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Deciphering *Dobbs*

Syllogism and Enthymeme in Contemporary Legal Discourse

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The syllogism is at the heart of legal reasoning. Many law students have heard some variation of this claim. Many law professors have repeated it. So foundational is this concept that Justice Scalia and Bryan Garner (2008, p. 41) argue that "the most rigorous form of logic, and hence the most persuasive, is the syllogism." But the syllogism offers a very limited lens onto legal argumentation. The syllogism merely provides a framework for ascribing logical structure to propositional statements; the enthymeme serves as a bridge between logic and persuasion, playing a crucial role in how arguments are presented and understood in the legal context.

The syllogism, as Aristotle elaborates particularly in his *Prior Analytics* (1989), is a form of deductive reasoning where a conclusion is logically derived from two given premises. For instance, in a classic syllogism, from the premises "All humans are mortal" and "Socrates is a human," one deduces the conclusion "Socrates is mortal." This structure is key to formal logic, where the conclusion necessarily flows from the premises. The enthymeme, discussed in Aristotle's *Rhetoric* (2004), mirrors the syllogistic structure but with one key difference: One of the premises is implied rather than explicitly stated, relying on the audience's inference. For example, the statement "Socrates is mortal because he is human" implies the general principle that all humans are mortal, without stating it outright. Thus, the enthymeme is often characterized as a truncated or incomplete syllogism.

However, it is important to recognize that the enthymeme is not a deficient form of syllogism. Rather, it serves as a parallel construct in the domain of contingent truths and persuasive argumentation. While syllogisms are appropriate in environments of certainty or agreed-upon premises, enthymemes are appropriate for the domain of legal argumentation, where premises are often subject to interpretation and debate, and all the logically necessary premises cannot be fully articulated.

Understanding the enthymeme's role in legal argumentation is particularly important when examining cases like *Dobbs v. Jackson Women's Health Organization* (2022). This case provides a compelling study of how enthymematic reasoning shapes legal discourse and decision-making. The leaked draft opinion and the final decision, authored by Justice Alito, demonstrate how unarticulated societal

values and assumptions underpin judicial reasoning. The majority opinion's reliance on a historical and originalist interpretation of the Constitution, while ignoring the historical lack of representation of women and minorities, demonstrates the rhetorical effect of implicit premises on judicial reasoning.

5.1 THE ENTHYMEME

In Aristotle's framework, enthymemes are closely related to syllogisms, sharing several key characteristics and a similar form, but inhabiting different domains. Aristotle's treatment of these forms in his works on logic and rhetoric reveals their complementary nature. While he categorizes "examples" as a rhetorical form of induction, he identifies the "enthymeme" as a variant of the syllogism, which he further characterizes as a "rhetorical syllogism." This distinction is crucial in understanding Aristotle's conception of enthymemes as not merely logical constructs but as tools adeptly suited for the art of persuasion.

Aristotle posits that the essence of rhetoric lies in its focus on modes of persuasion, which he equates to a form of demonstration (Aristotle, 2004). Persuasion, in his view, is most effective when an argument is not only formally valid but also perceived as having been demonstrably proven. This perspective is where the enthymeme's significance in rhetoric comes to the fore. Unlike the syllogism, which is primarily concerned with the logical structuring of premises leading to a conclusion, the enthymeme incorporates this logical framework within a rhetorical context. It is designed to persuade by presenting a logical argument where at least one premise is typically left unstated yet understood by the audience. This characteristic of the enthymeme makes it a powerful tool in rhetoric, as it engages the audience's own beliefs and knowledge to fill in the gaps, thereby making the argument more relatable and convincing.

Aristotle's emphasis on the enthymeme in rhetoric highlights its dual nature, combining the rigors of logical reasoning with the art of persuasive communication. This dual nature allows the enthymeme to be more adaptable and context-sensitive compared to the more rigid structure of the syllogism. In rhetorical discourse (including law), this adaptability makes the enthymeme particularly effective, as it can be tailored to the specific beliefs, values, and knowledge of a particular audience, thereby enhancing the persuasive impact of the argument. Thus, in Aristotle's view, the enthymeme stands as one of the most convincing modes of persuasion, embodying the intersection of logical reasoning and the art of persuasion in a manner uniquely suited to the objectives of rhetorical discourse (Aristotle, 2004). He goes on to say:

> The enthymeme is a sort of syllogism, and the consideration of syllogisms of all kinds, without distinction, is the business of dialectic, either of dialectic as a whole or of one of its branches. It follows plainly, therefore, that he who is best able to see

> how and from what elements a syllogism is produced will also be best skilled in the enthymeme, when he has further learnt what its subject-matter is and in what respects it differs from the syllogism of strict logic. The true and the approximately true are apprehended by the same faculty; it may also be noted that men have a sufficient natural instinct for what is true, and usually do arrive at the truth. Hence the man who makes a good guess at truth is likely to make a good guess at probabilities. (Aristotle, 2004, p. 3)

For those who teach legal reasoning through syllogism, it is reassuring to know that these processes are not entirely separate entities. According to Aristotle, understanding formal logic indeed aids in grasping quasi-logical reasoning. So, if the purposes are similar, the capacity for creating them is similar, and the form is similar, then why is Aristotle so careful to separate them in his taxonomy? In short, because syllogisms and enthymemes inhabit different domains. Syllogisms belong to the domains of philosophy and science, of dialectic and proof. Enthymemes belong to the domains of law and politics, of contingent truths and political philosophies.

But while Aristotle it careful to explain that the pursuits of man are not concerned with universal truths, he does not go so far as to accept a worldview that we would now categorize as postmodern – one where all truth is contingent and where all logical arguments are necessarily predicated on faulty understanding or deception and where emotional or manipulative arguments share the same status as arguments that attempt an internal logical consistency. He argues for the primacy of a particular mode of rhetorical argument, one that privileges logic above emotional appeals, at least for legal discourse. He says:

> Now, the framers of the current treatises on rhetoric have constructed but a small portion of that art. The modes of persuasion are the only true constituents of the art: everything else is merely accessory. These writers, however, say nothing about enthymemes, which are the substance of rhetorical persuasion, but deal mainly with non-essentials . . . It is not right to pervert the judge by moving him to anger or envy or pity – one might as well warp a carpenter's rule before using it. Again, a litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened. As to whether a thing is important or unimportant, just or unjust, the judge must surely refuse to take his instructions from the litigants: he must decide for himself all such points as the law-giver has not already defined for him. (Aristotle, 2004, p. 2)

It is this vision of the purpose of the enthymeme that many legal rhetoric scholars would readily adopt: an informal logic that aspires to logical certainty – one that avoids the dangers of undignified appeals to *pathos* and reproduces facts so that a judge may make a reasoned determination. A conservative reimagining of the structure of legal argumentation might acknowledge that, at the very least, legal arguments are advanced through enthymemes of the form described above, rather than through syllogisms. This acknowledgment would represent a significant shift in

the understanding of legal reasoning, as it would move away from the purely logical and formalistic view of the law.

5.2 ENTHYMEME IN LEGAL ARGUMENTATION

The seemingly infallible logical and quasi-scientific structure of the syllogism is what has endeared it so deeply to those who seek to make legal argumentation seem a formalistic pursuit. This deep-rooted affinity for the syllogism in legal circles is not merely due to its logical rigor but also because it offers an appearance of objectivity in legal reasoning. By framing legal arguments within a syllogistic structure, there is an implication that judicial decisions are the product of a straightforward, almost mechanical, process of logical deduction. This perspective is attractive in the legal field as it suggests that conclusions in legal matters are derived from a clear, rational process, minimizing the perception of subjectivity or bias. The syllogism, in this sense, is seen as a tool that distills complex legal arguments into a format that is both logically sound and ostensibly impartial. This approach aligns well with the desire in legal practice to portray the law as a system based on reason and universal principles, rather than one influenced by the whims and biases of individuals.

When explaining legal reasoning, law professors often map the well-known IRAC model (Issue, Rule, Application, and Conclusion) onto the syllogistic structure. In this model, the "Rule" represents the general law or legal principle applicable to the case at hand, forming the major premise of the syllogism. The "Application" involves an analysis of how this rule pertains to the specifics of the case, serving as the minor premise. And the "Conclusion" provides a resolution to the issue at hand, effectively acting as the syllogism's conclusion. Brian Larson calls this brand of deductive reasoning "rule-based reasoning" (Larson, 2018) and found that these rule-based arguments make up the majority of legal arguments in a study of legal briefs and opinions (Larson, 2021).

Legal formalists often champion the syllogism as the correct method of legal reasoning, advocating the view that the application of case law is akin to a scientific process, capable of being encapsulated within formal models of logical reasoning. This perspective is further elaborated by Thomas F. Gordon and Douglas Walton in their work, "Legal Reasoning with Argumentation Schemes" (Gordon and Walton, 2009). Gordon and Walton discuss various methods of argumentation in legal reasoning, aligning more closely with philosophical concepts of argumentation. They describe their model of argumentation scheme as tuples of the type (list [premise], statement), where the list [premise] denotes a list of premises, and the statement represents the conclusion of the argument. In their framework, a premise can be a statement, an exception, or an assumption, offering a nuanced approach to understanding legal arguments.

This perspective on legal reasoning suggests that the judicial process can be structured and dissected into a series of definable elements that construct a logical

argument. Just like solving a mathematical problem, each premise, statement, exception, or assumption is a variable in the equation that can either add, subtract, or modify the strength and direction of the argument. This means that the analytical rigor employed in the legal process goes beyond the mere presentation of facts and laws. It examines the underlying logical structure of the arguments and identifies the necessary conditions required to validate or negate a legal conclusion.

However, legal reasoning, unlike mathematics or natural sciences, requires significantly more than internal logical consistency or formal validity. It involves subjective factors such as human interpretation and judgment. Thus, while Gordon and Walton's approach provides a robust framework for breaking down the elements of legal reasoning into a systematic and methodical model, it also necessitates the acknowledgment of the inherent ambiguity and interpretative latitude within the law.

In response to the limitations of formal logic, there has been a shift, not only among critical legal scholars but also within the field of legal argumentation, toward a more rhetorical understanding of legal reasoning. This shift acknowledges the influence of rhetoric in legal discourse, challenging traditional legal thought that often underestimates the role of the enthymeme. João Maurício Adeodato (1999), for instance, critiques the traditional legal mindset that tends to view the enthymeme with skepticism, suggesting that the traditional approach is at odds with the inherently rhetorical and constructive nature of legal discourse. This evolving viewpoint underscores a growing recognition of the complexity and nuance in legal reasoning, beyond the confines of strict formal logic.

Adeodato's perspective represents a significant departure from the conventional legal formalist approach. He contends that the enthymeme, by acknowledging the unstated premises derived from shared values or beliefs, provides a more accurate representation of the real-world application of law. It captures the inherently rhetorical nature of law, where the decision-making process is not just a mechanistic application of pre-established rules but also involves interpretation and judgment, shaped by societal norms and values. His assertion that legal agents often unconsciously use enthymemes in their reasoning process underscores the inherently persuasive and interpretive nature of legal discourse.

But the rhetorical use of the enthymeme extends beyond just employing it when premises are universally understood; it also involves its use when the premises are controversial – in fact, sometimes *because* they are controversial. This more rhetorical understanding is explored in the work of Fabrizio Macagno and Giovanni Damele (2013), who investigate the role of implicit premises in argumentation, particularly when these premises are contentious or debatable. Their work provides insights into the rhetorical strategies used in selecting which premises to omit to lend legal arguments a veneer of being unassailable. Yet few legal scholars have engaged with the work of reconstructing implicit premises to understand their rhetorical force and to fully examine the internal logic of judicial opinions.

Rethinking the IRAC model as an enthymeme rather than a syllogism offers a more accurate reflection of the nuanced nature of legal reasoning. The syllogistic interpretation of IRAC suggests a rigid, linear progression from rule to application to conclusion, implying a level of certainty and predictability that often does not exist in legal contexts. In contrast, viewing IRAC through the lens of the enthymeme acknowledges the inherent uncertainties and interpretative elements in legal argumentation. The enthymeme, by its nature, allows for an unstated premise – often a normative or contextual assumption – which is crucial in legal reasoning. This perspective aligns more closely with the reality of legal practice, where judges and lawyers frequently rely on unarticulated principles, societal norms, or ethical considerations that are not explicitly stated but are nonetheless pivotal to the reasoning process. By conceptualizing IRAC as an enthymeme, we embrace a more realistic and flexible model of legal argumentation, one that better accommodates the complexities and subtleties inherent in the application of law to diverse and often unpredictable real-world situations. This approach not only provides a more accurate framework for understanding legal reasoning but also underscores the importance of critical thinking and interpretative skills in the practice of law.

In this light, I aim to examine the effect of the unstated premises on legal argumentation in *Dobbs*. For this examination, I use the following definition, tailored for legal analysis: An enthymeme is a rhetorical construct that connects premises to a conclusion in the realm of real-world, contingent truths, by strategically omitting certain premises and relying on the audience to fill these gaps. This omission is not a flaw but a deliberate technique that engages the audience's own beliefs and values, or obscures the omitted premises if they are controversial, making the argument more compelling and resonant within the specific context of legal reasoning and persuasion. Further, identifying legal reasoning as syllogistic not only overlooks the rhetorical dimension of legal argumentation but also mistakenly aligns it more with scientific discovery than with argumentation about pragmatic legal issues. This perspective erroneously positions legal reasoning in a domain akin to empirical science, where conclusions are drawn from established, objective facts through deductive and inductive reasoning. In contrast, legal argumentation is fundamentally about navigating and interpreting the complexities of human-made law, human behavior, societal norms, and ethical considerations. As Aristotle argues, legal argumentation involves a dynamic process of persuasion and interpretation, which necessarily operates through an enthymematic, rather than syllogistic, framework.

5.3 ENTHYMEME IN *DOBBS*

Dobbs v. Jackson Women's Health Organization (2022) highlights the difficulty of ascribing a to Supreme Court argument formal logic schemas, especially ones as rigid as the syllogism. Even though the argument does not map well to a rigorous

logical test, the exercise in attempting to do so results in a better understanding of where the argument fails.

Numerous legal scholars have already pointed out some of the major failings of the decision – it purports to represent a history that most likely never existed, it misreads precedent, and it ignores decades of established legal precedent to get to its justification for its ruling. Dahlia Lithwick and Neil S. Siegel (2022) have argued that "*Dobbs* [is] not just wrong, but *lawless* ... [b]ecause it is utterly unprincipled. It articulates a reason for overruling *Roe* out of one side of its mouth, then repeatedly protests that it will not be bound by this reason out of the other side of its mouth." But more insidious than these obvious examples of where the evidence or stated reasoning fails is where the majority opinion's reasoning is obscured by its reliance on unstated premises, a tactic that further complicates the application of formal logic schemas to its argument.

This elusiveness in the opinion's structure allows it to maneuver around certain logical and legal expectations. The decision, while overtly grounded in legal reasoning, subtly embeds its rationale in premises that are not explicitly articulated but are critical to its conclusion. These unstated premises include particular interpretations of history, assumptions about societal norms, or specific views on the role of the judiciary that would be controversial if stated overtly. This approach effectively conceals the full basis of its reasoning, making it challenging to dissect and critique the decision using traditional legal analysis. The concealment of these key premises not only contributes to the perceived failings of the decision, as noted by legal scholars, but also illustrates a strategic use of legal rhetoric. By not openly stating these foundational premises, the opinion avoids direct engagement with counterarguments and criticism, thereby shielding its reasoning from straightforward legal scrutiny. This method of hiding reasoning through unstated premises is not just a feature of this particular decision, but a broader tactic that can be observed in various judicial opinions, highlighting the complex interplay between legal argumentation, rhetoric, and logic.

Justice Alito's majority opinion employs enthymematic arguments within a quasi-logical framework to make its case for overturning *Roe v. Wade* (1973). By leveraging enthymematic arguments, Justice Alito aims to shape the Court's decision and persuade the reader, employing a structure that exhibits the appearance of logical coherence while concealing potential gaps in the reasoning. Moreover, its verisimilitude to the syllogism and the scientific rigor necessary to construct a syllogistic proof helps to give Alito's argument its rhetorical force.

Within this quasi-logical structure, Justice Alito strategically selects and presents arguments that encompass implicit premises, relying on the audience to fill in the missing elements. By leaving certain premises unexpressed, Justice Alito capitalizes on the persuasive force of these unspoken assumptions, thereby shaping the audience's perception and bolstering the strength of his argument.

To understand the rhetorical effect of Alito's enthymematic argumentation, let us first turn to those premises that are explicitly stated in the opinion. Alito says:

> We hold that *Roe* and *[Planned Parenthood v.] Casey* [(1992)] must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely – the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).
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> The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being." (*Dobbs*, 2022, p. 5)

One might reconstruct the nested enthymemes that comprise the test for *Dobbs* thus:

First major premise: Abortion is not a right enumerated in the Constitution.
  Implied premise: This case is about abortion, not a more general right to privacy, nor a right to control medical decisions about our bodies.
Second major premise: Unenumerated rights exist only if they are deeply rooted in our nation's history.
  Implied premise: A right is deeply rooted in our nation's history only if it has been legally recognized in all circumstances across all time (or at least in all circumstances across a particular time period).
  Minor premise: Abortion has not always been legal in all circumstances across all time.
  Minor conclusion: Abortion is not deeply rooted in our nation's history.
Conclusion: Abortion is not a right enshrined in the Constitution; therefore, *Roe* and *Casey* must be overruled.

The enthymemes at the heart of the *Dobbs* decision operate through missing premises, which play a crucial role in shaping the argument's trajectory and conclusion. The major premises, while they rely on some shared values and assumptions, have support beyond the argument being made by Alito in *Dobbs*. However, the implied premises introduce significant nuances that direct the argument toward a predetermined conclusion.

5.3.1 *Major Premise: Abortion Is Not a Right Enumerated in the Constitution*

Choosing a major premise for an enthymeme in legal argumentation is a deeply rhetorical act, one that sets the tone and direction for the entire argument. This choice is far from arbitrary; it reflects the arguer's perspective, biases, and the intended message they wish to convey. In essence, the major premise serves as the foundation upon which the argument is built, guiding the logical progression and influencing the conclusions drawn. It is the lens through which facts are interpreted and through which the argument gains its persuasive power. For instance, in a legal context, selecting a major premise that aligns with a particular legal theory or interpretation can significantly shape the outcome of the case. This premise acts as a filter, determining which facts are relevant and how they are to be understood. It is not just a statement of fact, but a declaration of the argument's underlying assumptions and values.

Furthermore, the rhetorical choice of a major premise in an enthymeme also dictates the engagement of the audience with the argument. A well-chosen premise can resonate with the audience's beliefs or values, making the argument more persuasive. It can also challenge or provoke the audience, compelling them to reconsider their views. In judicial decision-making, the selection of a major premise is a critical step that shapes the entire framework of legal analysis. It goes beyond ensuring the logical coherence of the decision; it involves a careful consideration of the broader legal principles, ethical implications, and societal values that underpin the law. By selecting a particular major premise, a judge essentially determines the narrative through which legal facts are understood and contextualized, thereby guiding the legal discourse toward a certain trajectory that resonates with the judge's understanding of the law and its role in society. This decision is a constitutive act, one that not only applies the law but also shapes it, reflecting James Boyd White's (1973) view of the law's constitutive nature.

The majority opinion sets up the analysis of *Dobbs* through the lens of abortion rights. The first major premise *is* demonstrably true through a reading of the Constitution: Nowhere is abortion mentioned in the document. When Justice Alito centers his analysis on whether abortion is an enumerated right in the Constitution, he strategically bypasses the broader and more contentious debate about the existence of a fundamental right to privacy.

5.3.2 *Implied Premise: This Case Is about Abortion, Not a More General Right to Privacy, nor a Right to Control Medical Decisions about Our Bodies*

The implied premise, that *Dobbs* is specifically about abortion and not about a broader right to privacy or bodily autonomy, limits the argument's scope. By framing the issue narrowly around abortion, Alito effectively limits the discussion to the legality of abortion itself, rather than engaging with the wider constitutional

principles that might underlie such a right. This strategic narrowing of the argument's scope is a key rhetorical move, as it shifts the focus of the debate and potentially influences how the audience, including the Court and the public, perceives and evaluates the issue.

Alito's approach sets up his narrow view of the historical development and understanding of privacy rights in American jurisprudence. While ideas about which privacy rights are fundamental has shifted over time, the argument that privacy is fundamental is not new. In their 1890 law review article, "The Right to Privacy," Warren and Brandeis initially characterized the right to privacy as an existing common law right that encompassed safeguards for an individual's "inviolate personality" (Warren and Brandeis, 1890, p. 205). According to their view, the common law ensured that each person had the right to determine the extent to which their thoughts, sentiments, and emotions would be communicated to others, establishing the boundaries of public disclosure. Their conception of the right to privacy emphasized that individuals possessed the choice to share or withhold information about their private life, habits, actions, and relationships.

The necessity for the legal system to recognize the right to privacy, as argued by Warren and Brandeis, stemmed from the potential impact of disclosing information about an individual's private life. They contended that such revelations had the capacity to influence and harm the very core of a person's personality, particularly their self-perception. In essence, they recognized that an individual's personality, including their self-image, could be affected, distorted, or even injured when private information became accessible to others. This original understanding of the right to privacy incorporated a psychological insight which, at the time, was relatively unexplored – an understanding that the disclosure of private aspects of an individual's life could have profound psychological consequences.

So, by the early part of the twenty-first century, the right to privacy had been enshrined as a fundamental right – one so foundational to understanding all our other rights that it can be left unsaid, thus forming a penumbra of constitutional protections. Alito strategically did not revisit the issue of whether a general right to privacy exists, instead limiting his focus to abortion more specifically. This allows him to find that abortion is not a fundamental right and skip the analysis of whether an anti-abortion law passes constitutional muster.

To determine whether such a fundamental right has been impermissibly infringed upon, courts generally apply the doctrine of strict scrutiny. Under this doctrine, which has been called one of "the most important and distinctive tenets … of modern constitutional law," the government must show that the law is narrowly tailored to achieve a compelling state interest (Siegel, 2006, p. 355). Strict scrutiny is a high standard that is difficult for the government to meet, and it often results in laws or policies being struck down as unconstitutional.

For instance, a state may enact a law that limits the exercise of free speech, but only if it can demonstrate that it has a compelling interest, such as safeguarding

national security, and that the law is carefully tailored to achieve that interest. To pass constitutional scrutiny, the government must meet both prongs of the test: showcasing a compelling state interest and ensuring that the chosen means are narrowly tailored, meaning the law is the least restrictive way to accomplish the desired objective.

This is the test *Roe* applied to anti-abortion laws in 1973. The Court weighed a woman's right to make decisions about her pregnancy against a state's interest in protecting "potential life." The balancing test it applied came to an equilibrium at the time of viability of the fetus. It weighed the relative interests, stating:

> On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).
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> 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. (*Roe v. Wade*, 1973, p. 154)

In this deductive argument, the Court considers a hypothetical syllogism: (i) "Rights of privacy are always absolute," (ii) "Reproductive decisions are subject to a right of privacy," and (iii) "Therefore, reproductive decisions are an absolute right." The Court then proceeds to demonstrate the falsity of premise (i) by presenting counterexamples that show privacy rights are not always absolute. This refutation of the first premise effectively undermines the conclusion (iii), demonstrating that reproductive decisions cannot be considered an absolute right in every circumstance.

Following this deductive reasoning, the Court's balancing test is reintroduced to provide a more nuanced explanation. The balancing test allows the Court to articulate why the conclusion (iii) is not universally true, particularly in the context of the case at hand. By employing this test, the Court can consider a range of factors,

including societal values, legal precedents, and the implications of absolute rights, to arrive at a more comprehensive and context-sensitive conclusion.

A balancing test may be seen as a compromise, one that Alito is not willing to make when he revisits the idea almost fifty years later in *Dobbs*. Where certain "fundamental rights" are involved, the Court has held time and again that regulation limiting these rights may be justified only by a "compelling state interest." But, in *Dobbs*, Alito is careful to state that the right to an abortion is not a fundamental right. He says, "Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one" and goes on to question whether unenumerated rights exist and under what circumstances the Court should be willing to acknowledge them (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 1).

The recognition of unenumerated rights within the constitutional framework has been a subject of considerable debate and interpretation. The courts have consistently acknowledged that the Constitution's protection extends beyond its explicit provisions, encompassing inherent and implied rights that are integral to individual liberty and justice. This understanding acknowledges that the Constitution operates as a living document, capable of evolving to address new challenges and societal expectations. But not all are willing to accept the Constitution as a living document. Originalism as a jurisprudential principle is rooted in the idea that we should seek to understand and apply the law as those living in the time it was written would have understood it. (See Hannah and Mootz, Chapter 2 in this volume, about the role of originalism in legal argumentation.) It has also been used to justify reactionary judicial rulings, as has the test applied in *Dobbs*.

When Alito focused his analysis on the specific question of whether abortion is an enumerated right in the Constitution, rather than exploring the broader concept of privacy, he effectively narrowed the scope of the legal debate. By concentrating solely on abortion, Alito implicitly underscores a widely held legal perspective: that abortion, in itself, is not typically regarded as a fundamental right. This framing contrasts with the broader and more complicated discussions surrounding privacy as a fundamental right, which might encompass a variety of personal decisions, including choices about one's body. Alito's decision to isolate abortion from this broader context of privacy rights thus shifts the legal discourse, focusing it on the enumeration of specific rights rather than on the exploration of underlying principles that might be considered fundamental to personal liberty and autonomy.

The argument then becomes: If the right in question is not a fundamental right, then it is not appropriate for the Court to apply a strict scrutiny test. This does two things for the argument, and hence the enthymeme. First, it allows Alito to apply a test that is much more favorable to the state. The government in the traditional analysis would be said to have an interest in protecting the rights of fetuses, and that interest would have to be a compelling one to overcome the burden of the law prohibiting abortion. And second, it removes the emphasis of competing rights from

the discussion. Rhetorically, this is an important move. Rather than pitting the rights of women against those of fetuses (or those of the state in protecting fetuses), the court is now able to examine whether "potential life" should have *any* rights, not just whether those rights should overcome the rights of the woman.[1]

Thus, Alito further obscures the rationale through his choice of categorical analogy. When defining the fundamental right to privacy that *Roe* protected, he selected a narrow focus not of bodily autonomy over the medical procedures we choose to have (something that would apply to men and women equally) but the right to an abortion (something that only women could face). And in doing so he ensures that groups that have been historically marginalized will continue to be treated as a different class from those who have traditionally held power in the United States, heterosexual white men. Rather than asking "is this basic right something that we have recognized on a broad basis," he narrows his focus to be something that would only apply to women.[2] By choosing the category from which to define a class, Alito sets up a test that could only fail.

The dissent takes issue with this narrow categorization and contextualizes the line of cases that helped define privacy rights as being fundamental to personhood:

> *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See *Casey*, 505 U. S., at 851, 857; *Roe*, 410 U. S., at 152–153 . . .). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children – and crucially, whether and when to have children. In varied cases, the Court explained that those choices – "the most intimate and personal" a person can make – reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*, 505 U. S., at 851. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.
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> (*Dobbs v. Jackson Women's Health Organization*, 2022, Breyer et al. dissent, p. 22)

The selection of rules and categorical definitions in legal arguments, as exemplified in the *Dobbs* decision, highlights the profound impact of the enthymeme and underscores the risk of equating legal arguments with syllogisms. If legal argumentation were purely syllogistic, its premises would be governed by natural law or intrinsic rules of the system, much like a geometric proof is bound by established

[1] In fact, it is this very pivot point that has led to much of the backlash about the decision from conservatives. A recent survey reveals that 90 percent of Americans think abortion should be legal if the woman's health is seriously endangered by the pregnancy. This view is shared by an overwhelming majority of Republicans, with 86 percent supporting this exception. Further, the survey found that two-thirds of Americans believe abortion regulations should be determined by public referendum rather than by elected officials or judges (Perry et al., 2022).

[2] It is also argued that abortion bans disproportionately affect women of color. See, e.g. *Attorney General Merrick B. Garland Statement*, 2022; Farge, 2022; Kirkegaard, 2021.

mathematical principles. In such a proof, the steps are dictated by predetermined rules; the person constructing the proof cannot arbitrarily dictate whether an acute angle is more or less than 90 degrees or whether a given angle is properly classified as acute or obtuse.

However, the realm of legal argumentation operates differently. A judge, unlike a mathematician, has the latitude to define the categories and rules applicable to a case. In the *Dobbs* decision, Alito exercises this discretion by narrowly defining the category of rule to specifically encompass abortion, excluding broader privacy rights. This strategic categorization sets up a test designed to fail under the parameters he establishes. Ironically, this approach not only allows him to apply the law as he has redefined it in *Dobbs*, which is narrowly tailored to abortion, but it also potentially paves the way for him to further restrict other privacy rights in the future, based on what he has decided in *Dobbs*.

5.3.3 *Major Premise: Unenumerated Rights Exist Only If They Are Deeply Rooted in Our Nation's History*

This premise comes with a rarely used test which, when applied, is likely to reduce individual rights: the *Glucksberg* test. The *Glucksberg* test sets forth the standard for evaluating substantive due process claims related to the recognition of new fundamental rights (Turner, 2020). Named after the 1997 Supreme Court case *Washington v. Glucksberg*, in which the Court upheld a Washington state law criminalizing assisted suicide, the test is used to determine whether a right is a fundamental right protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In its decision, the Supreme Court rejected the argument that there is a fundamental right to assisted suicide, and instead established a two-part test for determining whether a right is fundamental. The first part of the *Glucksberg* test requires that the right be "deeply rooted in this Nation's history and tradition" (*Washington v. Glucksberg*, 1997, p. 721). The second part of the test requires that the right be "implicit in the concept of ordered liberty" (p. 721), meaning that it is necessary for an individual's autonomy and dignity.[3]

Alito, in pages 11–13 of the *Dobbs* opinion, sets out to explain some of the history of the *Glucksberg* test. He specifically discusses the way that historical inquiries have been made when looking to confer a previously unrecognized right in *Timbs* and *McDonald*. He argues, "Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due

[3] There is also, arguably, another prong to the *Glucksberg* test, which was limited by its treatment in *Obergefell v. Hodges* (2015): the requirement of a "careful description" of the right under analysis. This prong was found to be inconsistent with an analysis of certain fundamental rights, especially those involving privacy.

Process Clause because the term 'liberty' alone provides little guidance" (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 13).

If we accept his theory of *Glucksberg*, then we might reconstruct the "syllogism" thus:

Major premise: Historical inquiries are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause.

Implied premise: In *Dobbs*, we are now asked to recognize a new component of the "liberty" protected by the Due Process Clause.

Implied conclusion: A historical inquiry is essential for *Dobbs*.

Of course, when we re-create the implied premise here, it fails. Alito never claims to be conferring a new right with *Dobbs*. He is revisiting a clearly established right, one that he argues was conferred in the *Roe* decision, but one that Blackmun argued had predated *Roe*.

Perhaps Alito would argue that the part of the implied premise here is that when *Roe* was decided, it would have been appropriate to have evaluated the case using the *Glucksberg* test. If we reconstruct the premise in that way, then we have a bit of a timeline problem. The Court can no longer rely on *Glucksberg* to justify the rule it is applying, as *Glucksberg* was decided two decades after *Roe*. The problem lies in the fact that legal precedent, as a principle, is typically not applied retroactively. Therefore, using the *Glucksberg* test as a yardstick to measure the historical legitimacy of a right recognized in *Roe* contradicts the general legal principle that precedent should not be applied to past rulings. This approach essentially reevaluates *Roe* with a standard that did not exist at the time of its decision.

Perhaps Alito would argue that the principle that a court must engage in historical inquiry of the type that *Glucksberg* lays out predates its articulation in *Glucksberg* and would have still been an appropriate test when deciding *Roe*. But then, ironically, we have an enumeration problem. The Court would be relying on an unarticulated rule whose foundations predate its articulation in *Glucksberg*. It seems absurd to argue that a legal principle is so foundational that the Court should apply it, even though it has not been previously articulated, for the express purpose of striking down a constitutional protection that is so foundational that the Court should acknowledge it, even though it has not been previously articulated.

Alito is doing something unusual in *Dobbs*: He is essentially relitigating a prior case. *Roe* was wrongly decided, his logic goes. When one applies a 1997 test to the 1973 *Roe* case, the result is different.

Reconstructing the "syllogism" in Alito's argument sheds light on what Macagno and Damele (2013) propose as the rhetorical force of implied premises. The uncontroversial premises are stated overtly; the controversial ones are not articulated. Thus, audiences must first supply the premise before they can point out any flaws with it. More problematic still is the plausible deniability that gets built into the system

because the speaker can respond to any such critique by reframing or rewriting their own argument. The enthymeme becomes a dialogical and living argument, capable of adapting to changing circumstances. And in this system, the speaker gets the benefit of the doubt: It seems unfair to put words into Alito's mouth and hold him to task for something he never said.

By carefully analyzing the argument as it is constructed, we can see that the application of *Glucksberg* is dubious at best. But what is a justice who wants to revoke a fundamental right to do in this situation? There is no corollary to the *Glucksberg* test when revoking rather than conferring a right under the Fourteenth Amendment. In fact, when the Court limits a fundamental right, it must do so with the restraint that the strict scrutiny test requires. Alito seems to be doing logical gymnastics to provide a basis for his argument that the right to an abortion is not a fundamental right.

5.3.4 *Implied Premise: "Deeply Rooted" Means Unwaveringly So*

The reconstructed, implied premise, "a right is deeply rooted in our nation's history only if it has been legally recognized in all circumstances across all time," though not explicitly stated in Alito's opinion, is essential for completing the "syllogism." It sets a remarkably high bar for any right to be considered fundamental and effectively narrows the scope of what can be considered a historically rooted right, excluding rights that may have evolved or been recognized over time.

This premise is arguably the most contentious, making its rhetorical omission advantageous, as it compels the audience to reconstruct it. Moreover, it is precisely this unspoken premise, along with the historical "evidence" Alito employs to support this aspect of his argument, that has attracted significant scrutiny and criticism.

The dissent critiques this narrow view of constitutional rights as failing to grasp how applications of liberty and equality can evolve with changing societal understandings, saying, "The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning" (*Dobbs v. Jackson Women's Health Organization*, 2022, Breyer et al. dissent, p. 14).

Minor premise: Abortion has not always been legal in all circumstances across all time.

In arguing that the right to abortion is not deeply rooted in the nation's history and tradition, Alito faces the challenge of proving a negative. It is notoriously difficult to prove the absence of something, especially a concept so nebulous as an unenumerated constitutional right. Instead of directly establishing the lack of historical entrenchment, he opts to provide evidence that abortion has, at various points, been illegal.

Alito asserts that "until the latter part of the [twentieth] century, there was no support in American law for a constitutional right to obtain an abortion. Zero. None. No state constitutional provision had recognized such a right" (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 15). Here, he provides more evidence to support the major premise that if abortion is a right, it had not been enumerated until recently. But this evidence does not answer whether the right would pass the *Glucksberg* test. Whether the right claimed is "deeply rooted in this Nation's history and tradition" requires an inquiry beyond just whether there has always been a legal right recognized in official statutes and constitutions.

He further contends that "by the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow" (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 16). By highlighting instances and periods where abortion was criminalized, Alito seeks to undermine the notion that the right to abortion is historically entrenched. However, this approach is logically flawed. As the dissent points out, "the right to an abortion emerged not recently, but as part and parcel of two centuries of jurisprudence grappling with the protection of the individual's liberty and dignity" (*Dobbs v. Jackson Women's Health Organization*, 2022, Breyer et al. dissent, p. 12). The dissent argues that the majority's focus on specific historical instances of abortion criminalization fails to account for the broader evolutionary arc of rights related to personal autonomy and reproductive freedom.

Moreover, the majority's reliance on historical abortion laws as evidence against a deeply rooted right is problematic because it assumes a static view of rights. As the dissent notes, "The Framers defined rights in general terms, to permit future evolution in their scope and meaning" (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 15). The fact that abortion had been criminalized in the past does not necessarily preclude the recognition of a constitutional right in the present, consistent with a modern interpretation of a foundational right. The historical legality of a practice is just one factor in a broader, more nuanced analysis. The *Glucksberg* test requires a deep dive into the historical context, societal values, and legal traditions surrounding the practice. For instance, a practice might have been criminalized due to historical misconceptions, cultural biases, or lack of scientific understanding, which have since evolved. Therefore, the mere fact of past criminalization does not definitively determine a practice's alignment with deeply rooted national traditions or its place within the concept of ordered liberty. The *Glucksberg* test calls for a more comprehensive historical and cultural understanding to assess whether a right is fundamental.

Minor conclusion: A right to abortion is not deeply rooted in our nation's history.

The minor conclusion in the *Dobbs* decision, that abortion is not deeply rooted in our nation's history, emerges as a logically consistent outcome based on the major

and minor premises previously established in the argument. However, it's crucial to distinguish between the formal logical validity of this conclusion and its rational soundness, as these are two distinct concepts in logical and legal reasoning.

Formal logical validity refers to the coherence within the structure of an argument. It evaluates whether the conclusion follows logically from the premises, without any internal contradiction, assuming the premises are true. In the case of the *Dobbs* decision, the argument is constructed in a way that the conclusion – that abortion is not deeply rooted in our nation's history – logically aligns with the premises laid out. The major premise, that unenumerated rights must be deeply rooted in our nation's history to be recognized, combined with the minor premise, that abortion has not always been legal in all circumstances, leads to the minor conclusion in a manner that is internally consistent. This formal validity is crucial for the argument to be seen as rational and coherent within its own framework.

However, rational soundness is a broader concept. It concerns not just the formal structure of the argument, but also the truthfulness or factual accuracy of the premises and the relevance and sufficiency of these premises in leading to the conclusion. An argument can be formally valid yet still be unsound if its premises are false or if they do not adequately support the conclusion. In the context of the *Dobbs* decision, questioning the rational soundness of the conclusion involves scrutinizing the historical and legal assumptions underlying the premises.

The major premise assumes that for a right to be constitutionally protected, it must have a deep historical root. This premise can be contested on several grounds. First, the interpretation of what constitutes "deeply rooted" is subjective and open to debate. History is not a static or objective narrative but is subject to interpretation and reevaluation. Second, the premise seems to ignore the dynamic nature of societal values and legal interpretations, which evolve over time. Rights that were once unrecognized or even unthinkable can become fundamental as societal norms and understandings progress. Finally, as explained above, the retroactive application of this principle, the *Glucksberg* test, is dubious at best.

Similarly, the minor premise, that abortion has not always been legal in all circumstances, while factually accurate, may not be sufficient to support the conclusion. The legal status of abortion throughout history is complex and varied, influenced by cultural, religious, and social factors. The premise oversimplifies this history and does not account for the nuanced ways in which abortion rights have been understood and exercised in different contexts.

Therefore, while the conclusion that abortion is not deeply rooted in our nation's history may follow logically from the premises in the argument, its soundness is questionable. It relies on premises that are either debatable or insufficiently robust to support the conclusion. This distinction between formal logical validity and rational soundness is crucial in legal reasoning. It highlights the importance of critically examining not just how conclusions follow from premises, but also the soundness of those premises and their capacity to genuinely support the conclusions drawn. The

enthymematic structure, complete with unstated but necessary premises, allows for the appearance of logic amidst an invalid argument.

Conclusion: Abortion is not a right enshrined in the Constitution; therefore, *Roe* and *Casey* must be overruled.

This conclusion is controversial, not just because of its effects, but also because of the method by which Alito supports it. He is ignoring *stare decisis*, which he justifies through the lens of a respect for the history of the United States and its legal system. The *Glucksberg* test allows him to do so.

The use of the *Glucksberg* test by Justice Alito in this context serves as a strategic tool, enabling him to reject longstanding legal precedent while framing his argument within a historical and traditionalist perspective. By applying this test, Alito positions his reasoning as a reflection of a deep respect for historical legal principles, rather than a departure from them. This approach provides a veneer of continuity and respect for legal tradition, even as it facilitates a significant shift in the interpretation of constitutional rights.

Alito's approach was carefully crafted to circumvent the label of an activist judge, a term often used to describe justices who are perceived as using their judicial power to promote personal ideologies rather than adhering to established legal principles and precedents. In his opinion, Alito could have explicitly stated his disagreement with the past fifty years of legal precedent regarding abortion rights and his consequent desire to overturn it. Such a direct approach, however, would have starkly positioned him as a judicial activist, openly challenging established legal norms and the Supreme Court's tradition of respecting precedent. And so, he refrains from such directness, opting instead for a more subtle approach that masks the radical nature of his decision.

The opening of Alito's opinion in *Dobbs* is particularly telling in this regard. Alito begins his opinion with the declaration, "Abortion presents a profound moral issue on which Americans hold sharply conflicting views" (*Dobbs v. Jackson Women's Health Organization*, 2022, p. 1). Rather than beginning with the law, he begins with a discussion of morals and politics. Here, he tips his hand that he will not be "following the law" in the way we generally assume the Court will follow its own precedent, according to long-held standards of *stare decisis*.

Compare the first line of *Dobbs* with that of *Roe v. Wade* (1973, p. 116): "This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, . . . present constitutional challenges to state criminal abortion legislation." Blackmun, in *Roe*, begins with a focus on the law and the legal issues. He does this, ostensibly, because he will argue that Doe is not entirely new law, that it is well-founded based on entrenched constitutional principles of privacy and personal autonomy. The opening line of *Dobbs* shows Alito's cards. He will be overturning a legal rule that has been on the books since *at least* 1973.

The departure from *stare decisis* in the *Dobbs* decision represents more than just a deviation from established legal precedent; it also signifies a divergence from the

traditional functions attributed to the courts by legal theorists. Typically, the judicial branch is primarily viewed as an interpreter of the law, tasked with applying established legal tests. However, in cases like *Dobbs*, the Supreme Court transcends this conventional role, notably engaging in the creation and endorsement of legal tests, especially in matters involving constitutional questions, such as the right to privacy. A significant portion of the rhetorical effort in the *Dobbs* decision lies in how the Court selects the appropriate test to apply.

The Supreme Court's role in formulating and endorsing legal tests underscores its influential position in the constitution of legal norms and the shaping of societal values. By engaging in this process, particularly in constitutional matters, the Court actively participates in the development of legal doctrine, sets precedents, and influences societal perceptions of rights and responsibilities. Consequently, the Court's decision-making process inherently involves enthymematic reasoning and argumentation. Each time it selects a rule to apply in a case, the Court implicitly engages in an argumentative process, where the choice of the rule serves as a premise, but the rationale for applying that rule often remains unstated.

5.4 CONCLUSION

The application of the *Glucksberg* test in the context of *Dobbs* underscores the challenges inherent in viewing legal reasoning purely through a syllogistic lens. Such an approach fails to fully grasp the rhetorical nature of legal argumentation, which goes beyond the rigid structure of deductive reasoning. While legal "syllogisms" can maintain internal consistency, they are unable to encompass the entirety of a legal argument. Invariably, there will be missing premises or unexpressed assumptions that shape the reasoning process.

The *Dobbs* decision reflects the inherent complexity of judicial decision-making, where the Court must balance fidelity to legal precedent with responsiveness to evolving societal values. By overturning *Roe* after almost fifty years, the *Dobbs* majority engaged in a quasi-logical argument that, while exhibiting a veneer of deductive reasoning, ultimately relied on unstated assumptions and controversial premises reflecting the particular worldview of the justices who joined it. Justice Alito's opinion models an enthymematic form of persuasive rhetoric in which the formal application of judicial tests obscures controversial moral and philosophical principles regarding privacy rights and bodily autonomy.

This strategic ambiguity is characteristic of skilled legal advocacy, allowing the audience to project their own values onto the gaps in logical reasoning. As a method for enacting this strategic ambiguity, the enthymeme represents not merely an abbreviated syllogism but a sophisticated rhetorical device for subtly encoding judicial activism in a framework resembling objective formal deduction. It enables the veiling of ideological assumptions within a superficially neutral analytical approach.

Critiquing legal opinions like *Dobbs* hence necessitates disentangling complex layers of rhetorical technique, including the decoding of strategic enthymemes. This more comprehensive orientation attunes legal scholars to the multifaceted interplay between persuasive communication and argumentation schemes in judicial decision-making. Ultimately, interpreting high-stakes rulings requires both rigorously assessing logical coherence and uncovering the symbolic meanings implicitly embedded within the Court's enthymematic rhetoric.

Acknowledging the rhetorical nature of legal argumentation prompts a deeper understanding of the complexity and nuance involved in legal decision-making. It emphasizes that legal reasoning is not a simple exercise in deductive logic but rather a dynamic process shaped by legal precedent, statutory interpretation, policy considerations, and societal values. And recognizing the limitations of a purely syllogistic approach to legal reasoning encourages a broader appreciation of the multifaceted nature of the law. It invites a more comprehensive exploration of the interplay among legal doctrine, persuasive communication, and the social and political factors that influence judicial decision-making.

By embracing the rhetorical dimension of legal argumentation, we gain insight into the art of persuasion within the legal sphere. This perspective highlights the importance of effectively engaging with the audience, presenting compelling narratives, and deploying persuasive techniques to shape legal outcomes. It underscores that legal reasoning is not merely an exercise in logical deduction but also a means to influence and persuade, recognizing the significant role of rhetoric in shaping legal decisions.

Ultimately, a holistic understanding of legal reasoning goes beyond the confines of a rigid syllogistic structure. It requires an appreciation of the interplay among logic, rhetoric, precedent, and the broader social and political context in which legal decisions are made. By embracing this complexity, we can engage in more nuanced discussions about the nature of legal argumentation and its implications for the development of the law.

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