legal and social prohibitions.[230] Before 1965, many states criminalized the use of contraceptives, even within marriage, based on moral and religious grounds that were deeply rooted in historical practice. The Court's decision to protect this intimate personal choice demonstrated that constitutional rights are not frozen in historical amber but can evolve to recognize individual autonomy. Similarly, the right to raise one's children, articulated in *Pierce v. Society of Sisters*, protected parents' liberty to

[229] 388 U.S. 1, 6–7 (1967) (striking down laws prohibiting interracial marriage and noting that such laws were widespread across the United States).

[230] 381 U.S. 479, 485–86 (1965) (recognizing a constitutional right to privacy that protects the use of contraception).

direct their children's education against state-mandated schooling.[231] These judicially recognized rights illustrate how fundamental liberties often emerge by challenging, rather than conforming to, prevailing historical traditions. The Court's role is not to calcify past practices but to interpret and incorporate the Constitution's broad principles of liberty and equality in ways that respond to changing social understandings and protect individual dignity.

Another critical assumption underlying the *Dobbs* decision is that historical prohibitions on abortion reflect a societal consensus rather than the imposition of particular moral or religious views. This premise deserves careful examination and challenge. A nuanced historical analysis reveals that attitudes towards abortion have been far more complex and varied than the Court's opinion suggests. Early American common law, for instance, generally did not prohibit abortion before "quickening" (the point at which fetal movement could be felt), and many of the stricter abortion laws in the 19th century were driven by specific professional and religious interests rather than broad societal consensus. By questioning this assumption, we can highlight the Court's selective use of history and argue for a more comprehensive understanding of the historical context surrounding abortion regulation. This approach could involve bringing to light historical evidence of women's efforts to control their fertility, the varied religious and cultural attitudes towards abortion throughout American history, and the complex social and economic factors that have shaped abortion practices and policies over time.

A third crucial premise that demands scrutiny is the notion that fetal interests should take precedence over women's bodily autonomy and health. This assumption, while not explicitly stated in the *Dobbs* opinion, underpins much of its reasoning. By prioritizing the state's interest in protecting potential life over women's fundamental rights to privacy and bodily autonomy, the Court effectively subordinates women's constitutional rights to fetal interests. This premise raises profound questions about gender equality under the law and the extent to which the state can compel individuals to use their bodies in service of others. Challenging this assumption involves highlighting the unique physical, emotional, and social burdens of pregnancy and childbirth, and arguing for a legal framework that fully recognizes women's autonomy and equality. It also requires addressing the broader implications of this premise for women's status under the law. If the state can compel women to carry pregnancies to term, what other impositions on bodily autonomy might be justified? By exposing and questioning this underlying assumption, we can argue for a more balanced approach that fully considers the rights and interests of women alongside any state interest in fetal life.

By exposing these unstated premises, we create space for critical engagement with the opinion's reasoning. This approach allows us to challenge not just the conclusion of the opinion, but the very framework within which it operates. Unpacking the unstated premises in legal argument can reveal the ideological commitments that underlie seemingly neutral legal principles.

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[231] 268 U.S. 510, 534–35 (1925) (protecting parents' right to direct their children's education as a fundamental liberty interest).

B. Centering Affected Communities in Legal Discourse

A crucial strategy for resisting the disparate impacts of facially neutral laws is to center the voices and experiences of affected communities in legal discourse. This approach, rooted in critical race theory and feminist legal theory, seeks to challenge the law's claims to neutrality by highlighting its real-world effects on marginalized groups.

In the context of abortion rights, centering affected communities in legal discourse involves several crucial strategies. One key approach is amplifying the stories of women who have sought or been denied abortions, particularly those from low-income backgrounds or communities of color. These narratives provide powerful, firsthand accounts of the real-world impacts of abortion restrictions, humanizing what can often become an abstract legal debate. By bringing these experiences to the forefront, legal arguments can be grounded in lived realities rather than theoretical constructs. This approach not only strengthens the persuasive power of legal advocacy but also helps to counteract the often decontextualized and depersonalized nature of judicial opinions. These narratives can offer a means of testing the excluded experience of the socially marginalized against the assertions of conventional legal doctrine and can illuminate the complex decision-making processes women undergo, the varied circumstances that lead to seeking abortion care, and the profound consequences of being denied such care. They can reveal how abortion restrictions intersect with other forms of systemic inequality, demonstrating that the right to abortion is not just about individual choice but about broader issues of social justice and equity.

Another critical strategy is incorporating empirical research on the socioeconomic impacts of abortion restrictions into legal arguments. This approach brings rigorous, data-driven analysis to bear on legal reasoning, providing a solid evidentiary basis for arguments about the effects of abortion restrictions. Such research can demonstrate the wide-ranging consequences of limiting abortion access, from economic impacts on women and families to broader societal effects on poverty rates, educational attainment, and workforce participation.[232] As a 2018 study has shown, women who are denied abortions face significant economic hardships and are more likely to live in poverty years later.[233] By integrating this empirical evidence into legal arguments, advocates can challenge the often narrow focus of judicial reasoning on abstract legal principles, forcing a consideration of the concrete, measurable impacts of abortion restrictions. This strategy can be particularly effective in countering arguments that downplay the significance of abortion rights or that frame abortion solely as a moral issue rather than a complex social and economic one. Moreover, empirical research can help to expose the disparate impacts of abortion restrictions on different communities, strengthening arguments

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[232] *See* Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence* 2 (Inst. for Women's Pol'y Rsch., Working Paper No. C486, 2019).

[233] Foster et al., *supra* note 217, at 407–13.

based on equal protection and highlighting the intersectional nature of reproductive rights issues.

Engaging with community organizations and advocacy groups is another crucial element in centering affected communities in legal discourse around abortion rights. This engagement ensures that legal strategies align with the needs and priorities of those most impacted by abortion restrictions. By collaborating closely with grassroots organizations, legal advocates can gain invaluable insights into the on-the-ground realities of accessing reproductive healthcare, the specific barriers faced by different communities, and the most pressing concerns of those directly affected by abortion laws. This approach embodies what Gerald López terms "rebellious lawyering," which "grounds its work in the lives and in the communities of the subordinated themselves."[234] Such engagement can lead to the development of more comprehensive and nuanced legal arguments that address the full spectrum of issues surrounding abortion access, from healthcare disparities to economic justice. Furthermore, this collaborative approach can help to build broader coalitions and movements around reproductive rights, linking legal advocacy with grassroots organizing and community empowerment efforts. As Mari Matsuda argues, "[t]hose who have experienced discrimination speak with a special voice to which we should listen."[235] By centering these voices, we can challenge the abstract, decontextualized reasoning often found in judicial opinions and bring attention to the concrete harms caused by seemingly neutral legal doctrines.

C. Reframing Legal Issues to Highlight Disparate Impacts

Another key strategy is to reframe legal issues in ways that make disparate impacts more visible and central to the analysis. This involves shifting the focus from abstract legal principles to the concrete effects of laws and judicial decisions on real people's lives.

In the case of abortion rights, reframing legal issues to highlight disparate impacts involves several key strategies. One crucial approach is to frame abortion restrictions not just as a matter of privacy rights, but as an issue of gender equality and economic justice. This framing recognizes that restrictions on abortion disproportionately affect women, particularly those from marginalized communities, and have far-reaching implications for their social and economic well-being. As Ruth Bader Ginsburg argued, "[t]he conflict . . . is not simply one between a fetus' interests and a woman's interests . . . Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."[236] By situating abortion rights within the broader context of gender equality and economic justice, advocates can

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[234] Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice 38 (1992).

[235] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987).

[236] Ginsburg, *supra* note 137, at 383.

challenge the narrow, privacy-based framing that has dominated much of the legal discourse around abortion and highlight the systemic inequalities that abortion restrictions perpetuate.

Another important strategy is highlighting the interconnections between abortion access and other social issues, such as poverty, racial discrimination, and healthcare disparities. This approach recognizes that abortion rights do not exist in isolation but are deeply intertwined with other forms of social inequality. For instance, research has shown that women who are denied abortions are more likely to experience economic hardship and insecurity.[237] Moreover, restrictions on abortion access often disproportionately affect women of color, exacerbating existing racial disparities in healthcare. By drawing these connections, legal advocates can present a more comprehensive picture of the impacts of abortion restrictions and challenge the tendency to treat abortion as a standalone issue divorced from broader social contexts.

Emphasizing the public health implications of abortion restrictions is another critical aspect of reframing the legal discourse around abortion rights. This includes highlighting increased maternal mortality rates and the health risks associated with unsafe abortions. As the World Health Organization has reported, restrictive abortion laws are associated with higher rates of unsafe abortions and increased maternal mortality.[238] By focusing on these public health impacts, advocates can shift the discussion from abstract moral debates to concrete issues of life and health. This framing also allows for the incorporation of medical and scientific evidence into legal arguments, potentially countering politically motivated restrictions that lack a sound public health basis. Furthermore, emphasizing the public health dimension of abortion access can help to situate reproductive rights within the broader context of healthcare policy and access, highlighting the interconnections between abortion rights and other aspects of women's health and well-being.

This reframing can help to counter the tendency in legal discourse to treat issues in isolation, divorced from their broader social context. As Kimberlé Crenshaw's work on intersectionality has shown, understanding how different forms of oppression intersect is crucial for developing effective legal and policy responses.[239]

D. Employing Interdisciplinary Approaches

Effective rhetorical resistance often requires moving beyond traditional legal analysis to incorporate insights from other disciplines.[240] This interdisciplinary approach can help to expose the limitations of purely doctrinal legal

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[237] Foster et al., *supra* note 217, at 407–13.

[238] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 2–3 (2012), https://iris.who.int/bitstream/handle/10665/173586/?sequence=1 [https://perma.cc/9L6W-J9EY].

[239] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140 (1989).

[240] Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 849-50 (1990).

reasoning and provide a more comprehensive understanding of the impacts of legal decisions.[241] The recognition of law's embeddedness in broader social contexts necessitates engagement with a range of disciplinary perspectives.[242]

For instance, public health insights are crucial for understanding the health implications of abortion restrictions and other reproductive health policies.[243] Research in this field can demonstrate the tangible health consequences of limiting access to safe and legal abortions, including increased maternal mortality rates and the risks associated with unsafe abortions.[244] Incorporating such public health data into legal arguments can provide a robust empirical foundation for challenging restrictive abortion laws.[245]

Economic analysis is equally vital for comprehending the far-reaching impacts of reproductive health policies.[246] Economic perspectives can help to frame abortion rights not just as a matter of individual choice, but as a critical factor in women's economic empowerment and societal progress.[247] Such analysis can illuminate the complex interplay between reproductive rights and broader economic outcomes.[248]

Sociological perspectives are essential for examining how abortion restrictions interact with existing social inequalities.[249] This sociological framing helps to situate abortion rights within broader discussions of social equity and justice.[250] It provides a framework for understanding how reproductive rights intersect with other forms of systemic inequality.[251]

Historical analysis provides crucial context for understanding the evolution of abortion rights and regulations over time.[252] By examining the

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[241] White, *supra* 15. *See also* Matyas Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement*, 6 Erasmus L. Rev. 91, 94–95 (2015) (contending that certain "concepts and ideas built into the doctrinal structures of law" cannot be fully understood or critiqued without insights drawn from other disciplines and empirical methods).

[242] Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* Law in Everyday Life 21, 25 (Austin Sarat & Thomas R. Kearns eds., 1993).

[243] *See generally* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (2012).

[244] World Health Organization, *supra* note 238, at 23.

[245] Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 Hum. Rts. Q. 1, 3 (2003).

[246] *See* Berenstein & Jones, *supra* note 232, at 2.

[247] Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. Pol. Econ. 730, 731 (2002).

[248] *See e.g.,* Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, 18 Rsch. Lab. Econ. 75, 76 (1999).

[249] Katrina Kimport & Tracy A. Weitz, *Abortion as a Sociological Case*, 39 Socio. F. 7, 7-8 (2024) (reviewing scholarship that treats abortion as an excellent sociological case study and encouraging more research, arguing that questions of access must be analyzed through lenses of gender, race, political-economy, and other structural inequalities); *see also* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1243–44 (1991) (using intersectionality to show how overlapping systems of race, gender, and class shape legal vulnerability—an analytic framework that sociological studies now apply to abortion restrictions and their disparate effects).

[250] Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 228 (2d ed. 2000).

[251] Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 Ann. Rev. L. & Soc. Sci. 327, 328 (2013).

[252] Siegel, *supra* note 84, at 263–64.

historical development of abortion laws and societal attitudes towards reproductive rights, legal scholars can challenge ahistorical arguments that present current restrictions as longstanding traditions.[253] This historical perspective can reveal the complex and often contradictory nature of attitudes towards abortion throughout American history.[254]

By bringing these diverse perspectives to bear on legal issues, we can challenge the narrow framing often employed in judicial opinions and highlight the complex, multifaceted nature of issues like abortion rights. This interdisciplinary approach allows for a more nuanced and comprehensive understanding of the law's impacts, potentially leading to more just and equitable legal outcomes.[255] As Julie Novkov argues, "Interdisciplinary work in law and social sciences can provide important insights into the operation of law and legal institutions in society." [256] By embracing this interdisciplinary perspective, legal scholars and advocates can develop more robust and persuasive arguments for protecting and advancing reproductive rights.

E. Developing Alternative Narratives

The power of interdisciplinary approaches is significantly amplified when combined with narrative reframing, a potent tool for rhetorical resistance. This strategy extends beyond mere critique of existing legal narratives; it involves the active construction of new narratives that center the experiences of marginalized groups and illuminate the real-world impacts of legal decisions.

Stories, parables, chronicles, and narratives serve as powerful instruments for dismantling entrenched mindsets—the collection of presuppositions, received wisdoms, and shared understandings that form the backdrop of legal

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[253] N.E.H. Hull & Peter Charles Hoffer, Roe v. Wade: The Abortion Rights Controversy in American History 12 (2d ed. 2010).

[254] Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973, 8 (1997).

[255] Incorporating interdisciplinary analysis into judicial reasoning can legitimize rhetorical resistance by grounding legal decisions in empirical data and broader societal considerations. For instance, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court famously relied on sociological and psychological studies highlighting the detrimental effects of segregation on children to conclude that separate educational facilities were inherently unequal and thus unconstitutional. Similarly, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court considered extensive scientific evidence regarding public health impacts and climate change to establish standing and ultimately direct the Environmental Protection Agency to regulate greenhouse gas emissions.

One of the most notable historical examples of interdisciplinary rhetorical resistance in litigation is the "Brandeis Brief," first presented by Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908). Rather than focusing solely on traditional legal arguments, Brandeis's brief extensively cited sociological data, economic analysis, public health studies, and other empirical evidence to demonstrate the harmful effects of long working hours on women's health and well-being. By successfully persuading the Court to uphold protective labor laws through an interdisciplinary evidentiary approach, the Brandeis Brief established a precedent for integrating broader societal impacts into judicial decision-making, legitimizing empirical evidence as a powerful rhetorical tool in legal advocacy.

[256] Julie Novkov, *Toward a Legal Genealogy of Color Blindness*, 35 Law & Soc. Inquiry 565, 566 (2010).

and political discourse. These narrative forms possess a unique capacity to challenge and restructure the fundamental frameworks through which we interpret and engage with legal and social realities.

In the context of abortion rights, narrative reframing offers a vital avenue for reshaping public and legal understanding. Crafting stories that emphasize the role of reproductive autonomy in women's full participation in social, economic, and political life can profoundly impact how abortion rights are conceptualized. These narratives can powerfully illustrate that access to abortion transcends individual choice; it is fundamentally about women's ability to shape their own destinies and contribute fully to society.

The decision to bear a child occupies a central position in a woman's life, intimately tied to her well-being and dignity. It is a deeply personal decision that she must make for herself. When the government assumes control over this decision, it effectively treats women as less than fully adult humans capable of making their own choices. This perspective underscores the profound implications of reproductive rights for women's autonomy and equal standing in society.

Another crucial aspect of narrative development involves telling stories that illustrate the intersectional nature of abortion access, showing how restrictions disproportionately affect women who are already marginalized due to race, class, or other factors. These narratives can highlight how abortion restrictions intersect with and exacerbate existing social inequalities. The problem with identity politics is not its failure to transcend difference, as some critics charge, but rather its tendency to conflate or ignore intragroup differences. By telling stories that capture these intersectional realities, advocates can challenge overly simplistic legal narratives and highlight the complex ways in which abortion restrictions impact different communities.

Developing narratives that challenge the fetal-centric focus of many anti-abortion arguments is another crucial strategy. These narratives can highlight the complex realities of women's lives and the multifaceted reasons why women seek abortions. The conversation must shift from fetal life to women's lives. Such narratives can emphasize the diverse circumstances that lead women to seek abortions, including economic hardship, health concerns, and personal aspirations. By centering women's lived experiences, these stories can counteract the tendency to reduce abortion to an abstract moral issue, instead framing it as a complex decision embedded in the realities of women's lives.

Through the development of these alternative narratives, legal advocates can challenge dominant legal discourses and create space for more nuanced and inclusive understandings of reproductive rights. Law indeed is a powerful storyteller, but it is not the only storyteller in our culture. By crafting compelling counter-narratives, advocates can reshape the legal and cultural conversation around abortion rights, potentially influencing both judicial decision-making and public opinion.

The power of stories, parables, chronicles, and narratives in destroying mindsets—the bundle of presuppositions, received wisdoms, and shared understandings against which legal and political discourse takes place—cannot

be overstated. These narrative forms serve as potent tools for challenging and reshaping the fundamental frameworks through which we interpret and engage with legal and social realities.

An important strategy for rhetorical resistance involves engaging in what scholars have termed "popular constitutionalism"—the idea that constitutional meaning should be shaped not just by courts, but by the people themselves through various forms of political and social action. This approach recognizes the dynamic nature of constitutional interpretation and the crucial role that public engagement plays in shaping legal norms.

By organizing at the grassroots level, advocates can create pressure for legal change and contribute to evolving interpretations of constitutional rights. Public education efforts can contribute to ongoing societal conversations about constitutional values and rights. By focusing on electoral politics and policy-making, advocates can work to create a legal and political environment more conducive to protecting and advancing reproductive rights.

Conclusion

Throughout this Article, I have examined how judicial opinions employ enthymematic reasoning to mask value judgments behind a veneer of neutral legal analysis. In *Dobbs*, we see this rhetorical strategy at work through multiple enthymemes—the historical rights enthymeme that selectively privileges certain traditions while ignoring others; the public controversy enthymeme that transforms moral disagreement into a rationale for diminishing constitutional protection; the categorical choice enthymeme that isolates abortion from other bodily autonomy rights; the stare decisis enthymeme that reconfigures precedential weight. These rhetorical structures are powerful precisely because they leave crucial premises unstated, inviting audiences to fill these gaps with seemingly common-sense assumptions that often reflect dominant ideologies rather than critical examination. The result is a facially neutral opinion that nonetheless produces profoundly unequal impacts, particularly on women from marginalized communities who bear the heaviest burdens when reproductive healthcare is restricted. By exposing these enthymematic structures and their disparate effects, we can begin to develop more effective strategies for rhetorical resistance that challenge not just the conclusions of judicial opinions, but the very frameworks within which they operate.

Through these various forms of popular engagement, advocates can work to shape constitutional understanding from the ground up, potentially influencing both judicial decision-making and the broader legal and political landscape surrounding reproductive rights. Successful social movements have produced some of the most significant expansions of constitutional liberty and equality in American history. By embracing popular constitutionalism, reproductive rights advocates can contribute to this ongoing process of constitutional evolution and contestation.

The Supreme Court is not the highest authority in the land on constitutional law; the people are. By engaging in popular constitutionalism, we

can challenge the notion that constitutional interpretation is the exclusive domain of courts and work towards a more democratic and inclusive process of shaping constitutional meaning. Effective rhetorical resistance to judicial opinions like *Dobbs* requires a multifaceted approach that combines rigorous legal analysis with strategies for centering marginalized voices, reframing issues, and engaging with broader social and political movements. By employing these strategies, we can work towards a legal discourse that is more attuned to the real-world impacts of judicial decisions and more responsive to the needs and experiences of all members of society.

As we move forward, it is crucial to recognize that rhetorical resistance is not just about winning legal arguments, but about transforming the very terms of legal and political debate. By challenging the underlying assumptions and frameworks that shape judicial opinions, we can work towards a more just and equitable legal system—one that truly serves the needs of all members of society, not just those with the most power and privilege.