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This project considers how narrative is employed as a rhetorical strategy to materially alter the laws that govern individual rights in the United States legal system. Rather than existing as a concrete set of rules, the law is a series of rhetorical events that is intended as an affirmation and reflection of the community values that govern society. Using reproductive rights as an example, I offer a rhetorical analysis of three US Supreme Court opinions and demonstrate that the Court uses its role as primary legal storyteller to impact individual rights in ways that are often unrecognized and thus fail to prompt a public response. This leads to expanded judicial power and rights that increasingly fail to reflect the governed community's values. Specifically, I trace the Court's narratives in opinions that rule on abortion rights, beginning with the right's creation in 1973 in *Roe v. Wade*. I then examine two cases that altered abortion rights in material ways while crafting narratives that obscured the changes made: *Planned Parenthood v. Casey* in 1992 and *Gonzales v. Carhart* in 2007. This analysis shows how the Court employs rhetorical choice to persuade multiple audiences that its decisions are just and right in order to gain acceptance and compliance. As the latter cases move further away from the initial right's protections, the analysis reveals the considerable legal power granted to the Court by virtue of its rhetorical power, including the ability to subvert its duty to adhere to precedent. This project proposes that scholars be more precise about rhetorical situations in legal contexts to ensure that analyses lead to effective insights. Once recognized, narrative possibilities in rights-making can be used by the governed. This analysis also calls for consideration of the role the press plays in conveying the Court's messages to a public audience. Critically, the findings identify systemic weaknesses and have potential application far beyond reproductive rights.

IT IS SO ORDERED: THE STORYTELLING POWER OF THE UNITED STATES SUPREME COURT

by

Kristie L. Ellison

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Approved by

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DEDICATION

For Sally and Nancy and all the women on whose shoulders I stand.

For Heather and Abby and all the women who stand on mine.

APPROVAL PAGE

This dissertation written by Kristie L. Ellison has been approved by the following committee of the Faculty of The Graduate School at The University of North Carolina at Greensboro.

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CHAPTER I: STORYTELLING AND RIGHTS-MAKING IN A RHETORICAL CONTEXT

On January 22, 1973, nearly a decade before the first woman would join them, the United States Supreme Court ruled, by a 7-2 majority, that a woman's constitutional right to privacy included her right to obtain a safe and legal abortion. At the time, the ruling was hailed as a major victory for American women, and it solidified women's right to make decisions regarding their own bodies.[1] Yet, almost immediately after the Court's decision in *Roe v. Wade*, lawmakers began working to chip away at its holding, starting with the Hyde Amendment, a federal law that was passed less than four years later and prohibited the use of federal funds for abortions except to save the life of the pregnant person. This prohibition, which would stand even in cases of serious health risks, effectively denied numerous women the ability to exercise their constitutional right almost from the beginning. In the ensuing nearly five decades, through legislative action and subsequent Court decisions, abortion rights continued to erode, often using "informed consent" laws for any number of restrictions, such as 24-hour waiting periods and required ultrasounds. In response to a new solidly conservative majority on the Supreme Court, in the spring of 2019, several states passed laws that banned abortion as soon as a fetal "heartbeat" could be detected, well short of the pre-viability protection provided by *Roe*,[2] and

[1] Laws regarding reproductive rights, including abortion, have a material impact on all members of our society and directly affect all people capable of childbearing, regardless of gender identity. I use "women" in this dissertation because of the historical context of the legal texts I examine, including the language most often used by the Court, the press, and scholars. This language is not intended to deny the lived experiences of those who do not identify as women, then or now, and current conversations about reproductive justice, including reproductive rights, should include all voices.

[2] Although there is some variation, viability is around twenty-four weeks, and the "heartbeat" as defined by these laws is around six weeks. These electrical impulses, which are detectable by machines, are not heartbeats in the traditional sense.

Alabama banned all abortions from the moment of conception, with the stated purpose of getting before the now "friendly" Supreme Court.[3] The significance of Alabama's law is that, unlike other restrictions, even the "heartbeat bills," there would be no possibility for the Court to uphold the law without directly overturning *Roe*.[4] However, before Alabama's law could reach the High Court, the Court agreed to hear a case on a Mississippi ban at fifteen weeks gestation that would not require, and initially did not request, a decision on whether to overturn the landmark case. Notwithstanding that it did not need to do so, a point vehemently raised by Chief Justice John Roberts in his opinion concurring only in the judgment, on June 24, 2022, in *Dobbs v. Jackson Women's Health Organization*, a five-member conservative majority ruled that the *Roe* Court had simply been wrong in its findings and interpretation, ending a constitutional protection that American women had enjoyed for nearly a half-century. This stunning turn of events left many to wonder: How did we get here?

The decision to overturn *Roe* in *Dobbs* was not a complete surprise after a draft of the opinion was leaked the previous month to a media outlet, which then published it. Following the leak, the imminent ruling sparked a substantial public reaction as both objectors and supporters vocalized their response. Although rare, vote changes occasionally happen during the drafting process, and indeed had occurred in an earlier abortion case, providing a small glimmer of hope for those who wished to preserve *Roe*'s promise.[5] However, this time, there would be no

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[3] Justice Anthony Kennedy retired in 2018 and was replaced by Justice Brett Kavanaugh, who was perceived as more consistently against abortion rights in contrast to Justice Kennedy's reputation as a swing vote.

[4] Of course, the Court could avoid the issue by not accepting the case.

[5] Though not publicly known at the time, an initial vote in the *Planned Parenthood v. Casey* decision would have overturned *Roe* thirty years sooner. When Justice Blackmun's files were released in March 2004, a note from Justice Kennedy revealed the unexpected shift.

reprieve. The effects of the *Dobbs* decision are real and immediate for many individuals in the United States, those whose states fail to offer similar protection for reproductive choice and sometimes affirmatively act to prevent such choice even in the face of serious health consequences. Yet, there is a more significant danger to the US Constitution and legal system flowing from the opinion—an abrupt and overt turn against the long-standing doctrine of *stare decisis*, the duty of the Court to adhere to the precedent established in earlier cases.

Building new decisions on top of previous opinions allows for long-term consistency and stability and is a necessary component of individuals' ability to understand, and thus exercise, their constitutional rights. Particularly in matters of such significance and that involve rights that are central to individuals' lives and decision-making, the Court only departs from established case law in the most narrow and extreme circumstances, generally when the community value system that laws are intended to reflect shifts in ways that are no longer compatible with the original holding. The most well-known example is the Court's unanimous 1954 decision in *Brown v. Board of Education* to retreat from its previous 1896 "separate but equal policy" based on society's changed understanding of segregation.[6] *Dobbs*'s explicit denial of an earlier Court's constitutional interpretation, one that was asserted with a stronger vote count, without the requisite general public support—made particularly evident by the responses to the leaked draft—upends centuries of established judicial practice, threatening the stability of individual rights and the Court's own authority. Since the *Dobbs* decision, public discourse about the pollicization and legitimacy of the High Court have risen sharply. Significantly, though, *Dobbs*

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[6] This departure refers to the US Supreme Court decision in *Plessy v. Ferguson*. Here, I am referring to the Court's understanding of a general shift and do not intend to imply that there were not still significant issues related to segregation and racism, many of which persist today.

did not begin the retreat from precedent; instead, it merely brought it into the light. Supreme Court opinions have two goals—to justify its decision and to persuade audiences that this is the right course of action—and the Court carefully crafts a narrative, selecting particular aspects and telling its own story, to meet those goals. As such, guiding principles such as precedent and objectivity are steeped in the narrative that the Court constructs for the legal community, the press, and the public about its decisions. Accordingly, a rhetorical analysis of significant Supreme Court opinions on abortion rights, with careful attention to their specific legal context, demonstrates how the Court uses its power to create those narratives in order to create, shape, and alter individual constitutional rights in ways that are often hidden from public view.

Throughout this dissertation, I maintain that rather than existing as a concrete set of rules, the law is a series of rhetorical events that is the affirmation and reflection of the community values that govern society. That said, a rhetorical analysis of legal texts should consider them within their legal context in order to more carefully assess the rhetorical choices made. Using reproductive rights as an example, I argue specifically that the US Supreme Court uses its role as chief legal storyteller to impact individual rights in ways that are often unrecognized and thus fail to prompt a public response. This, in turn, leads to expanded judicial power and rights that increasingly fail to reflect the community's values. My goal in this project is to propose that scholars be more precise about rhetorical situations in legal contexts to ensure that such analyses lead to effective insights. Most importantly, these issues involve real people with real lives and real concerns. Theorizing is important for considering possibilities, but material impacts and lives are at stake. While these realities have become newsworthy in the wake of *Dobbs*, many individuals have consistently contended with regulations that prevent access to abortions in ways that threatened their health and lives, issues which disproportionately affect young, poor, rural,

and/or individuals of color.[7] Toward an effort of precision, I contend that when examining Supreme Court opinions, scholars should consider the complexity of the dynamic, shifting rhetorical situation as well as the recursive role of the public, whose values laws reflect and whose compliance laws seek. This precision allows for a more nuanced analysis of the rhetorical moves made as part of rights creation. Specifically, this project considers how narrative is employed as a rhetorical strategy to materially alter the laws that govern individual rights. While primarily focused on how the Supreme Court leverages its narrative as a form of power, revealing these sites of power also offers sites for potential public intervention.

Since 1973, *Roe* has become synonymous with an individual's right to obtain a safe and legal abortion within public discourse, and much debate about reproductive rights centered on the likelihood that it would be overturned. Significantly, however, *Roe* is not the entire story of abortion rights; it is merely the beginning. The law is not a set of rules that a higher authority enforces against a community with little power other than to vote. Instead, laws are shifting reflections of communities created by a dynamic collection of actors in fluid and multiple rhetorical situations. As such, while modern US abortion law initially started with the federal rights articulated in *Roe*, the true law is built from all the interactions, formal and informal, which reflect community values and accepted regulations. This includes changes made in subsequent Court cases, even cases that purport to uphold the status quo. Thus, after reconsidering the foundation set by *Roe*, I examine two cases that altered abortion rights in substantial material ways while crafting narratives that deflected or even obscured the reality: *Planned Parenthood v. Casey* in 1992 and *Gonzales v. Carhart* in 2007. Using Keith Grant-

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[7] Black women in particular suffer significantly worse outcomes during and following pregnancy, including substantially higher rates of maternal mortality.

Davie's framework of the "compound rhetorical situation" as well as a lens informed by my own extensive legal background,[8] I offer a rhetorical analysis of all three cases in order to complicate the conversation about rhetorical choices and to demonstrate how that complication impacts the laws and rights themselves. Moreover, as the latter two cases move further away from the initial right and its protections, the analysis reveals the considerable legal power granted to the Court by virtue of its rhetorical power, including the ability to subvert its duty to adhere to precedent. Critically, the findings from these analyses reflect systemic issues and have potential application far beyond reproductive rights.

The selected three Court opinions were chosen for both their legal significance and rhetorical influence. As the opinion that first articulates the individual constitutional right to obtain an abortion, *Roe*'s significance, both legally and rhetorically, stems from its foundational role, dictating the terms of both the right and the discourse around it. The rhetorical analysis considers how the legal context constrains the Court's available choices, in both positive and negative ways, and suggests that despite the many critiques of the opinion's narrative about women, the rights established were the strongest they would ever be. *Casey* is the Supreme Court case that establishes the "undue burden" standard for determining constitutionality of state abortion restrictions, a standard that offers possibilities for the consideration of individual lives by purporting to acknowledge women's barriers to access but fails to live up to those possibilities by applying the standard in a way that suggests these obstacles are uniform. Moreover, while the narrative constructed in *Casey* unequivocally reaffirms the Court's duty to

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[8] My positionality as researcher is integral to my analysis throughout this project. I have a law degree, am licensed in two states, and practiced law for eight years. Both my education and practice included some focus on issues of constitutional law.

adhere to precedent as well as the precedential value of *Roe* specifically and acknowledges that the abortion right is grounded, in part, in gender equality, the decision marks a substantial erosion of the protections afforded by the right and opens the door for continued erosion.

Finally, *Carhart* is the Supreme Court case that upholds the Partial-Birth Abortion Ban Act of 2003—a federal law that bans a particular method of later-term abortions, dubbed by antiabortion activists as "partial birth" abortion—declaring the method is never medically necessary despite medical testimony to the contrary. The majority opinion is significant for upholding the law, despite the fact it was passed in direct contradiction with a previous Court decision about the constitutionality of a similar restriction, instead siding with and repeating Congress's weaker medical evidence. Most notably, the Court rules for the first time that abortion restrictions are not necessarily required to have an exception to protect the health of the pregnant person. Yet, the story told in the opinion creates the appearance that the Court is following precedent; it also incorporates a narrative known to have been generated by the antiabortion movement. However, the dissenting opinion in the case offers a counternarrative of how precedent and equality rights should operate in the decision, including recognition of the varied lived experiences of women and potential health risks that had been crowded out of the debate. Examining the majority and dissenting opinions together, the rhetorical analysis calls into question the rhetoric of objectivity and inevitability usually employed in court decisions and reveals how judicial power continues to expand through the Court's narrative decisions. Though the concluding chapter situates the analysis within the current post-*Dobbs* moment, focusing on these three core opinions allows for careful consideration of a manageable area in terms of both time and space and demonstrates the unsettled nature of the constitutional path well before the sharp turn in *Dobbs*.

Rhetoric, Rights, and Reality

Rhetorical analysis of legal discourse is important because in the United States legal system, rights are created and maintained through language; though words themselves may be symbolic, acting together, they are material. Comparing law and literature, constitutional law scholar Paul Gewirtz suggests that they each "attempt to shape reality through language" (4). This echoes Lloyd Bitzer's definition of rhetoric as "a mode of altering reality, not by the direct application of energy to objects, but by the creation of discourse which changes reality through the mediation of thought and action" (4). Because of this connection between law and language, rhetoric plays a key role in how rights are understood by all to whom they apply, including their creators, enforcers, and beneficiaries. Not only are legal rights created through language, so too are the communities that create and rely on them. Indeed, rights can be viewed as a reflection of the values shared by a given community.[9] As those values shift, the community and its rights shift as well. In arguing that the law should be seen as a branch of rhetoric rather than a system of rules, James Boyd White points out the dynamic nature of community creation as well as the recursive relationship between law and community: "Both the lawyer and the lawyer's audience live in a world in which their language and community are not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested" ("Law" 691). Similarly, Rebecca Dingo argues that rhetorical analysis of public policy requires examination of the movement and

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[9] Throughout this project, I refer to the connection between laws, courts, and the community's values, by which I am referring to the shared value system that allows a community to form based on collective empathetic identification. There are many barriers to participation in the US legal system and many voices unheard and intentionally silenced. I do not intend to suggest that in practice the laws genuinely reflect the values of all individuals or even always the true majority. I aim to keep these discrepancies in mind throughout my analyses and highlight certain particularly relevant shortcomings of constitutional protections.

communication of the policy: "By tracing how gender mainstreaming rhetorics circulate within various policies and how they are networked with new and sometimes conflicting ideologies, we can see how rhetorical meaning is not always stable" (6). Indeed, she suggests that "*meaning* and rhetorical purpose change as it moves from policy to policy" (6). As these arguments demonstrate, legal rights do not exist as merely articulated words or signed pieces of paper but in the rhetorical event that occurs in each interaction of rhetor, text, and audience as the articulation occurs. Thus, studying the rhetorical moment provides a more nuanced understanding of what those rights are, how they operate, and how they reflect society.

In addition to reflecting community values, legal rights also reflect—and create—sites of power within the community. Arguing for increased diversity within legal discourse, law professor Patricia Williams asserts that our legal rights are a central part of who we are as individuals and as a society: "In the law, rights are islands of empowerment. To be un-righted is to be disempowered, and the line between rights and no-rights is most often the line between dominators and oppressors" (233-234). Rhetoric is a crucial part of this analysis, as rhetoric reflects the power inherent in exercising control over the language disseminated. According to Kenneth Burke, "Even if any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent it must function also as a *deflection* of reality" (*On Symbols* 115). In other words, the choice of what is said, and what is not said, empowers a rhetor to control the reality created through words. This power is especially potent when wielded to shape a society's appreciation of its members' most fundamental rights. Importantly, because of the law's material effect, a shift in perceived power is also a shift in actual power. Connecting White's definition of law as a rhetorical event with the inherent role of systems of power suggests that a given community, as an audience of the articulation of rights, is

an active participant in the very existence of rights. Put another way, legal rights are only as secure as the community understands them to be. Accordingly, examining specific sites of rights communication reveals potential moments of erosion of those rights, both directly from the rhetor and from audience response. In addition, because society's function requires community compliance with laws, by conveying under what terms it accepts such laws, the community becomes a co-rhetor.

There are many moments and spaces where rights communication occurs, official and unofficial, and opinions of the US Supreme Court are particularly noteworthy given the social, political, and legal authority with which they are created and handed down, generating the impression of being the unquestionable ultimate authority. That authority has substantial consequences for individual rights as well as for the community that is shaped by them, consequences for the latter that are often material. Moreover, the authority of the Court allows it to shape the governed community and how the community perceives of a given situation, including its own values. Thus, examining opinions of the High Court provides insight not only into the rights granted but also into a particularly authoritative reflection and establishment of society and its values through discourse. For example, as rhetorical scholar Katie Gibson observes with respect to the significance for women:

> The Court's opinions are of importance to feminist rhetorical critics as they often include representations of women and gender that become a part of the Court's collective rhetorical framework for thinking and reasoning about the legal rights of women. These representations, infused with the authority and finality of the United States Supreme Court, are especially of interest because of their potential to endorse, to reshape, or to resist public meaning. ("The Rhetoric" 314)

Accordingly, considering how legal rights are communicated from their official creation sites to the public and back, allows for a greater understanding of the roles of rights' creators, communicators, and receivers, including how those roles operate on all sides.

Furthermore, consideration of reproductive rights in particular is useful because these rights are illustrative of legal rights related to women's equality more broadly, and progress (or regression) gained here can be considered for other marginalized communities. In her critique of the *Roe* Court's physician-centered language, drawing on the work of White and Maurice Charland on law and constitutive rhetorics, Gibson argues, "The rhetorical communities advanced through the Court's opinions have real consequences, creating possibilities and limitations that extend far beyond specific Court rulings" (313). For Gibson, the values highlighted and reaffirmed by the Court's rhetorical choices would solidify a hierarchy of physician over patient, and men over women. Similarly, legal scholar Paula Abrams asserts that "[t]he opinions of the Court, beginning with *Roe*, mediate abortion stigma through both language and legal standards" (295). Although I argue throughout this dissertation that there may be reasons for the *Roe* Court's rhetorical choices that were vital to its persuasive efforts, the impact to the larger community that concerns Gibson and Abrams remains and, as such, must be acknowledged. Thus, my aim is to expand rather than merely redirect how we think and talk about the rhetoric of Supreme Court opinions.

Rhetorical Narratives and Stories in Law

Narrative as a rhetorical strategy plays a crucial role in meaning making, and my research is grounded in the work of Clare Hemmings, who asserts an intention "to identify the repeated narrative forms that underwrite these stories by analyzing the textual mechanisms that generate coherent meaning and allow for author, context, and reader agreement" (17). Thus, Hemmings acknowledges the complex interaction that becomes the event of communication. She further maintains that close attention to narratives "goes some way to explaining how it is that we reproduce these narratives in ways that fly in the face of the complexities we otherwise

cherish" (17). Accordingly, analysis of the role of narrative in reproductive rights discourse helps to disrupt the status quo and make room for other possibilities. Indeed, Hemmings argues, "If Western feminists can be attentive to the political grammar of our storytelling, if we can highlight reasons why that attention might be important, then we can also intervene to change the way we tell stories" (2). Specifically, Hemmings considers issues such as who is and is not cited in storytelling and how stories can create empathy. This dissertation asks similar questions about how stories are told, primarily by the Supreme Court, including whose stories are told to whom, for what purpose, and to what effect.

Because of the connection between rights and community values, a key concept throughout my analysis is the connection between narrative and identification. According to Burke, "it is so clearly a matter of rhetoric to persuade a man by identifying your cause with his interests" (*A Rhetoric* 24). Examinations of public policy consider not only how rhetoric functions on an individual level, but also how it operates among people collectively to create and maintain a society. Indeed, Dingo observes that "public policies are intrinsically rhetorical" (22). As a rhetorical strategy, narrative builds the bonds that foster the ability of a group of individuals to form a community, through identification, that is stronger than its individual parts. As Arthur Asa Berger aptly states, "narratives, in the most simple sense, are stories that take place in time" (5). And while many stories are linear, he observes, they can also move in other ways, including circles (4). Such movement reflects the complex and dynamic ways that rhetorical communication occurs. Indeed, as James Phelan and Peter Rabinowitz argue, examining narrative as rhetorical strategy allows for a critical consideration of the web of communication: "In explaining the effects of narrative, rhetorical narrative theory identifies a feedback loop among authorial agency, textual phenomena (including intertextual relations), and reader

response" (5). In addition, narrative can be an effective strategy for communicating across discourse boundaries. According to James Jasinski, "Narrative experience is a particular kind of discursive participation with the capacity of generating empathy and friendship" (483). Likewise, Walter Fisher suggests that "narration works by suggestion and identification" (15). Through storytelling, narrative describes the experience of the individual in a way that others can understand and, thus, allows for a connection on a personal, emotional level. This connection can support the identification process, making narrative a critical component of community formation and maintenance. According to Dexter Gordon, rhetoric can move individuals into a collective subject, and "such a collective subject does not exist in nature as a collective being but is constructed in a narrative and serves to legitimize the goals of such a narrative" (33). Similarly, Berger argues that narratives "furnish us with both a method for learning about the world and a way to tell others what we have learned" (8). Thus, the collective both influences and is influenced by the narrative. Recognizing this rhetorical function of narrative demonstrates how communities and their values are constantly evolving. As the narrative shifts, so does the collective. Thus, in the same way that rhetoric more broadly works as a part of knowledge creation rather than mere reflection, narrative in particular contributes to the construction of our material reality in a recursive way.

Furthermore, although the collective is human-made rather than existing in nature, it is real and able to impact the community in a substantive way. As such, inclusion of diverse voices is an essential part of creating a value system that best reflects the community. In explaining feminist narratology as founded in the idea of recognizing the value in studying non-mainstream texts, Robyn Warhol observes that the concept "was based on the feminist assumption that texts are always linked to the material circumstances of the history that produces and receives

them" (9). Hemmings argues for a view of narrative as "creating stories that we all participate in and that constitute a process of collective knowledge production that locates us in particular ways" (22). She suggests that narratives have such a significant impact that there is no space outside of them and, thus, no detached, objective truth, but rather varying perspectives. Critically examining narrative illuminates how these different perspectives are understood and valued. Specifically, Hemmings examines citation and empathy as two critical sites of considering the role of narrative. Similarly, this dissertation explores how narrative acts in the inclusion and exclusion of perspectives, as well as in creating empathy as part of the collective's identification process. Both of these functions can have significant impacts on the legal rights within a community, which are a reflection of its values. Debates over the values accepted by a society illustrate the ability of rhetoric to shape a community and impact both the beliefs of its members and the ways in which those beliefs may lead to restricted movement, such as through laws. By examining what happens as rhetorics move among different communities within a larger society, this dissertation considers the impact of both individual and collective action on the legal rights of those in the society.

Storytelling, a narrative genre, is an intrinsic part of our legal system, employed both within the system and as a way to make sense of how laws fit within our shared societal values. Indeed, communication scholars Maggie Jones Patterson and Megan Williams Hall observe how law is essentially an "ongoing story that a nation tells about its citizens, their values, and progress" (100). Thus, it is vital to consider how narrative operates as an essential rhetorical device within our legal system, particularly given the legal system's alleged allegiance to objectivity. In her analysis of the perpetration of abortion stigma through the language used in the legal system, Abrams claims, "Narrative, widely used in American jurisprudence, is a

powerful rhetorical device," suggesting that "the persuasive power of narrative lies largely in its ability to engage the audience in an empathetic or sympathetic response" (297). Because of the legal system's reflection of societal values, values which are largely shaped based on with whom the majority identifies, it is vital to consider how narrative is and can be used to influence the legal system and the material effects that result.

In an examination of the community's beliefs about and response to the legal rights granted to it, the rhetorical efforts of narrative become significant, particularly when reviewing the perspective of those outside positions of power. Indeed, responding to legal theory's assertion that law should not consider human emotions because law is reason and reason must restrain emotion, legal scholar Lynne Henderson concludes that empathetic narrative has a place in legal discourse because it is based on understanding human experience rather than simply emotion (1650).[10] Yet she also observes that "to be effective, empathic narrative does seem to require concrete human stories rather than abstract appeals to legal principles" (1650). For example, it is likely not enough to make vague references to "women's rights" in order to evoke the kind of empathic response that would support the identification process. Indeed, this point becomes particularly critical as the primary narrative around abortion shifts from health concerns to individual rights. In addition to empathy, Hemmings asks us to consider whose stories are being told and cited. Because empathy is such an important part of identification among diverse

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[10] Henderson opens her article with a quotation from a dissenting opinion by Justice Thurgood Marshall, the first Black member of the High Court, that she asserts captures the "troubling phenomenon produced by fidelity to the Rule of Law in legal theory and practice": "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live" (1574). She ends by asserting, "Empathy cannot necessarily tell us what to do or how to accomplish something, but it does alert us to moral choice and responsibility. It also reminds us of our common humanity and responsibility to one another" (1653).

groups, as narrative becomes acknowledged within legal discourse, it creates a crucial voice for traditionally marginalized members of the governed community. Peter Brooks highlights this, observing that "storytelling serves to convey meanings excluded or marginalized by mainstream legal thinking and rhetoric" (16). Given this vital purpose, recognition of citation is paramount. Certainly, for narrative to do the work of even trying to introduce marginalized voices, the stories of those voices must be told—where possible, in those voices.

A critical examination of how narrative operates in legal discourse is timely, as conversations about the use of narrative in legal contexts become more prevalent. For example, within official legal channels, narratives enter courtrooms not only through the parties' briefs, an expected site of such persuasion techniques, but also in other official texts. One example is the relatively recent introduction of victim impact statements into criminal court proceedings. Although some argue against their use, adhering to the notion that the judicial process is an objective one, victim impact statements are becoming increasingly popular as testimony to the judge before sentencing. Moreover, in their genre analysis, rhetorical scholars Amy Propen and Mary Schuster found that while a particular victim impact statement may have little impact on a given sentence, collectively the victim impact statements work together to shift the attitudes of some judges and, as judges have acknowledged, bring "reality into the courtroom" (20). In fact, one judge offered a description with detailed imagery that demonstrates the effect of emotional persuasion: "[The victims] explained how [the defendant] came in with a gun, and how he duct-taped them and then put them into a room and terrorized them. I mean you can feel that" (20). Here, the judge's own narrative, offered to justify his belief in the benefit of victim impact statements, demonstrates the constant motion and recursive nature of this rhetorical strategy. This trading of narratives—from the public to judges, then from judges back to the public and to

lawyers, which then creates new understandings that can drive new narratives, both from the public and the lawyers—is a pivotal part of what makes up the community's values and its legal system. Importantly, as with all formal engagements with the US legal system, the effect of victim impact statements is subject to the racial biases that permeate throughout the system. Death penalty researchers have established that the race of the victim is the most likely indicator of a defendant receiving the death penalty, even over the race of the defendant; specifically, white victims are more likely to evoke the death penalty, implying that white life has more value. In his book *Just Mercy*, Bryan Stevenson notes the connection between this victim valuation and victim impact statements, observing that "focusing on the status of the victim became one more way for the criminal justice system to disfavor some people" (141). Accordingly, such narratives should be regarded cautiously and as a reminder of the importance of addressing the significant racial disparities within our society, including its legal system.

Another way that narratives are directly part of legal discourse, particularly with respect to reproductive rights, is through voices briefs. Voices briefs are amicus, or "friends of the court," briefs filed to the US Supreme Court, and they contain stories of people who are outside the case itself but want to express to the Court how they will be materially impacted by its decision. They are primarily used in cases with high and widespread stakes, including reproductive rights, death penalty, and gun violence cases. As Linda Edwards observes, "The point of the stories in a voices brief is not to establish evidentiary facts but rather to share the experience and human perspective of the speaker" (52). Citing rhetorical scholars, she goes on to suggest that the "primary purpose of a voices brief is to expand that judge's realm of identification to include groups not previously a part of the judge's personal world" (64). To do this most effectively, the stories shared are often from people already closely aligned with the

judge, including other lawyers or judges. Although voices briefs are a step in the right direction toward introducing a human element and varied lived experiences into the official record, the gatekeeping nature of the legal system creates access issues and, while perhaps not as rhetorically constrained as case-specific factual evidence, their status as legal documents limits rhetorical choices. As such, while significant, they are only one part of the collective story.

Stories are important for more than just what those in power hear, however. The potential for empathetic identification can also be found in the stories that they tell, such as judges when they render their decisions. As discussed further below, in order for our legal system to function, it is crucial that officials communicating legal rights—judges and lawmakers—do so in a way that the community can accept as just. Courts in particular do this by making their rulings seem inevitable rather than innovative. Brooks explains the value of narrative in this process: "[C]ourts must attempt to present their opinions as seamless webs of argument and narrative. The story of the case at hand must be interwoven with the story of precedent and rule, reaching back to the constitutional origin, so that the desired result is made to seem an inevitable entailment" (21). To illustrate, Patricia Wald, a former Chief Judge of the US Court of Appeals for the DC Circuit, reveals that "[w]hen an appellate judge sits down to write up a case, she knows how the case will come out and she consciously relates a 'story' that will convince the reader it has come out right" (1386). Thus, narrative plays an essential role in work that judges do to inform and persuade both those within the legal community and the public about the law and how it operates. Moreover, because the law is a reflection of the community and its values, a judge's narrative has potential impacts beyond the narrow legal issues being articulated.

Notably, the distinct positioning of multiple judicial audiences, both legal and public, complicates the storytelling process; accordingly, considering the active role of the audience, that

is, accounting for not only what was said but how it was received, allows for a greater appreciation of the role of narrative. Indeed, Gewirtz argues that "treating law as narrative and rhetoric. . . understands legal decision making as transactional—as not just a directive but an activity involving audiences as well as sovereign law givers" (3). Part of examining the audience and its role is considering not only how judges are using narrative, but also how the public is receiving and reacting to it, including the discourses that surround the official texts. In addition to operating within the legal system, narratives are used to discuss legal discourse from the outside, especially through journalistic reporting. While narrative journalism is often considered as being found in the "lifestyle" section of a given publication, an Australia study indicated that "[c]ourt, crime and police stories were among the most likely to be presented in narrative form, particularly if these stories had tragic, sensational or unusual elements" (Johnston and Graham 523). Thus, messages from the US legal system, which already often include narrative strategies, can be re-narrated by the press. All of these interactions are important because the unique circumstances of each communication create a different rhetorical situation, including a different audience. That is, the "public" that is interacting with a court's narrative is not precisely the same "public" that interacts with the media's narrative, yet each interaction informs the other. Circling back to Berger's earlier observation, many stories are not linear, meaning the message could appear differently depending on what a particular hearer already knows. For an issue as significant as legal rights, such differences could be meaningful.

As an example, reproductive rights offers an especially rich analysis for considering the complexities of legal narratives. Unsurprisingly for such a personal and controversial subject, women's stories have played an important role in the efforts of the United States, as a community, to work out its positions and values with respect to reproductive rights. In her

analysis of abortion rhetoric, Celeste Condit observes that in the 1960s, women's stories of illegal abortions, reproduced in magazines, newspapers, and speeches, "provided a direct and stout rhetorical bridge, translating the private experiences of individual woman into an argument for social change" (*Decoding* 25). She goes on to point out how rhetorical narratives allowed a large, public audience to identify with individuals directly impacted by the social condition of abortions being illegal while also allowing the problem to be framed as a social problem, one which the individual could not control (34). Here, narrative works to communicate across boundaries and to influence public policy decisions. In fact, by 1972 a Gallup poll revealed that nearly two-thirds of Americans supported legalizing abortion (Gallup A2), suggesting that the women's storytelling was working.

This dissertation considers formal legal abortion narratives starting with the Supreme Court's opinion in *Roe*, including the impact to the women's stories once the Court entered the conversation. In her analysis of abortion stigma, Abrams points out that "judicial opinions frequently employ narrative to distill complex factual or legal issues into a coherent and simplified theme" (298). This process endows the storyteller with a particular power, as Abrams observes that the rhetor "necessarily selects certain facts and truths" and "disregards and omits others" (298). With respect to abortion in particular, Abrams argues that the choices made, particularly by the Supreme Court, create a narrative subtext within an opinion about how society should value women based on their reproductive choices (302). For example, a choice to refer to a potential abortion-seeker as a "woman" versus a "mother" both suggests that these identities cannot co-exist and makes clear, in conjunction with discussions about rights and liberty, who the Court believes is more worthy of support. Given the inherent authority that

historically accompanies the High Court's version of a narrative, its storytelling power is amplified, thus raising the stakes.

Rhetorical Exigences and Constraints in a Legal Context

Although my analysis of Supreme Court narratives is a rhetorical analysis, a key aspect is considering the specific rhetorical implications of the legal context in which the texts were created. To address these complexities, I employ Grant-Davie's model for analyzing rhetorical situations. According to Grant-Davie, "a rhetorical situation is a situation where a speaker or writer sees a need to change reality and sees that the change may be effected through rhetorical discourse" (265). Although, at first glance, such a description may seem odd for a Supreme Court opinion, which appears to enjoy the benefit of changing reality by its very existence, the Court is actually tasked with effectively persuading the community, legal and public, that its opinions, and the changes they bring about, are fair, just, and even, thus inevitable. Moreover, the intricacies involved in this persuasive effort, particularly in ground-breaking cases, such as *Brown v. Board of Education* and *Roe v. Wade*, create "compound rhetorical situations," which Grant-Davie defines as "discussions of a single subject by multiple rhetors and audiences" (265). Specifically, Grant-Davie builds upon Bitzer's foundational model in three key ways: 1) by providing an expanded discussion of exigence; 2) by adding rhetors to the existing elements of exigence, audience, and constraints; and 3) by suggesting that any of the elements may be plural, thus leading to a significantly more complex rhetorical situation (266). Using this model allows for a more complete and nuanced rhetorical analysis of the discourse surrounding legal rights as well as a site to reconsider the significant rhetorical latitude afforded to the Court, often occluded, and the impacts of its choices.

Although each case is guided by its own specific exigences, including unique goals and alignments, there are considerations common to court opinions. While Bitzer likens exigence to the rhetor's motivation for creating the text, Grant-Davie's expanded view asks us to consider "what the discourse is about, why it is needed, and what it should accomplish" (266). According to Grant-Davie, these questions include attention to the values at stake, the moral and practical issues that need to be resolved, and specific objectives. Goals can be primary and secondary, stated and implied, and thus a multiplicity of goals leads to multiple audiences, often addressed simultaneously. Consequently, this model accounts for the moral questions and value judgments involved in the dynamic rhetorical situation that leads to the creation of legal rights. In addition, it acknowledges the practical implications of what must be accomplished, for example, the necessary goal of a court opinion to persuade the public to comply. The Court having a limited ability to ensure compliance through force, the governed society must be persuaded that laws are just and should be followed. According to Gewirtz, court opinions serve three main functions: 1) to provide guidance about the law; 2) to demonstrate that the decision was appropriately reached by explaining the deliberative process; and 3) to convince the audiences that the decision is the right one (10). These functions apply to three audiences—other judges, lawyers, and the general public (10). Similarly, Brooks contends that although judicial opinions sound as if the result is inevitable, such a belief is created through the persuasive technique of the judge, again noting that the judge must convince multiple audiences (20-21). Accordingly, court opinions are substantially more persuasive than their language suggests.

Moreover, persuading the public to comply, requires a delicate balance of legal authority and public acceptance. The Court must be careful, especially in controversial instances, to frame their discourse in a way that aligns with existing beliefs about cultural values. For example,

examining the *Roe* decision's focus on a woman's right to choose and the debate over how fundamental that right is, Condit suggests that the disconnect between the dissenting conservative Justices' assertion that the right of choice was not fundamental and the majority's position that it was arose from each side's characterization of women within society. Specifically, the former saw women only as mothers, thus discounting the "choice" to not bear a child, while the latter believed that women did need to control reproductive choices in order to have equality in an egalitarian society (*Decoding* 106-107). For the majority, that abortion had been illegal for the last century was not because the right was not fundamental but because society had not offered women equality (107). Critically, Condit argues that each side resting its decision about the fundamental nature of the right on its "concrete level of characterization" of women was not "judicial error, but rather a social necessity" (108). This is because, she asserts, "in order to be effective legal discourse must always rest ultimately on the public characterizations of the people its rules will constrain" (108). Thus, Condit claims, "To understand a justice's characterization of the sociopolitical world is therefore as essential as to understand her or his legal philosophy" (108). Accordingly, a crucial element of striking a persuasive balance is to frame decisions in terms with which the community already agrees. Using Grant-Davie's definition of exigence allows for consideration of the persuasive goal as well as the community values implicated.

Notably, the values at stake in any Court opinion are those of the community that the Court represents.[11] Although the legal system is not designed to simply change with every minor

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[11] This suggestion may seem a bit hollow given the most recent actions of the High Court, which seems to be largely insisting its own values are central. Chapter 5 briefly explores how the current Court is departing from rather than adhering to traditional rules, explicit and implicit, that govern the Court, thus leading to instability.

shift of community ideals, because of the necessary persuasive aspect of its rulings, the Court should consider community needs and values. Moreover, while laws are grounded in tradition and history, there is also space for adjustment over time.[12] In some cases, the Court directly confronts this aspect of its decision-making in its opinions. For example, in a 1958 case involving what constitutes "cruel and unusual punishment," Chief Justice Warren held that the Eighth Amendment "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society" (*Trop v. Dulles* 101; my emphasis). This framework has continued to be used to analyze Eighth Amendment cases for decades and reveals the Court's awareness that community values change over time and, at least in certain cases, its acceptance of its own role in reflecting those changes. Other examples of the Court reflecting changing values can be found in Civil Rights cases, such as *Brown v. Board*. In the case of *Roe*, letters and articles from multiple perspectives, including a recent Gallup poll on the issue, were found in the case files of Justice Harry Blackmun, author of the majority opinion in *Roe*, (Greenhouse and Siegel, *Before* Roe), suggesting an effort to be especially diligent in considering the community's values on such an important issue. Moreover, because the Court's opinion must be persuasive, it is essential that it reflects the community's values rather than simply trying to change them by mandate. Indeed, one can dictate actions but not values.

In addition to the exigences that apply to court opinions by virtue of their legal context, there are specific constraints that impact the available means and rhetorical choices. Allowing for the possibility of them operating in both positive and negative ways, Grant-Davie defines

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[12] To be sure, the extent to which the Constitution allows for such changes is a subject of differing ideologies and a primary site of divergence between liberal and conservative members of the Court.

constraints as "all factors in the situation, aside from the rhetor and the audience, that may lead the audience to be either more or less sympathetic to the discourse, and that may therefore influence the rhetor's response to the situation" (273). A complete analysis of the rhetorical choices made in creating legal rights must consider both issues of audience persuasion and legal implications. Where communications function in a specialized legal system, certain formalities often constrain the available means. In this dissertation, I aim to offer insight into how the legal system itself constrains the rhetorical choices of the discourse within it. Specifically, I consider the tenet of objectivity, the effect of required legal frameworks, and the constraint of precedent.

As one of its most central tenets, our legal system values objectivity. It treats justice as if it were a right and wrong binary, as if there were a real truth out there waiting to be uncovered. Indeed, it is a common trope in crime shows to flashback to the "real" crime scene, thus allowing for closure and a sense of justice prevailing (or not). Moreover, as Henderson observes in her analysis of the role of empathy in the legal system, an essential component of maintaining our social order through law is the equality it provides: "The virtue of the Rule of Law is that it is ostensibly 'neutral' and prevents abuse of persons. The neutrality and generality of the Rule of Law seek to serve the goals of protecting individuals from arbitrary treatment and of respecting people as autonomous and equal" (1587). It is this focus on neutrality and objectivity in order to maintain fairness, Henderson argues, that, while not incompatible with empathy, whittles its importance often down to nothing. Indeed, she expresses concern that a failure of empathy negatively impacted the *Roe* Court's ability to identify with the women for whom the lack of access to abortions could have devastating consequences: "Perhaps because the narrative of 'unwanted' pregnancy and its effect on women was underdeveloped when *Roe* was decided, the Court lacked appreciation of the human issues involved" (1620). Such a failure to identify with

women seeking abortions, particularly those with the fewest resources and thus furthest removed from the worldview of judges and Justices, has permeated much of the judicial discourse surrounding reproductive rights with continued damaging consequences.

One solution offered is retreat from objectivity. As feminist scholars work to underscore lived experiences and positionality, a common focus is the danger of overgeneralizing groups of people. This issue is often raised by those objecting to women being written out of the legal narrative on reproductive rights in *Roe*. Citing one legal scholar's claim that unitary characterizations of women have interfered with equality, Gibson observes that the "universality of women…fails to recognize the vast differences in women's experiences and leaves many women unprotected" ("The Rhetoric" 325). Such a critique of the legal system is fair, and some scholars have argued the system should accommodate a more varied, individualized approach. Law professor Katharine Bartlett, for example, analyzes several possible legal methods for embracing feminist ideals and concludes that positionality is the most promising (886). Yet, while the ideal solution may be a legal system that recognizes that objectivity does not always equal fairness, there are ways to explore the potential for narrative intervention in the meantime.

Furthermore, while the legal system provides the appearance of objectivity, an increasing number of scholars and public voices are calling the idea of true objectivity into question. In her analysis of the material impacts of law school exams, Williams notes that the exams rely on "one of the law's best-loved inculcations: the preference for the impersonal above the personal, the 'objective' above the 'subjective'" (87). Yet in Williams's work, she suggests that literary theory and personal writing have helped her to challenge the veracity of this idea. Robert Ferguson makes a similar observation, analyzing the genre of the judicial opinion and finding that one of the features is inevitability of the decision reached, which he concedes is a rhetorical move rather

than an accurate reflection of the judicial process (213). In other words, the judge is using the art of persuasion to convince the reader that the end result is inevitable, or an objective truth, rather than the ruling actually *being* inevitable. Accordingly, objectivity acts as a rhetorical constraint because it impacts how the Court is able to express its decision in an effectively persuasive manner. Such choices can influence both the legal and factual story the Court tells. Indeed, Wald reveals that shaping the facts is one way in which a court persuades the public that its decision is enviable and just (1386). Therefore, acknowledging the members of the Court as sophisticated jurists and rhetors, the decision to minimize the women's stories in *Roe*, for example, may have been calculated to achieve their rhetorical goals of giving the appearance of objectivity.

Analyzing judicial opinions in the context of a legal system that values objectivity is important for several reasons. First, this context offers potential explanations for rhetorical choices, which can, in turn, provide possible avenues for intervention. In other words, understanding the reason for the choice influences the response. In addition, this analysis creates space to question whether the objectivity is genuine or merely perceived and, thus, the role of narrative in achieving that perception. Moreover, because rhetoric contributes to material reality, the effects of the appearance of objectivity on individual rights is real. Importantly, recognizing ways that the legal system fails to live up to it goals of objectivity affords opportunities to acknowledge and examine the stories that are already part of our legal system and to reveal the ways those stories can create empathy and thus lead to identification, particularly for those who are typically excluded from the ideals of "fairness."

In addition to objectivity, there are other ways, big and small, that Court opinions may be constrained by their legal context. Examples from *Roe* illustrate the point. First, critiques of the *Roe* Court's focus on a state's right to interfere—as opposed to a woman's right to control her

body—should consider that the Court's analysis is guided by the legal framework used to determine what rules are appropriate when restricting fundamental rights. As the *Roe* Court observes, "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'" (155). In other words, when the state makes rules infringing upon an individual's fundamental right, it must first bear the burden of establishing its "compelling" interest in the activity it is trying to control. This determination is crucial because failure to establish the requisite interest stops the analysis without the individual having to prove anything. Thus, while the language may seem to center the state instead of women, this is the legally required way to work through the issue. Moreover, it centers the state because it first burdens the state, and that is, from a legal standpoint, a more individual-friendly position. Notably, the Court finds there is no compelling state interest in the first trimester of pregnancy. While standards evolved in later decisions, under *Roe*, states were not allowed to make any rules regulating abortion during the first trimester.

Next, framing the discussion in terms of a physician's right to practice medicine also has a legal justification. The Texas law at issue in *Roe* made criminal the *performance* of abortion but not receiving one (*Roe* 117n1). While the effect of this law did—and was intended to—obstruct women more so than physicians, it was physicians' behaviors that were restricted. The Court does acknowledge the law's implications for women, giving Jane Roe standing where the physician who was initially in the lawsuit was denied. That said, the discussion of a law that criminalizes physicians' actions required consideration of physicians' rights. Finally, the need for votes in appellate court decisions acts as a direct constraint on rhetorical choices. As Wald explains, "In an appellate court composed of strong-minded men and women of different political and personal philosophies, consensus is a formidable constraint on what an opinion

writer says and how she says it. Her best lines are often left on the cutting room floor" (1377). In cases involving issues as controversial and volatile as abortion, the constraint of compromise cannot be overstated; as Wald puts it, "Rhetoric is the hostage of judicial politics" (1380).

While all the issues noted above offer potentially significant nuances in a rhetorical analysis of Supreme Court opinions, the one most urgent and thus far underexamined is rhetorical implications of the constraint of precedent. As Grant-Davie observes, "[p]recedents always create constraints" (276), and such constraints have a significant impact within the legal system. Moreover, he argues, while constraints are often thought of as limitations or restrictions, Bitzer defines them more as aids that can be harnessed by the rhetor to constrain the audience to a particular point of view (272). Accordingly, I suggest that reframing the constraint of precedent as positive rather than negative provides the Court a clear rhetorical path for creating and expanding new rights. Following legal precedent offers a logical way to justify change, particularly in a system that often resists change and, in theory at least, creates certainty for those who are governed by the rights established.

Under the doctrine of *stare decisis*, or adhering to precedent, those within the legal system agree to be bound from one case to the next, allowing the foundation of case law to build upon itself. Even the US Supreme Court, the highest court in the US legal system, must contend with its earlier holdings. As the opinion in *Casey* observes, this system gives the public a sense of reliance on decisions and the rules they set forth, recognizing that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it" (854). This, in turn, requires that opinions persuade the public that the resolution is just and right in a way that appropriately deals with the public's expectation based on previous cases. While the lay public may not know a great deal about the nuances of the legal system, they do generally have an

understanding that future courts rely on decisions by earlier ones. Returning to the example of *Roe*, some scholars criticize the Court's decision to rely on the Fourteenth Amendment's right to privacy rather than taking the opportunity to establish women's bodily autonomy. However, the legal system's reliance on precedent, an admittedly imperfect method of establishing predictability, guides the Court's rationale. In *Roe*, the Court is careful to provide the history of the right to privacy and its protection of family planning decisions (152-153). Significantly, extending existing rights, ones that are already accepted, demonstrates that the Constitution rather than the Court is creating and protecting the new right. Because of the foundational links established, attempts to overturn *Roe* could put other rights in jeopardy, rights which potential opponents may not be willing to risk.[13] Conversely, if the *Roe* Court had used newly emerging language about women's bodily autonomy, the legal basis for the decision would have been less clear, as the Constitution does not offer explicit protection for bodily autonomy. Although the outcome of individual cases may not always seem to reflect the community values that it should, diverging too much from accepted legal practice, while liberating the language, diminishes the rhetor's ability to constrain the audience into reaching the inevitable conclusion that this is the right and just answer. Notably, a court's efforts to persuade in the context of a previous ruling becomes particularly complex where and when it is making a decision that appears to be at odds with said earlier ruling. In such a case, the court must carefully explain its choices so that it distinguishes the new case, or, as in a case like *Brown v. Board*, explains why the earlier decision should no longer apply. However, here the Court's power to use precedent as a positive

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[13] Indeed, this issue can be observed in the *Dobbs* opinion, as the Court attempts to distinguish all other similarly situated rights, such as marriage equality and contraception, a move the dissent argues is disingenuous.

constraint becomes more significant. In the cases that follow *Roe*, particularly *Casey* and *Carhart*, the Court recognizes the constraint of precedent and uses it to advantage. Much like judicial opinions had long been using rhetorical choice to give the appearance of objectivity and inevitability, the Court found ways to craft the appearance of following precedent, thus giving new opinions unearned historical judicial weight.

Crucially, judicial exigences and constraints and the rhetorical possibilities for addressing them highlight the role of storytelling in shaping Court opinions. According to White, "The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns" ("What's" 1367). In other words, despite the appearance of objectivity, inevitability, and adherence to precedent, a court opinion does not merely announce a ruling; rather, it weaves together a narrative that explains and justifies the outcome. Indeed, being a good storyteller allows an opinion's author to offer that explanation on their own terms, thus impacting the rights and community in the desired way. Moreover, as Wald puts it, while there are constraints of facts and precedent, "skill in judicial storytelling definitely enlarges the scope of judicial discretion" (1388). Thus, the ability to create a well-crafted narrative generates a larger pool of possibilities for explaining a judge's desired outcome.

Audiences and Rhetors in Judicial Storytelling

Given the complexities of the rhetorical situation surrounding Supreme Court opinions, their constraints and exigences lead to the confluence of multiple co-rhetors and audiences. Although Court opinions are often thought of and talked about as proclamations of the law, the interdependent dynamic of multiple rhetors and audiences complicates the analysis. Because laws are intended to reflect community values, government actors, including the Court, are

granted the authority to dictate such reflections by the community they govern. It is thus necessary for a society's function that persuasive efforts regarding those values and the rights that flow from them are effective. Moreover, taking into account the practical goals often implicated in rights-making reveals a more complex conception of audiences, which, in turn, can lead to additional rhetors for persuasive effect. Rhetorical analysis of key opinions on reproductive rights demonstrates the multiple and varied audiences and rhetors, including who they are, what drives their roles, and how they can affect both the legal rights and the official narratives that discuss them.

Multiple and Varied Audiences

A primary way that a rhetorical analysis is useful in parsing the nuances of the Supreme Court's narratives is through the examination of the multiple, differing audiences. Constraints unique to the legal system as well as the specific goals of the Court can have a significant impact on the audiences who must be convinced by the Court. Accordingly, the rhetorical choices of the Court, including its choice of rhetors, must all be analyzed with a sharp eye toward the specific audiences it seeks to persuade. Drawing on Chaïm Perelman and Lucie Olbrechts-Tyteca's discussion of "composite" audiences and Douglas Park's proposal of four types of audiences, both addressed and invoked, Grant-Davie highlights the importance of recognizing a rhetorical audience as multiple, shifting, and inextricably tied to rhetors (270-271). While legal audiences—judges and lawyers—are important, also parsing the public audience into nuanced participants—medical professionals, governed public, and the press—further illuminates the complexity and challenges associated with the Court's role as decision maker.[14]

[14] Because my focus is on audiences and co-rhetors as reasonably perceived by the Supreme Court, unless a specific issue dictates otherwise, I refer to the medical community, the

While there are many interconnected rhetors and audiences as well as many real, impacted lives at stake, at its core, an opinion of the US Supreme Court is a legal document, written by the highest legal authority to a legal audience. Though the words can, and are intended to, reach a larger public, the rhetorical situation should be understood in its legal context. As law professor Sanford Levinson observes in his analysis of judicial opinion rhetoric, the legal audiences are professional, such as lawyers and judges, as well as nonprofessional, including both state and federal lawmakers, not all of whom come to office with a legal background (199). Notably, these legal audiences expect a certain level of conformity to genre conventions with respect to both language and reasoning, thus impacting the available means of persuasion. For example, although the legal system is not as objective as it purports to be, the rhetoric of objectivity is expected and an essential component of the persuasive process. This is not to suggest the legal community is a monolith, however, as there are many audiences—judges, lawyers, lawmakers—each of whom approaches the rhetorical situation from a different position, often with a different goal.

Furthermore, in situations with multiple rhetors, such as a group of lawmakers or a panel of appellate judges, the audience includes the rhetors themselves. In a discussion of the myriad of factors influencing judicial rhetoric, Wald reveals that "much bargaining goes on among judges about the grounds for a decision" (1378). Such bargaining both constrains rhetorical choices and creates an internal judicial audience that must be persuaded as part of the opinion writing process. As aptly explained by Justice Felix Frankfurter, "When you have to have at least

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public, and the journalistic media each as a singular collective group. Each of these groups could be parsed in numerous ways, based on different interests, authorities, and concerns, among other things. The nuance of such a detailed breakdown of each group is beyond the scope of this project, but its absence here is not intended to deny its existence.

five people agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammeled by what anybody else may do or not do" (qtd. in Levinson 199). In remarks on dissenting opinions, Justice Ruth Bader Ginsburg specifically highlights this internal audience, pointing out that though rare, "on occasion, a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court" (*My Own* 282). Relaying a time that happened for her, she notes, "Whenever I write in dissent, I aim for a repeat of that experience," declaring "hope springs eternal!" (282). In the case of *Roe*, this bargaining was indeed significant. As Marian Faux details in her historical narrative of the case, there was considerable disagreement among the Justices over Justice Blackmun's initial draft of the opinion, which the others believed to be too cumbersome and medicine-centric. The discord grew until Justice Douglas wrote a memo, which he planned to publish, outlining his grievances. Although he ultimately withdrew the memo and disclaimed responsibility, the controversy spilled into the public when the memo was leaked to the press (274-276).[15] Eventually, the Court decided to rehear the case with its two new members, and the internal debates over the drafts began again (292). Importantly, as Faux observes, "Blackmun recognized the importance of obtaining a solid majority to stand behind the opinion, and he was willing to compromise to get it" (292). Accordingly, while the public is often not privy to the specific details surrounding drafting and deliberation, the significance of the internal judicial audience, including the necessity of persuading its members, cannot be overstated.

[15] Similarly, while the origin of the *Dobbs* leak remains publicly unknown, one theory is that it was leaked by one of the Justices for a purpose related to internal voting and/or drafting discussions.

In addition to the “who” part of a legal audience, there is also an issue of “when.” Because of the historical nature of the legal system and its devotion to precedent, the legal audience of a court opinion includes not only current members of the legal community but also those who have yet to come. Future lawyers incorporate the rationale of opinions into their own arguments to future judges, who must then enforce the rights set forth in the opinion. Thus, as White observes, a court opinion “invites lawyers and judges in the future to think and speak as it does” (“What’s” 1366). Therefore, he goes on to argue, “in every case the court is saying not only, ‘This is the right outcome for this case,’ but also, ‘This is the right way to think and talk about this case, and others like it’” (1366). Indeed, because of the legal system’s reliance on precedent, future cases can realistically hinge on the particular words chosen in an opinion. Moreover, court opinions can often lay the framework for future legislative action by explicating the specific problems with a given statute. While there are undoubtedly countless cases that receive little to no attention beyond their initial issuance, the Court is aware that its opinion in cases such as *Roe* and *Casey* will be relied on for generations. As such, the Court persuades both the current legal audience and an unknown future one that its decisions are legally sound and inevitable. Future lawmakers may also take up the issue, and, as in the case of the Partial Birth Abortion Ban Act, future courts may have to make decisions about those future laws. In that instance, the Act responded to one Court opinion about a similar state law and was then assessed by the *Carhart* Court, thus demonstrating the connected and recursive nature of the process.

The legal audience, however, is carefully balanced with others. In addition to internal audiences, multiple, nuanced audiences can also be found outside the legal system. First, the public, who needs to understand and exercise the rights, must also be persuaded. According to Richard Davis in his analysis of the interaction between the Court and the press, “The justices

believe that their written opinions can affect how the public responds, not only to the Court's own policy resolution in the case at hand but also to the Court itself" (10). While there is not complete consensus among the Justices about whether their decisions should be legible to a lay audience, many do believe that this is part of their responsibilities. Specifically, Davis reports, Chief Justice Earl Warren and Chief Justice Roberts have both suggested opinions should be accessible to lay people (13). This appeal to the public can be seen in *Roe* through examples such as using an easily understood "trimester scheme" and in honoring the public's belief that abortion is a medical procedure. Moreover, as the Court becomes more political, its appeals to the public are increasingly direct. For example, in *Carhart*, Justice Ginsburg read the dissenting opinion from the bench to highlight the dissenters' objections publicly.

In addition, the "public" that makes up the governed community can also be parsed in a myriad of ways based on value systems, potential impact, and the like. And while such stratification is too great to allow for analysis of all possibilities in a meaningful way, some audiences are so directly implicated as to warrant further consideration. For example, in *Roe*, though the Court had legal authority to establish women's right to seek an abortion, it had no corresponding authority over the behavior of those who would perform the abortions. Significantly, the monumental, potentially lifesaving right the Court was granting would have been hollow if women had no way to exercise it.[16] Unable to simply order physicians to perform abortions, the Court faced a practical exigence of needing the medical community's agreement, thus making the medical community a crucial audience of the Court's opinion. As discussed

[16] Only a few years after *Roe*, the Hyde Amendment's prohibition on taxpayer funding would leave many women with such a hollow right.

further in chapter 2, this specific audience offers insight into some of the rhetorical choices that many current scholars find problematic, such as the focus on physicians' rights.

Finally, given the important communication work done between legal and public discourse by the journalistic media, the press is a significant audience of both government and public rhetors. Although officially the Court is not required to consider public opinion and, thus, would not need to connect with the press, Davis observes that "studies of the Court's interactions with the press demonstrate that the justices do follow press coverage of their own decisions and other actions and structure the Court's institutional relationship with the press to maximize press coverage in ways that reinforce the institution's legitimacy" (xvii). Regarding *Roe* specifically, that Justice Blackmun's files contained various editorials and news articles, including the 1972 Gallup poll, indicates the likely use of the press as one source for determining the most effective way to persuade the public. Similarly, Davis notes that Justice Blackmun's files showed that he continued to follow news coverage on abortion long after *Roe* was decided (120). This suggests that the Court views the press as a source of information on public discourse.

In addition, the Court's relationship with the press is reciprocal, even if indirectly. Davis argues that "it is significant that the justices believe that how [controversial] decisions are crafted, explained, announced, and defended can make a difference in press coverage and public comprehension" (188). Indeed, Wald observes that "[s]ometimes a judge purposely 'writes down' to defuse a volatile subject" (1415).[17] However, she goes on to note that such efforts are not always successful, as the press can still choose to "play" an opinion as controversial (1416).

[17] Here, Wald provides an example of writing an opinion about the "gag rule," a rule that prevents federally funded health clinics from discussing abortion, "in the same matter-of-fact style as if it were talking about ball bearings of emission standards" (1416).

While carefully crafting opinions, Supreme Court Justices know the press is a critical part of conveying its holding, and even rely on it to do so. Intervention by the press is particularly important given that legal discourse often precludes easy access to the Court's own words, and thus many members of the public rely only on press coverage to explain their rights, an issue with which the Court is aware. In his discussion of Chief Justice Warren's rhetorical acumen in crafting the *Brown v. Board* opinion, Levinson observes that the Chief Justice "was concerned, altogether properly, not to antagonize needlessly the editorial writers of the great Southern newspapers, who would have to translate the decision for their readers" (198). Justice Steven Breyer similarly notes this in his 2021 book on the increasing politicization of the Court, asserting, "Journalists' understanding is important, for it is only through their reporting that the vast majority of Americans learns just what courts, including the Supreme Court, do" (49). Furthermore, through its reporting of individual stories as part of the compound rhetorical situation, the press is able to elevate public voices to all audiences involved.

Rhetors and Co-Rhetors

Significantly, the Supreme Court is not only tasked with persuading multiple audiences simultaneously, they are also aware of their role and make rhetorical choices accordingly, thus highlighting their role as primary storyteller. As preeminent legal scholars, Justices on the US Supreme Court understand both their role in shaping society and the ways in which rhetorical choice plays a vital part in that shaping. From the moment one begins law school, a central and pervasive lesson is the necessity for precision of language. In a field where a misplaced comma can become the subject of heated debate, words are chosen with care and purpose. Although critical of some of those choices, Abrams acknowledges the Court's appreciation of its obligation. Tracing the Court's inconsistent use of mother and woman in abortion opinions, she

asserts, “it seems unlikely that the Justices are unaware of the potential impact of the language they choose, particularly in controversial decisions where every sentence is parsed for clues to unresolved issues” (316). Indeed, Davis asserts that Justices are “sensitive to the effects their decisions have on public opinion and their own institution’s role, as well as to the imperatives of ‘selling’ their actions to a sometimes skeptical public” (10). He notes how Justice Frankfurter reminded his colleagues of this vital role in 1955, the year following the *Brown v. Board* decision, reminding them “‘how we do what we do in the Segregation cases may be as important as what we do’” (10). Accordingly, analyzing the rhetors’ roles in legal rights-making more fully addresses the dynamics involved, and Grant-Davie’s framework is particularly helpful here.

Diverging from Bitzer, Grant-Davie asserts that “rhetors are as much constituents of their rhetorical situations as are their audiences” (269). Moreover, he claims, “Rhetors need to consider who they are in a particular situation and be aware that their identity may vary from situation to situation” (269). Importantly, he suggests that because of the potential complexity of a given rhetorical situation, there are often multiple rhetors involved and any rhetor may have multiple, shifting roles (269). Especially when dealing with controversial issues such as reproductive rights, the compound rhetorical situation of a High Court opinion results in a message that is often the work of multiple rhetors, both among and outside the Court members, and the Justices who navigate various identities and roles. Identifying the various co-rhetors is central to understanding the Court’s rhetorical choices, as knowing where words and argumentation strategies come from offers potential explanations for their selection. In addition, the selection of the co-rhetors—that is, to whom the Court gives voice—is itself a choice to be explored. Finally, considering the multiple roles and shifting identities of even individual rhetors reveals the complexity of the rhetorical situation.

Due to the legal system's reliance on precedent, previous Courts act as co-rhetors in any given decision. For example, to use precedent as a positive constraint in *Roe*, the Court first acknowledges that "[t]he Constitution does not explicitly mention any right of privacy" but affirms that the Court has recognized it starting as far back at 1891 (152). The Court then lists more than a dozen cases that support the right to privacy in many different areas, including procreation, contraception, and family planning, areas that would be essential to its reasoning here. The rationales, and often language, of these past cases thus contribute to the narrative the Court creates in *Roe*, for better or for worse. Notably, the Court can use its selective authority as storyteller to shape the narrative crafted with the earlier opinions in numerous ways. Traditional legal norms provide an understanding of how far such selection should go—for example, there are specific ethical rules about not misleading the Court. Yet, as the highest court, the Supreme Court has significant latitude, particularly when persuading a public rather than legal audience. The analysis is this project shows that Courts have been increasingly testing these boundaries and increasing its own power through its selective choices.

The Court also relies on other professionals to tell its story, especially in other areas of expertise, such as medical issues. For example, in the historical tracing section of the *Roe* opinion, which the Court uses to persuade its audiences that the decision is just and right, the Court directly relies on the words and reasoning of many other historical and professional groups, such as ancient lawmakers, the Hippocratic Oath, Christian clergy, and English lawmakers, to justify its holding. Importantly, the Court relies heavily on the words and logic of the American Medical Association, both directly and indirectly, making the AMA a significant co-rhetor. In so doing, the Court bolsters its ethos with its physician audience by relying on physicians' own governing body. As with other co-rhetors, the Court's selection power can have

a significant impact on the story depending on whose expertise it relies on. Because the public audience trusts the Court's selection of experts, it trusts the information repeated. This is another area that shows considerable shifts in more recent reproductive rights cases, as the Court selects less reliable medical co-rhetors and allows legislators to tell the medical story.

Less directly but as importantly, the public and press can act as co-rhetors in Court narratives. Because the Court is reflecting the values of the community it governs, the public acts as co-rhetor by expressing those values so that they can be reflected back. As another example, which chapter 2 explores further, the physician-centered language in *Roe* can be traced directly to the Gallup public opinion poll, suggesting the Court's efforts to frame the decision in terms with which the public already agrees through its word choice. Finally, often acting as intermediary between formal legal communications and public understanding, the press also acts as rhetor within the larger context of rights-making, which can result in significant consequences as it influences public response. Furthermore, considering the larger collective narrative around Court opinions reveals that the press can act as a co-rhetor, telling stories beyond the scope of the Court's limits, but made newsworthy by the Court's own narrative.

In addition to allowing co-rhetors, a rhetor may also take on multiple roles, which is part of the persuasive process. As Grant-Davie observes, "audience can influence the identity of the rhetor" (270). In *Roe* for example, primary author Justice Blackmun had spent several years as general counsel for the Mayo Clinic, providing him with a physician-friendly identity that is visible in the opinion. Indeed, Henderson notes that Justice Blackmun's history with Mayo is the usual explanation for the opinion's focus on physicians, because, as some suggest, he was more concerned with the rights of physicians that those of women (1626). However, analyzing the choice in the context of the opinion's persuasive goals suggests that Justice Blackmun's Mayo

connection was not a limitation that caused favoritism toward the medical community, but rather a positive attribute that allowed him to shift to an identity tangential to medicine to persuade a physician audience and a public that viewed abortion as a medical procedure. More recently, as the Court has become increasingly political and partisan, Justices have managed identities connected to their role as Justices and the expectations created by their political affiliations. This balance is especially clear in *Casey*, as an opinion written jointly by three conservative Justices explaining their decision to uphold *Roe* based on their duty to precedent while explicitly acknowledging that they may not have all voted the same way if the issue were being raised for the first time.

A Rhetorical Analysis of US Supreme Court Narratives in Abortion Rights Opinions

As Levinson observes, "Judicial opinions are rhetorical performances" (187). An assessment of any performance, he notes, requires that the critic be aware of, among other things, the intended audience and desired effects, such as, in the case of judicial opinions, "persuading the audience and demonstrating a certain authority over it" (187). Indeed, in his discussion of Chief Justice Warren's opinion in *Brown v. Board*, Levinson argues that "[o]nly an awareness of intended audience—and an appreciation for the de facto limited power of courts—enables us to understand what is surely one of the most famous judicial opinions of the twentieth century" (197). He concludes that rather than using the opinion to lecture the public about racism, the Chief Justice intentionally called for the opinion to be "unemotional and, above all, non-accusatory," likely using his political training to understand the importance of avoiding antagonizing the local governments, which would be in charge of compliance with the decision (198). Levinson goes on to suggest that Chief Justice Warren was also concerned with his audience of fellow Justices, having prioritized the need for a unanimous decision: "The marginal

cost of even one dissent was, no doubt, perceived as extremely high" (198). Thus, in considering the rhetorical moves the High Court made in crafting its opinion in *Roe v. Wade*, an opinion that would perhaps equal *Brown v. Board* in its significance and legacy, and the abortion rights opinions that follow, it is essential to keep the legal story at the forefront.

Furthermore, examination of Court opinions within their legal context is important not only to form a more complete understanding of the rhetorical choices but also to highlight the necessity of the collective work done by multiple rhetors and audiences beyond the four corners of a particular opinion, for example the Court issuing opinions and the press reporting on them. Explaining his concept of a compound rhetorical situation, Grant-Davie observes that "clearly the situation continues after the point at which the discourse begins to address it" (273), thus allowing for a compound rhetorical situation, which is "made up of a group of closely related individual situations" (274). For example, applied to *Roe*, one may consider that while the Court is bound by issues of legal standards, case analysis, and precedent, the press is not similarly constrained. Yet, reporting on women's stories in connection with the issued decision adds the ethos of the Court to the stories it was unable to tell. Similarly, this framework highlights the significance of a Court's choice to incorporate a narrative from a public co-rhetor, such as the *Carhart* Court's validation of an antiabortion activist narrative, which then creates the possibility of including additional portions of an outside group's narrative into the official legal discourse. In addition, given the significance of precedent, considering the compound rhetorical situation aids in explaining how cases build upon each other and, thus, lines of cases should be read together. This is particularly important for understanding when invocations of earlier cases are used in misleading or incomplete ways as well as when necessary cases are ignored altogether due to the Court's rhetorical selection.

In the chapters that follow, I trace the Court's narratives in opinions that rule on abortion rights and examine how those narratives altered the individual right to obtain a safe and legal abortion, beginning with the right's creation in *Roe* and then to its increasing diminishment in *Casey* and *Carhart*. Of particular note, the latter two cases reflect the key role of *stare decisis*—that is, the Court's duty to honor precedent—in ensuring the stability of rights and constraining judicial power. First, the *Casey* Court created a narrative to restrict the individual right while appearing to remain within the bounds of precedent by somewhat misrepresenting *Roe*'s holding. The *Carhart* Court went further, misrepresenting both law and facts, and created a narrative that purported to follow the law but substituted the Court's own values for those of the community and its beliefs about women's experiences in place of women's stories. While the Court's misrepresentations worked in the short term to avoid precedential constraints, this move also affected the other purpose of precedent, causing instability of rights and, once the reality because evident, the Court's own authority.

Importantly, once recognized, narrative possibilities in rights-making can be used by the governed. For example, in chapter 2, I examine, in part, how in *Casey*, the "undue burden" standard is treated as if it is stable and can be objectively applied to women as a uniform group, when in fact whether a potential burden is undue—i.e., creating a substantial obstacle to obtaining an abortion—often varies depending on a woman's circumstances. In other words, while one woman might find it a mere inconvenience to make two separate trips to the doctor to allow for a 24-hour waiting period, for another woman this requirement may be impossible to overcome. By ignoring the individual circumstances of women, the *Casey* Court was able to avoid the very real connection between issues of access and legal rights. Yet, by acknowledging the role of the public in serving as the reflective surface for conforming rights to community

values, we uncover the possibility for making a difference through a change in public perception rather than a direct change in the language of the law, the former likely an easier feat. For instance, interpreting the undue burden standard as more subjective, or even applying it with a more inclusive view of what makes a burden undue, would have material impacts for individuals without having to change the law itself. Though this specific option has been foreclosed by *Dobbs*, the ideas can be expanded to include other contexts.

In order to limit the scope of the interrogation and to focus on specific moments of judicial storytelling, each of the three primary chapters concentrates on a particular US Supreme Court opinion on reproductive rights, specifically abortion rights and regulations. After exploring the foundation of modern-day abortion rights by analyzing *Roe v. Wade*, the two texts that follow move forward nineteen and fifteen years respectively, allowing for some consideration of changing time while each individual moment is captured in its own context. Moreover, the two selected cases each marks significant, material changes to the individual right granted in *Roe*, despite the Court's assertions otherwise. These cases offer specific examples of a disconnect between the Court's words and actions, accomplished and received in different ways, which illustrates the power the Court can create through its narrative choices. The concluding chapter provides a brief consideration of the Court's recent decision explicitly turning against its previous holdings in *Roe* and subsequent cases in order to situate the analyses in the current, vastly different legal landscape.

Chapter 2, "*Roe v. Wade* (1973): Identifying with a Medical Narrative to Expand Reproductive Rights," revisits the case that first established an individual's right to a safe and legal abortion, *Roe v. Wade*. Examining the Court's rhetoric in *Roe* is valuable for assessing how the opinion contributed to women's fundamental right to obtain a legal abortion as well as

society's larger understanding of to what rights women are entitled. Although many rhetorical and legal scholars have considered this opinion, I place the text within its inextricably connected rhetorical and legal contexts, thus complicating the analysis. Critical rhetorical, feminist, and legal scholarship on *Roe* generally highlights and critiques the Court's framing of abortion rights as protected by privacy rather than as a right to bodily autonomy and its prioritization of physicians' rights, thus perpetuating the idea that doctors know more about what women need than women themselves. In other words, despite the material impact to women's lives, the Court privileges doctors' stories over women's stories and grants the right to women only as patients. While these criticisms are fair with respect to the implications of language, they fail to account for the full complexity of the rhetorical situation, including the unique legal aspects.

When drafting opinions, even less controversial ones, the High Court balances practical and legal goals and constraints, which, in turn, leads to addressing multiple audiences and selectively incorporating co-rhetors. Moreover, public policy implications can create a discourse around an opinion, expanding the compound rhetorical situation. Accordingly, I argue that analyzing the rhetorical situation of *Roe* as a dynamic, multifaceted collection of stories provides insight into the Court's rhetorical choices in writing its decision and demonstrates how the Court creates power through those choices. To do this, I analyze the specific goals of the Court, the alliances created in furtherance of those goals, and how those goals and alignments come together to influence the opinion's narrative. In this chapter, I pay particular attention to the integral role of the medical community and the unique challenges of introducing a new constitutional right. I further consider how the official opinion contributes in significant ways to a larger discussion, thus creating space for additional voices. I suggest that such an analysis reveals a more favorable position for women than some scholars' initial assessments allow. The

goal of this analysis is not a rehabilitation of the *Roe* Court as feminist storytellers, but rather to reveal aspects of narrative critiques that are often overlooked in order to inform future, similarly situated critiques so that potential solutions may be more fruitful. It further illustrates how the Court can use its storytelling power in progressive ways, while following traditional legal norms. This sets up the contrast in the opinions that follow, ultimately ending in a complete reversal.

Chapter 3, "*Planned Parenthood v. Casey* (1992): Saving Liberty Over Rights," examines the quietly pivotal case *Planned Parenthood v. Casey*, in which the US Supreme Court retreated from the trimester scheme set forth in *Roe* and articulated a new standard for abortion restrictions that hinged on whether the state was placing an "undue burden" on the right to obtain an abortion prior to viability. Critically, the opinion substantially increases states' ability to create abortion restrictions by holding that though the states' interest in fetal life is not enough to ban abortions prior to viability, it exists throughout the entire pregnancy and can be asserted as a basis for restrictions designed to "inform" a pregnant woman in ways that persuade her against abortion. I chose this case as the starting point after *Roe* in part because of its legal significance as the first case that returns a great deal of discretion to the states, thus setting up the continued erosion of abortion rights, and in part because of its rhetorical significance as purporting to bring the focus of reproductive rights back to the individual rights of women, thus making their stories especially important. Whereas the Court's decision in *Roe* was centered around the rights of physicians and viewed abortion as a medical decision, in *Casey* the Court purported to consider the obstacles that blocked access for women. Writing in the year following the decision, though recognizing that "more regulations will be found to be reasonable measures permissibly designed to promote childbirth over abortion," legal scholar Patricia Martin was hopeful that the undue burden standard would lead to more concrete explanations of reproductive rights, such as "an

informed consent issue [that] can be analyzed…in terms of the poverty, oppression, or demographic factors that limit women's lives" (316). In addition, she opined that "as the undue burden test is applied over time, it may allow the assumptions underpinning state regulations to be examined more closely," asserting that "abortion regulations may become vulnerable to attack if they embody repugnant or stereotypical notions of women's reproductive capacity, personal rights, or social relationships" (316-317). Though her evaluation was possible and reflects a more inclusive legal system, the increased space for the Court's narrative authority ultimately results in fewer reproductive considerations and protections rather than more.

In this chapter I consider the constraints faced by the Court, including the precedent set by *Roe* and the legal system's focus on objectivity, which is valued as a central tenet of fairness. In addition, I examine the competing identities of some of the members of the Court, who struggled as both Justices and conservatives. This analysis shows that although an undue burden standard suggests the kind of empathy for which storytelling is well-suited, because of the legal system's tendency towards perceived objectivity, the Court's application demonstrates a failure of empathetic identification with pregnant people whose rights would be unduly burdened by the new restrictions. This failure largely continued for future courts attempting to apply the new standard. As such, the diminished rights were not balanced with increased individualized protections. More significantly, while the Court's narrative regarding its duty of adherence to precedent—an adherence in this case that was primarily rhetorical—gave the appearance of solidifying the foundation of the right to obtain an abortion, the Court's precedent story eclipsed all others, particularly in the media's reporting, thus largely obscuring the significant changes made to the rights. Accordingly, the decision did not trigger the kind of public response that might have made clear that the Court was straying from the values it was meant to reflect,

allowing further diminishment to continue, often uncontested. Although the misdirection may have been unintentional, it highlights how the Court's narrative can be a crucial factor in the establishment and protection of legal rights.

Chapter 4, "*Gonzales v. Carhart* (2007): Expanding the Boundaries of Precedent's Rhetorical Constraint," focuses on the US Supreme Court's 5-4 decision that surprised many legal analysts by upholding the Partial-Birth Abortion Ban Act of 2003, a federal ban on one method of performing later-term abortions, ruling that the Act did not present an unconstitutional undue burden. *Gonzales v. Carhart* resulted in another significant, but underreported diminishment in the right to obtain an abortion, holding for the first time that an abortion regulation did not have to include an exception to protect the health of the pregnant person unless it created a health risk for a significant enough number of women to constitute an undue burden. This holding was both a novel application of the undue burden standard and in direct contradiction of a previous Supreme Court case that struck down a virtually identical Nebraska state law seven years prior. Notably, the *Carhart* Court does not explicitly acknowledge overturning the prior case, instead relying on evidence, legal and medical, provided by the US Congress in the Act as well as its own creative selection of references to earlier decisions to uphold the law while asserting fidelity to previous case law. The Court also repeats Congress's graphic descriptions of abortion procedures in furtherance of an antiabortion plan to turn public support against abortion. Unrelated to any of the necessary analysis, the Court's narrative adopts and amplifies a rationale of protecting women from their own regret, which came directly from antiabortion activists. Where the *Casey* Court may have unintentionally hidden its legal shifts, the *Carhart* Court's choices appear calculated to reach the desired result while misleading the audience, thus increasing its power without public objection.

The single dissenting opinion, written by Justice Ginsburg and joined by the other three dissenters, provides an alternative legal analysis of the facts that offers a counternarrative to the later-term abortion debate by including a more diverse range of individual experiences and reminding the Court—and the public—of its obligations to follow precedent. More urgently, the dissent recasts the precedent narrative, providing the details left out in the majority's selection and alerting the public to the danger of a Court covertly diminishing not only a particular right but also the system's own traditional norms that are intended to limit judicial power. Examining the majority and dissenting opinions in *Carhart* in tandem demonstrates how un-inevitable judicial decisions often are and reveals how courts use narrative to persuade the public they are correct, creating the appearance of inevitability. Moreover, the differences between the narratives, including exigences and co-rhetors, highlights the increasing politicization of the Court, an issue exacerbated by the judiciary's growing power, created by careful rhetorical choice. Crucially, however, such power does not come without a cost to the Court's legitimacy.

Chapter 5, "Liberty's Lost Refuge: Moving Forward with a Jurisprudence of Doubt," concludes by briefly considering the implications of the Court's recent sharp turn away from both abortion rights and its own duty to precedent by explicitly overturning both *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Organization*. It argues for the importance of analyzing formal legal documents like Supreme Court opinions as both rhetorical and legal for a more complete understanding of the Court's rhetorical choices. John Poulakos proposes that "[r]hetoric is the art which seeks to capture in opportune moments that which is appropriate and attempts to suggest that which is possible" (36). Exploring how narrative operates as a rhetorical strategy to address appropriateness allows for consideration of what, thus, may be possible. On one hand, this analysis demonstrates what has been possible for the High Court to increase its

own power through the narratives crafted in its opinion. Such expanded power reaches far beyond reproductive rights and unsettles both the stability of individual rights as well as the authority of the Court itself. Notably, although the starkness of the *Dobbs* ruling brought this issue into the light, the Court had quietly been on this path for thirty years. Significantly, though, the possibilities belong not only to the Court, but also to those within the governed community. More fully explicating the rhetorical choices of the Court reveals not only warnings that can then be heeded but also additional possibilities for intervention, especially for those with less access to official legal spaces.

The polarized positioning and dramatic political shifts make abortion rights a particularly effective example for examining how the United States Supreme Court employs its storytelling power in furtherance of expanding its legal power. That power is not without limits, however, and those limits have come into sharper focus since the Court's ruling in *Dobbs* and increasing threats to its legitimacy. Accordingly, exploring the Court's power also offers an opportunity to consider checks on the Court's authority by the those in the community that grants it. Accordingly, reproductive rights also warrant rhetorical investigation because of their individualized contexts and material consequences. As Martin argues, "the abortion debate involves more than a conflict between abstract principles. It involves actual abortion decisions—real decisions made by real women within the particular context of their own lives" (317). Moreover, it is an uncomfortable example. Martin points out that "[t]hese kinds of new, more concrete questions will demand that we struggle to understand and describe the multiple dimensions of women's reproductive experience" (317). It is this kind of struggle and discomfort that leads us to ask challenging questions, which can, in turn, lead to more satisfying and inclusive answers. During this time of judicial and legal uncertainty, it is difficult to assess how

to most effectively use the available means of persuasion. Yet, evoking empathic identification through storytelling can begin the process of establishing collective values that are meant to undergird the law. And as Justice Ginsburg reminds us, hope springs eternal.

CHAPTER II: *ROE V. WADE* (1973): IDENTIFYING WITH A MEDICAL NARRATIVE TO EXPAND REPRODUCTIVE RIGHTS

In March 1970, Norma McCorvey, pregnant, unmarried, and seeking to have a Texas law that prohibited performing abortions declared unconstitutional and unenforceable, filed a lawsuit under the pseudonym Jane Roe on behalf of herself and all women who might wish to terminate a pregnancy. The following month, Sandra Cano filed a similar lawsuit under the pseudonym Mary Doe, joined by many others including medical professionals and clergy, challenging Georgia's abortion law, which was more liberal than the Texas law but still prohibited an abortion in Cano's situation. Cano, pregnant and married, was living in extreme poverty and had lost custody of her three children because of her inability to care for them. Although the two women would give birth and put their children up for adoption while waiting for the slow wheels of justice to turn, their stories and pseudonyms would become the foundation of the modern US narrative of reproductive rights nearly three years later, following the United States Supreme Court's 1973 landmark decision in *Roe v. Wade*. Those stories, while initially cloaked in anonymity and, years later, uncertainty about the women's participation, would begin a new chapter in reproductive freedom and the financial and social benefits that come with it. However critical those stories are, they could not stand alone; instead, to accomplish the goal for which these women set out, these individual stories would be woven along with legal and medical stories into a larger narrative by the High Court. Though the case upended the legal landscape of reproductive rights and materially improved reproductive options for many and was praised as progress, the story the Court told has been subject to much criticism for its heavy reliance on a medical narrative. In this chapter, I explore the rhetorical affordances of the medical narrative in

Roe, and to a lesser extent its companion case *Doe v. Bolton*,[18] and argue that the Court was reacting to rather than creating the relationship between legal and medical communities in rhetorically crafting its opinion. The Court's telling of its own version of the reproductive rights story marks the beginning of the modern-day individual right to obtain an abortion in the United States by bringing together several stories—primarily legal and medical and to some extent individual—to craft a persuasive argument about the justness of the expanded right to multiple discrete audiences. More broadly, the analysis reveals how the Supreme Court uses its narrative authority, in addition to its constitutional authority, to expand individual rights.

At the time *Roe* was decided, all but four states had laws significantly restricting abortion, many of them complete prohibitions save in life-threatening circumstances. Building on recent case law regarding privacy in family planning decisions, including contraception, the Court ruled that abortion was entitled to the same protection and set forth a detailed framework for possible state intervention based the length of the pregnancy and the motivation of the regulations. It did so by employing a number of medical concepts and terms as well as physician-centered language, such as marking the protections afforded by the individual right by trimester and viability and basing its decision in part on maternal mortality rates. Because the medical community was an essential component of effecting the right to obtain what was then considered a medical procedure, the Court used its position to influence that community one professional to another. Indeed, it was because of this effort to persuade physicians, and the public who trusted

[18] Although the cases were technically decided separately, the opinions are authored by the same Justice and were handed down together. They are each referenced throughout the other, including the in opening line of *Roe*: "This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, post, p. 179, present constitutional challenges to state criminal abortion legislation" (116).

those physicians, that the Court endeavored to not only highlight the medical narrative but also connect it to the legal one. In her critique of the medical framing, rhetorical scholar Katie Gibson describes the significant historical narrative in the opinion as an account that "interweaves the stories of medicine and law and introduces medicine as an authority alongside the law" ("The Rhetoric" 316). I suggest that the connection between the two stories is more extensive than the historical narrative and served as an essential part of the Court's persuasive efforts to expand reproductive rights. The *Roe* Court's careful weaving of stories, with attention to its legal constraints, practical goals, necessary audiences, and co-rhetors who would best contribute to the story—both before and after its own text—allowed it to create from existing law, albeit imperfectly, a solidly grounded individual right to obtain a safe, legal abortion.

Examining the complex, compound rhetorical situation of the Court decision in *Roe v. Wade*, illuminates the possible motivations for the Court's rhetorical choices, such as the physician-centered approach, that often draw critical responses from scholars and activists. I suggest that while there are valid criticisms regarding the lack of narrative space afforded to women in a discussion over their right to make the most personal decisions about their bodies, there is also a certain efficacy in the rhetoric because of the historical context and legal constraints. Moreover, explicating the intricacies and interwoven components of the rhetorical situation reveals the full breath of the story, or rather stories, being told by the Court, including to whom and why. This mix of constraints, goals, co-rhetors, and varied audiences leads to multiple competing stories which ultimately become inextricably intertwined. While it is a fair critique to suggest that the women's stories should have been more prominent in the narrative, it does a disservice to the stories that are told and discounts the careful balancing act required of the Court as it made history. Across this chapter, I examine important aspects of each of the

stories—medical, legal, and individual—as they competed for space in the foundational *Roe* narrative, including why some stories were privileged over others, and consider some of the impacts of those rhetorical decisions.

I begin by situating the *Roe* decision in the relevant historical context, including the legal, medical, and public opinion aspects. Then I consider the specific goals of the Court, both legal and practice, in order to examine its various rhetorical motives. In addition, I identify the specific conflict the Court was seeking to resolve, how in aligned itself with respect to that conflict, and how that alignment further impacted its rhetorical choices. From there, I interrogate the opinion's narrative, identifying language and rationale choices that reveal both medical and legal co-rhetors. In addition, I highlight the ways that women can be found within the narrative, both within the opinion and as part of the compound rhetorical situation. Finally, I assess the impacts of the Court's narrative and consider how complicating our understanding of the Court's rhetorical power suggests possibilities for including additional voices, even in unofficial spaces. Using abortion rights as an example, this chapter serves as a starting point for explicating the complexities of judicial persuasion and revealing the legal effect of the Supreme Court's rhetorical choices. In *Roe*, the Court uses its narrative to expand individual rights; later chapters will demonstrate how the Court can retract rights, using its storytelling power to conceal its efforts and avoid public response.

Legal and Historical Context

Despite its flaws, *Roe v. Wade* is a carefully crafted story that effectively identified and solidified the shifting values of its communities—legal, medical, and public—and it is worthy of

inquiry for the lasting impact it made, both real and perceived.[19] First, *Roe* is significant for creating substantial change through constitutional interpretation—that is, re-envisioning existing law—rather than waiting for Congress to act. Highlighting how Justices "act in concert to pursue institutional strategies," Richard Davis observes, "Court opinions like *Brown v. Board of Education* and *Roe v. Wade* intentionally reshaped public policy" (13). Moreover, Davis asserts, such opinions are directed toward both the legal community and the public (13). Notably, despite being only a few years newer than the 1954 *Brown* decision, *Roe* has a stronger public currency. Citing a 2009 CNN survey, Linda Greenhouse and Reva Siegel point out that among Americans who can name a US Supreme Court case, *Roe* is the case they are most likely to name, at rate eight times that of *Brown* ("Before (and After)" 2030).[20] *Roe*'s popularity is significant not only for the sake of public awareness, but also because that awareness increases the impact the narrative has on the shaping of the governed community. Put another way, because the public is so aware of the decision, it is more likely to be influenced by the narrative the opinion conveys. Furthermore, public recognition may be due in part to the debates that swirl around *Roe* to the present day. Despite the fact that even prior to being explicitly overturned in *Dobbs v. Jackson*

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[19] As noted in chapter 1, examining the Court's strategies necessitates considering communities, such as the governed public, in the somewhat collapsed form that the Court uses when deciding on its imagined audiences. As such, the values highlighted are often the most visible, and many nuances are erased. I do not intend to imply that the laws reflect all values or are applied in a genuinely equal manner. Additionally, given the limited life experiences of the Justices, there are certainly significant gaps in their ability to identify with many of those who are disadvantaged by our legal system. My analysis is not intended as an excuse for such limitations; rather, the goal is to ultimately discover additional possibilities for intervention by complicating the rhetorical situation of Court opinions. I similarly do not intend to imply that either legal or medical communities function as a monolith with respect to values or potential influence and indicate specific divergences when relevant to the analysis.

[20] Notably, this survey predated the more recent discussions regarding the possibility, and eventual reality, of overturning *Roe*.

Women's Health Organization in 2022, many of the legal protections set forth in *Roe* no longer applied, and had not for nearly thirty years, the public debate is still formed around *Roe* and its "trimester scheme" as the standard bearer.[21] Significantly, much of the public debate focuses on various political positions with little discussion of the material aspects, such as health risks and economic realities. In fact, according to Greenhouse and Siegel, "*Roe* has become nearly synonymous with political conflict" (2030). Indeed, it is that continued conflict that makes *Roe* a site valuable for rhetorical study, as each new debate offers fresh context and insight.

In addition to its impact on general public policy, *Roe* is an essential moment in the larger story of the history of women in the United States. Gibson begins her analysis of the *Roe* Court's rhetorical choices asserting that *Roe* is "widely recognized as the most historic Supreme Court decision involving women's rights in the twentieth century" ("The Rhetoric" 312), and Patricia Martin suggests the opinion "marked a new chapter in American life" (309). Specifically, Martin points to the impact it had on reproductive freedom, including the related social and economic freedoms, and well as the political battles it began, including the role of the judiciary (309). It is important to acknowledge, however, that as with any rhetorical event, *Roe* can only be analyzed at a given moment at a time. In other words, because audience is an active part of the rhetorical understanding of a text, there is no "real" *Roe* opinion but only a reader's understanding of it, which shifts in different times and contexts. Moreover, public awareness of *Roe* further complicates the analysis. Gibson begins her strong criticism of the Court's male physician-centered rhetoric by acknowledging, "In public memory, *Roe v. Wade* stands for the victories of second wave feminism and women's hard fought independence" (312). Accordingly, given the

[21] Chapter 3 explores how the changes made to the right in 1992 in *Planned Parenthood v. Casey* left little of *Roe*'s original protections but largely went unnoticed.

significant place *Roe* holds in the history of American rights, I explore its weaknesses in a way that also acknowledges the work it accomplished, especially the real individual rights it created. Being both critical and understanding of the rhetorical choices made by the Court reveals interventions to expand constitutional rights, including the ability of exercising it.

An easy response to why one should analyze *Roe v. Wade* when considering the High Court's abortion discourse is simply because it is the beginning. However, within a legal system that was already nearly two hundred years old and that values tradition and precedent as paramount to its functioning, *Roe* is, of course, not the beginning. In fact, for many activists, it was the culmination of years of hard work. Moreover, assessing the nuances of rhetorical situation, Keith Grant-Davie asserts, public debates create "a group of closely related individual [rhetorical] situations," which overlap such that it is helpful to think of them as a compound rhetorical situation (274). Because abortion policy is often a topic of public debate, this framework is especially helpful for examining the rhetorical situation of *Roe*. A primary aim of this chapter is to consider the larger rhetorical situation as the *Roe* opinion is communicated; however, expanding the rhetorical situation of *Roe* also includes examining the texts that came before it. This is particularly important because the nature of the law expects opinions to draw on existing opinions to reflect the community being governed. While a full historical account of the years leading up to *Roe* is not required, there are a few key events that made the decision possible and that offer crucial insights into the decisions made by the Court with respect to both language and rationale. Inside the legal system, the Supreme Court was increasingly recognizing privacy rights for Americans, particularly regarding family planning matters. Outside, among members of the medical community and the general public, values related to abortion were shifting, and those shifts were being communicated. Examples of these individual rhetorical

moments demonstrate the rhetorical series of events that the law draws on to create its narrative, articulating and justifying its decision.

The connection between past, present, and future cases is a crucial component of the Court's ability to create power through its storytelling role. In the US legal system, the precedent of earlier cases, particularly previous decisions by the Supreme Court, is critical not only for the cases' legal guidance but also for their rhetorical contributions to the available means of future Courts. The two Supreme Court cases most essential to the *Roe* narrative, and setting the stage for increased reproductive freedom, are *Griswold v. Connecticut* and *Eisenstadt v. Baird*. Decided in 1965, *Griswold* held that several specific constitutional protections, taken together, create a certain "zone of privacy," included in which is a married couple's decision to use contraceptives (485). Accordingly, states were prevented from interfering with that right. *Eisenstadt*, decided a year before *Roe*, extended the right to use contraceptives to unmarried women, holding that distinguishing between married and unmarried women violated the Equal Protection Clause (456).[22] Importantly, the Court made clear that the right to privacy applied to individuals, as opposed to a married couple as an entity, and that it encompassed not only bedroom matters, but also childbearing. According to the *Eisenstadt* Court, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (454). Because of the legal system's constraint of precedent, both the resulting freedom and the privacy rationale on which it was built would be essential for *Roe*. Highlighting the significance of the timeline, Nan Hunter notes that *Eisenstadt*

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[22] Relevant to the analysis, this equality violation should be understood as based solely in marital status rather than gender more broadly.

was pending before the Court while Justice Blackmun was working on the initial draft opinions in *Roe* and *Doe* and asserts that Justice William Brennan, the author of the *Eisenstadt* opinion, took the opportunity to expand marital privacy to outside of marriage, creating an authority that could be then cited in *Roe* (167). I suggest that considering precedent as a positive constraint reveals that the authority Justice Brennan provides is both legal and rhetorical. While not suggesting anything unethical, the situation demonstrates how the rhetorical choices can increase power when made as part of a coordinated effort. Furthermore, these two cases not only laid the legal foundation for *Roe*, they also reflected and affirmed the shifting community values that protected issues related to consensual sex from government interference, including heterosexual sex between unmarried adults.[23] Moreover, these cases were not only reflecting, but also becoming part of a larger narrative of changing values on reproductive rights, including abortion.

As discussed in chapter 1, for the Court to effectively persuade the public, it must work within a framework that the public already accepts. Notably, in the years leading up to *Roe*, there is evidence that support for creating a federal right to obtain an abortion was growing outside the court system as well. First, professional groups began to voice their change in attitude regarding abortion. Tracing the history of public discussions on abortion leading up to *Roe*, Greenhouse and Siegel observe, early health arguments for changing abortion laws involved protecting women from illicit abortions and addressing pregnancies where the child would be born with severe developmental problems ("Before (and After)" 2036-2037). Thus, they note, "A group of mostly male doctors, lawyers, and clergy increasingly argued that medicine, not law, should regulate the practice of abortion to provide access to women facing exceptionally difficult

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[23] It would take significantly longer for non-heterosexual couples to be afforded the same privacy rights.

pregnancies" (2037), a view that would ultimately be reflected in the *Roe* opinion. Notably, these ideas were not out-of-the-blue, as there was an existing framework in place that offered some options for women seeking abortions, specifically therapeutic abortions. Many states allowed for abortions when, sometimes multiple, physicians determined it was necessary for a women's health; these were known as therapeutic abortions. Reasons could include both physical and psychological concerns, as well as significant birth defects. However, the system was onerous and the results uncertain, as women were left entirely at the mercy of physicians, who were, in turn, at the mercy of inconsistent enforcement both between and within individual states. Ironically, although the Hyde Amendment would later erase much of *Roe*'s reproductive progress for poor women, Greenhouse and Siegel cite pre-*Roe* public health studies and publications that assert the primary problem with the current system of therapeutic abortion was disparate access based on wealth (2036).[24] In any event, these discussions led to legal and medical associations adopting new official positions on the regulation of abortion.

As the governing body of the medical profession, the American Medical Association (AMA) was also an essential contributor to the larger abortion narrative, one that the *Roe* Court draws on to support its decision on an issue in which the medical community was directly implicated. Although the AMA had previously taken a stance against abortion, in June 1967, it released a new policy statement together with a detailed account of a report by the Committee on Human Reproduction and related discussions. The report, which was prepared with the AMA Law Department, summarized existing abortion laws in the different states and, although noting

[24] They quote the response of one public health official describing the difference between therapeutic and illegal abortions: "Actually, according to my definition, in many circumstances the difference between the one and the other is $300 and knowing the right person" (2036).

a connection with ethics, was focused on resolving legal confusion rather than ethical issues (41-43). The AMA report reflects both the uneven availability of therapeutic abortion and the growing range of reasons for providing them, which in turn caused conflict with the laws of most states as some physicians took a broader view of what constituted health risks for a pregnant person (42). [25] Psychiatrists were particularly implicated because suicide risk was one of the few possibilities for establishing the risk to life required by most laws absent a clear physical health concern (43). In addition to the consultation with the AMA's Law Department, the Committee's report provides an account of liaison activities, including meetings with the legal profession as well as psychiatry, clergy, and child care organizations (44-46). In some ways, the legal and medical communities appear to be working in harmony, showing deference to the other's views within its own area of expertise. In its 1967 statement, the AMA stops short of officially adopting a suggested new law but lends its support to existing legislative efforts by other medical associations. Specifically, the AMA quotes the California Medical Association's statement of support for a pending bill to modify California's law to one similar to the Model Penal Code,[26] stating that they support the "moderate position as one that is reasonable, medically justified and

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[25] As explained in the AMA report, "The laws governing therapeutic abortion in the United States vary somewhat in phraseology. Basically, however, in 45 states the laws permit induced termination of pregnancy only to save or preserve the life of the mother, and in the remaining 5 states and the District of Columbia, to protect the health or safety of the mother" (1967: 42). The report goes on to note that most of the laws were enacted about 100 years prior, when termination was risker, the field of psychiatry was new, and the birth defect risk from rubella was unknown. The report further states that modern pregnancy care is improved. Highlighting the discrepancy between law and practice, the report observes, "Yet, each year in the United States approximately 10,000 pregnancies are terminated by licensed physicians in accredited hospitals with the knowledge and concurrence of consulting colleagues. Few of these are necessary to save the mother's life" (42).

[26] The Model Penal Code is a "suggested" universal law code designed to help states make laws that are relatively uniform. It has no actual authority but represents the best consensus among the legal community regarding criminal law.

in the best interest of the patient and quality medical care" (48), thus articulating its focus on patient care and its alignment with the legal community on the issue. This is significant because it demonstrates that when the *Roe* Court aligned itself with the medical community's position on abortion, it was reciprocating the AMA's initial move. In fact, in the few years leading up to *Roe*, several states started revising their therapeutic abortions laws in ways that more closely reflect the AMA's position, and four states began allowing elective abortions. [27]

While the AMA did not posit specific new laws, it offered an extended discussion of its view on criminal abortion, seeking to redefine rather than abolish the concept and acknowledging limits to unfettered abortion access.[28] Explicating the AMA's position on criminal abortion is central to unpacking its contribution to *Roe* narrative because it underpins the primary goals and explains the Court's framework for pre-viability regulations. Analyzing the AMA's rhetoric from a legal perspective reveals both a more nuanced objection as well as a clear connection to the focus on women's health during the first two trimesters. The AMA's 1967 statement contains a section specifically addressing so-called criminal abortion—as opposed to therapeutic abortion—and affirming its continued support of preventing such abortions, asserting that it "is unequivocally opposed to any relaxation of the criminal abortion

[27] Between 1967 and 1970 twelve states passed laws that allowed for abortions, based on medical committee review, for reasons of health, sexual assault, and significant birth defects: Colorado, North Carolina, California, Maryland, Georgia, Arkansas, Delaware, New Mexico, Kansas, Oregon, South Carolina, and Virginia (Greenhouse and Siegel, "Before (and After)" 2047). In 1970, four states repealed their previous abortion laws, allowing abortion in "early" pregnancy without restriction: Alaska, Hawaii, New York, and Washington (2047).

[28] Because the legal issue with respect to abortion centers on whether physicians may legally perform them, thus allowing safe and legal abortions, at the time of *Roe* criminal abortions, those performed outside the proper clinical setting, were the only alternative to therapeutic abortions, those performed in a clinical setting. The elective abortions allowed in four states were too new to be fully understood legally, though their existence likely accounts for the factual detail that Jane Roe could not afford to travel from Texas to another jurisdiction.

statutes" (43). Owing to this statement, in their book on the broader historical context of *Roe*, Greenhouse and Siegel critique the AMA's position as a "modest step" and suggest that the report "disavowed any effort to loosen the legal restrictions on abortions that lacked therapeutic indications" (*Before* Roe 26). However, a closer look at the entire section on criminal abortion reveals that the AMA's primary concern was patient care. Importantly, the AMA explicitly defines criminal abortion as "the interruption of pregnancy by either physician or non-M. D. under clandestine circumstances; i.e., outside the hospital without keeping of records and without consultation" (1967: 43). Moreover, the AMA explains its opposition to criminal abortion as being "deeply concerned with *the large number of abortions performed outside of hospitals* and believ[ing] that all possible avenues should be utilized to reduce the toll of human misery produced by this illicit procedure" (43; my emphasis). Thus, rather than viewing criminal abortion as merely "lacking therapeutic indications," the AMA is primarily concerned with abortions that are performed outside of hospitals without proper records and/or by those who are not physicians. In fact, the AMA's discussion of the laws regarding therapeutic abortions was focusing on substantially broadening what circumstances could be considered therapeutic, and it expressly declined "to raise the question of rightness or wrongness of therapeutic abortion" (49). Taken together, this demonstrates a focus not on regulating an individual's motivation for seeking an abortion, but rather on the circumstances under which abortions are performed, which, in turn, suggests a primary motivation of protecting women's health.[29] Moreover, the AMA's language signals its willingness to continue to support both reasonable limits and self-

[29] Although as the primary governing body, the AMA is likely also concerned with the medical profession's authority, including its own; however, its desire to address "the toll of human misery" indicates its concern about patient health.

governance, an essential component of the connection between the two groups of professionals as they sought to change the landscape of reproductive rights and a position that allows the *Roe* Court to follow the lead of the medical community.

Finally, perhaps in part persuaded by public statements of legal and medical associations, the public's opinion was changing as well, as evidenced by a 1972 poll by George Gallup indicating that nearly two-thirds of Americans supported legalizing abortion (A2). As discussed further below, both the public's opinions and Gallup's framing of the questions that elicit public support contribute to the rhetorical choices the Court makes in constructing the legal abortion story. In sum, although many suggest that the decision in *Roe v. Wade* was too much, too soon, thus setting off an urgent, and long-lasting, need to undo it,[30] the historical context demonstrates the many tools the High Court had at its disposal for persuading its audiences that its ruling was right, just, inevitable, and, perhaps most importantly, in-line with their existing values.

Shared Goals and Women's Health

Elucidating the rhetorical choices made by the *Roe* Court requires careful attention to the exigence that was driving the abortion narrative at the time of the decision. Grant-Davie's expanded view of exigence allows for a more nuanced analysis of US Supreme Court opinions by asking for considerations of moral questions and value judgments—key components of rights creation—as well as practical implications for implementing new rights. These considerations are especially relevant in an analysis of *Roe*, which is rife with moral questions and has the

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[30] Greenhouse and Siegel offer an extended discussion of "commentary in the academy and popular press that attributes conflict over abortion to the Court's decision in *Roe*," which they dub "[t]he '*Roe*-caused-backlash' narrative," suggesting the narrative "has acquired a life of its own, such that those who invoke it scarcely look to history" ("Before (and After)" 2071-2072).

unique practical issue of needing to alter behavior beyond that of the state because creating a right to a safe and legal abortion required both stopping state interference and maximizing the number of physicians who would perform them. Indeed, reporting on testimony to the Reference Committee at its Clinical Convention in Philadelphia in 1965, during which the issue of abortion created significant interest, the AMA observes that "[a]fter much discussion it became quite clear that there are several distinct, but related, elements in the problems of legally permissible elective abortions" including moral, legal, and medical elements, as well as issues of customs and tradition (1967: 41). This observation, which remains true today, exemplifies the inextricable tie between professional organizations and highlights the related complexities that lead to the complex rhetorical situation surrounding the *Roe* decision and the legal rights it granted. Following Grant-Davie's framework, the first step in analyzing exigence is to ask what the discourse is about, both the general subject matter and the underlying issues, specifically asking, "what questions need to be resolved by this discourse?" (268). Although the framing of these questions is itself a choice—and there are undoubtedly questions to be answered about the connection between women's equal participation in society and reproductive control—at the time of the *Roe* decision, the key issues related to family planning rights were privacy and health care. Thus, from the Court's perspective, the primary questions to be resolved were: How far is the state allowed to intrude into the private medical decisions of individuals? To what degree can the state's moral value judgments be used as justification for interfering with a physician's best medical judgment about what is in the best interest of their patient? And, relatedly, between the state and a physician, who is in the best position to ensure that society's values are reflected in any given individual case? In other words, if the community's evolving values accept that in

certain circumstances a woman should be allowed to obtain a safe, legal abortion, which professional group—legal or medical—was best situated to assess the facts?[31]

Also critical to understanding the *Roe* Court's rhetorical choices is the specific kairotic moment. While some activists were beginning to connect reproductive rights and gender equality at the time *Roe* was decided, the most urgent and dangerous issue was the health risk to women who were seeking illegal methods of terminating their pregnancies—the infamous back-alley abortions. Regardless of whether this exigence led to the broadest justification for expanded legal rights, it was the issue that was most likely to find support from both the larger public and the medical community. Indeed, as reflected in its discussion of criminal abortions, or those performed outside of clinical standards, the AMA was raising the health concerns, urgently expressing its position that "all possible avenues" be employed in response to "the toll of human misery" caused by illegal abortions (1967: 43). Similarly, there were potential health risks for pregnant people who needed to terminate their pregnancy for any number of medical issues but were unable to do so due to the unavailability of safe and legal abortions.

Although there were allowances for therapeutic abortions, the process could be complicated and the results were not uniform, thus leading to a continued lack of access for many who needed it. In the AMA's 1967 statement, it offers insight into its sense of urgency with respect to the differing state laws and the non-uniform enforcement of them. For example, the statement notes that in California the previous year, nine physicians were charged with

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[31] Of course, asking the question this way discounts the option that pregnant people are the ones in the best position to assess the situation. I frame the questions in this way not because individual choice should not be an option, but because there is no evidence to suggest it was widely considered a viable option at the time. In other words, while the moral debate over abortion showed shifts in the community's values, there was not significant support for complete deregulation.

unprofessional conduct for performing therapeutic abortions for women who had had rubella, which posed a substantial risk of birth defects but did not directly threaten the life of the mother (43). Significantly, the AMA observes this prosecution "marks the first instance in which current abortion laws have been invoked against licensed physicians who openly terminated pregnancies in an accredited hospital after consultation" (43). Although on its face this concern suggests a primary worry of physicians getting into legal trouble, coupled with the statements about criminal abortion and given the context that therapeutic abortion was the only way of addressing the health concerns of pregnant people in nearly all states, there is a clear connection between disrupting therapeutic abortions and future health risks for patients. In addition, the AMA specifically highlighted the shift in the public's views, reporting that its recommendation to revise state laws came after "noting a disparity between the law and what it believed to be a reflection of *current medical and public opinion*" (40; my emphasis). This is significant because it demonstrates the AMA's position that laws should reflect public opinion and that laws about medical care should incorporate the views of the medical community. Moreover, by tying together medical and public opinion, the AMA signals that it has the public on its side. Finally, as cases like *Griswold* and *Eisenstadt*[32] demonstrate, the legal landscape had been shifting in a way that declared contraception decisions a personal and private matter, thus paving the way for other reproductive decisions to be treated similarly. Moreover, evolving state laws suggested shifting values related to the intersection of laws and reproductive health.

[32] As discussed further below, because of the legal context's constraint of precedent, previous cases are essential not only with respect to timing, but also for considering what rhetorical tools are available to the Court in crafting its decision.

Critically, the Court needed to persuade specific audiences—medical, public, and internal—in order to accomplish its practical goal. Though the support of the medical community for a broader view of abortion had gained enough traction to alter the stance of its official governing body in a public way, it was not universal, and thus, resulted in a specialized audience that is crucial for understanding the rhetorical choices made in *Roe*. Grant-Davie's third and final question when examining exigence contemplates the goals of the discourse, the answer to which is especially illuminating in the *Roe* analysis. Following Grant-Davie's model and asking specifically "What is the discourse trying to accomplish?" (268) reveals an implied third goal that was not only important, but in fact necessary, to making the newly articulated rights meaningful and thus accomplishing the stated goal, namely ensuring the abortions women sought were actually available.

While it was within the Court's authority to establish the rights to obtain and perform abortions, the Court had no power to make abortions actually available; this power rested solely with the physicians who would—or would not—perform them.[33] Moreover, while the AMA, the body that did have some authority over physician behavior, evolved to a position of recognizing abortion as an important part of patient care in an official statement in 1970, it stopped short of requiring physicians to perform the procedure, stating that no medical professional would be compelled to violate their "good medical judgment" or "personally-held moral principles" (1970: 221). Despite the AMA's more favorable position regarding access to abortion, a group of over two hundred obstetricians and gynecologists, many of them prominent, filed an amicus brief in

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[33] Congress often uses its powers, such as taxation, to encourage certain behaviors, but the Court, whose job is only to interpret existing law, has no parallel control over individual actors. In addition, laws alone with no buy-in regarding their purpose are generally ineffective for dictating behavior, especially on such sensitive issues.

Roe urging the Court to uphold the Texas law banning abortion, passionately arguing that the "obstetrician has two patients: mother and child" and asserting that it is "deplorable to think that discussions of mortality can so easily exclude the child" (Greenhouse and Siegel, *Before* Roe 350). Accordingly, the Court would need use its rhetorical ability to persuade physicians that it was right and just, and even inevitable, that they use their medical powers to effect the right the Court was granting.[34] That some physicians were so vocally opposed further highlights the importance of persuading as many physicians as possible that elective abortions fit within the governed community's shared value system to ensure the best possible access.

Similarly, as with all opinions, the Court needed to persuade the public that the correct decision was reached so that the community would accept the result and act accordingly. Notably, because physicians are members of the governed community, public acceptance could further bolster their willingness to provide the procedure electively. Connected to the goal of persuading the public is honoring the legal context in which opinions are written, especially precedent, because the public must have respect for the legal system itself in order to be persuaded by those acting within it.[35] Indeed, precedent can be used as a positive constraint to persuade the public that the expanded right is just. Additionally, internal negotiations within the

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[34] The significance of this persuasive effort cannot be overstated. Even today, nearly half a century later, physicians can, and do, opt out of abortion training. In their article offering a narrative approach to understanding physicians' decisions, Janet Singer et al. note, "The decision on the part of obstetrics and gynecology residents to opt in or out of abortion training is, for many, a complex one. Although the public debate surrounding abortion can be filled with polarizing rhetoric, residents often discover that the boundaries between pro-choice and pro-life beliefs are not so neatly divided" (56). In fact, it remains a goal of those hostile to abortion rights to make them more difficult to access, in part, by reducing the number of providers.

[35] Chapter 3 explores how this issue can dominate the decision itself and the resulting impacts. Chapters 5 considers the damage to the Court's authority when it deviates from established precedent without sufficient explanation.

Court are important because having a stronger vote count adds persuasive value by offering a more united position. The 7-2 vote in *Roe* was particularly vital given the controversial nature of the decision. Furthermore, a higher vote count can become one of the available means for future lawyers and judges to add persuasive value.[36] Thus, the implied goal of persuading the public creates a secondary implied goal of getting as many Justices as possible to sign on to an opinion, a goal which can have material consequences on the rhetorical choices made in drafting the opinion.

Physicians vs. States on the Battlefield of Women's Bodies

As reflected in the questions that the opinion aimed to resolve, although women were being impacted in material ways by state abortion restrictions, the legal conflict in *Roe* was between the states, which desired to regulate the behavior of their citizens in a way that purported to reflect the community's moral values, and the medical community, whose movements and choices were being threatened and restricted. This clash between the states and the physicians is sometimes blamed for a framing that excluded women from participating or even being visible, in the reproductive rights story relayed by the Court. For example, in her analysis of how the Supreme Court contributes to abortion stigma beginning with *Roe*'s "narrative of woman as the passive recipient," Paula Abrams argues, "*Roe* may begin with a statement of autonomy but it ends with the woman being reduced to the battleground on which the state and the physician stake out their interests" (302-303). Similarly, in her analysis of the role narrative can play in creating empathetic understanding in the legal system, Lynne Henderson asserts, "The focus was less on women, and more on … the responsibility of

[36] Although the analysis demonstrates the majority's deviation from traditional judicial norms, chapter 4 examines how the *Carhart* dissent makes use of *Roe*'s vote count.

physicians and their 'right' to administer treatment" (1626). However, the issue before the Court was specifically about state interference in physicians' ability to provide medical care that the latter deemed appropriate. Notably, the states' abortion restrictions, including the Texas law at issue in *Roe*, criminalized the act of performing abortions, not receiving them (*Roe* 117, fn 1). In fact, such laws often explicitly excluded the pregnant women from punishment (*Roe* 151). This conflict is illustrated in the AMA's 1967 statement articulating its revised position on abortion. In the discussion of California's action to charge physicians who performed therapeutic abortions within hospital guidelines, part of a section descriptively titled, "The Therapeutic Abortion Dilemma," the report describes the impossible situation physicians were potentially facing in their efforts to be both good citizens and good medical professionals (42-43).[37] The AMA showed concern that psychiatrists in particular "may be forced to act contrary to the law and trust that no legal action will follow or to exaggerate the circumstances to justify his recommendation" (43). The keeping of accurate records being central to good medical practice, this dichotomy set up a decision that is either legally *or* medically sound, but not both. Moreover, the discussion suggests that the AMA was troubled by what it saw as the legal community extending its reach into matters that had previously been regulated within the medical community. As a professional community committed to a high standard of ethics and robust self-regulation, physicians could be viewed as an additional, yet independent mechanism for relaying and enforcing the community's moral values. In fact, the legal and medical communities had been working together toward drafting model regulations. Here, though, the

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[37] The AMA did indicate an understanding of its role in the larger conversation, noting as part of its discussion of the California issue that the "anticipated judicial review in this case could have a profound effect on abortion laws throughout the country" (1967: 43).

dispute that the Court was faced with resolving was which side, legal or medical, was in the best position to balance the moral interest of the community with the health interests of the community's members.

Given the complexity of the task at hand, creating—or recognizing—a new individual right through constitutional interpretation, the *Roe* Court relies on identification as one of its primary persuasive tools. According to Kenneth Burke, identification is the process of coalescing people, and their power, through drawing on their shared beliefs and concerns (*A Rhetoric* 20). Thus, identification comes not from being in the same position, but from recognizing where otherwise disparate people or groups have goals that overlap or are rooted in the same values, such that it is worth joining forces. Moreover, identification is grounded in taking sides in an effort to resolve conflict. Indeed, Burke observes that "[i]dentification is compensatory to division," arguing that "[i]f men were not apart from one another, there would be no need for the rhetorician to proclaim their unity" (22). Furthermore, as Burke suggests, a rhetor may persuade by creating a connection with the audience through a shared identity (46). Thus, persuasion is essential for convincing the audience to identify with the rhetor and, having convinced the audience of the shared interests, identification becomes its own persuasive technique. Finally, with his doctrine of consubstantiality, Burke argues that people identify, and thus create a community, with those who are either like them or who have interests that align with their own, making identification an important part of finding common values on which to build a society (21). Therefore, identification is a vital part of both forming a community and negotiating what the shared values of the community are, a continual negotiation. Given the High Court's role in reflecting and articulating the community's value system, particularly in an area such as

reproductive rights, considering how the *Roe* Court employed identification rhetorically illuminates potential motives behind its choices for both the physician and public audiences.

To accomplish the goal of protecting women's health, the Court identifies and aligns with the medical community, who had, through the AMA, demonstrated its shared concern regarding women's health and access to safe, legal abortions. The medical community was also concerned about the disparate enforcement of laws against abortion, particularly where the laws questioned the physician's medical judgment about therapeutic abortion. The Court sided with the medical community on this issue as well, creating space for physicians to operate and make medical decisions, using viability as the line for interference on behalf of the fetus. Although states could make pre-viability regulations after the first trimester, those regulations had to share the goal of protecting women's health. Examining how the Court progressed regarding its view of women's decision-making capability, Siegel asserts the *Roe* Court's decision "was in part a decision to emancipate doctors from the hazards of random prosecutions; in part it reflected concern about the hazards to women of illegal abortions" ("Dignity" 1774). Notably, because of access issues, the first goal is implicated in the second, that is, addressing the random prosecutions will also address, though not fully, health hazards. Both the language and the reasoning of the *Roe* Court demonstrate this alignment, which supports the Court in persuading physicians as well as the general public to accept this new individual right.

The Court's choice to side with the medical community over the states was not a turn away from the legal community, but rather a determination of how each side, medical and legal, might best play its part within society. The ongoing work between the two professional groups indicates that the foundation for such an alliance had already been laid. Indeed, the AMA's 1967 statement makes clear its intention to work with the legal community rather than around it.

Specifically, the AMA notes that the "granting of a license to practice medicine does not grant to the physician the right to decide for himself, based solely on his own personal conscience and social judgment, whether to obey or disobey any existing law" (41), thus recognizing the limits of its own authority. In addition, the AMA announces its view that the problem of reconciling abortion laws "is essentially one for resolution by each state through action of its own legislature" (42). While the AMA defers to state legislators, it simultaneously "offers" its assistance, thus re-asserting itself into the discussion. Specifically, the AMA adopts a position statement to be "used as a guide" for lawmakers and constituents in states considering reforms (50) and declares it within medical ethics standards "for physicians to provide medical information to State Legislatures" to assist with the reform process (51), thus articulating its expectation to have a seat at the legislative table. Moreover, in its 1970 statement, the AMA outlines its plans for self-regulation, while also reaffirming its intention to act within the confines of the law: "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that *do not violate the laws* of the community in which he practices" (221; my emphasis). Thus, the medical community indicates that it is willing to work with the legal community, including state legislatures, to address the health concerns of pregnant women. In return, it wanted to be included in the reform discussion and have protection against the actions like those taken in California against physicians who were acting within accepted medical standards. Ultimately, it would be the Court rather than the state legislatures who would meet the demands of the medical community, taking it up on its offer of assistance and drawing on the AMA's reasoning and language to argue to its physician members as well as the public.

For its part, the *Roe* Court first reminds the medical community that its current therapeutic abortion dilemma is ultimately one of its own making. The Court's discussion of the position of the AMA begins, "The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period" (141). While highlighting this historical context makes clear to the medical community, as well as the legal community and the public, that the AMA was an active participant in creating the laws it now complains about, from an identification standpoint, it also solidifies the point that the two professional communities have historically been aligned. This move adds persuasive value by justifying the Court's choice to align with the AMA now. Rather than siding with physicians at the expense of the states, the Court is adhering to the previously agreed upon position of alignment. In its opinion, the *Roe* Court discusses the AMA's 1967 policy statement as well as the revised 1970 statement, thus using the AMA's position to solidify its own. The Court specifically points out the AMA's view that abortion is a medical procedure, its reliance on physicians' judgment, and its distinction between good medical practice and "mere acquiescence to the patient's demand" (*Roe* 143, quoting AMA, 1970: 221). This discussion indicates the Court's recognition of the AMA's efforts to self-regulate in a reasonable way as well as the medical community's willingness to represent the community's values when participating in abortion decisions. Moreover, the Court declines to speculate on when life begins noting the inability of other professionals, including physicians, to do so (159), expressing its reluctance to wade into the business of making medical determinations and further marking the boundaries of each side.

Despite largely appearing to side with the medical community, the Court's opinion in *Roe* demonstrates its rhetorical understanding of the areas that the states and medical community agreed upon and aligns with the states by leaving room for them to maintain some control over the reproductive rights granted within their individual borders. Specifically, starting in the second trimester, the Court found that the states did have a compelling interest in protecting the health of pregnant people, and thus permitted regulations created toward this interest. The Court provides examples of permissible regulations, such as qualifications and licensing requirements for both the provider and the facility (163), reflecting the kinds of regulatory and best medical practice concerns raised by the medical community in the AMA's discussion of criminal abortion. In addition, once a fetus is viable, the Court allows the states near-complete discretion regarding its laws, including the ability to prohibit abortions entirely, except when "necessary to preserve the life or health of the mother" (163-164).[38] Given the conflict it is addressing, this rhetorical concession by the Court is somewhat illusory, as physicians generally were not intending to "abort" viable babies.[39] Moreover, while critiques often emphasize the Court's holding that the decision "vindicates the right of the physician" to perform abortions, the opinion first focuses on the states' remaining rights, declaring that this "decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those

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[38] Including "health" here reflects the AMA's broader view of therapeutic abortion as expressed in its 1967 report. The *Roe* Court offers no discussion about this exception, such as how and by whom necessity should be determined or how health should be defined, suggesting significant deference to the medical community on the particulars of administration and no real anticipation of pushback on this point. Yet this exception later becomes a flashpoint of the abortion rights debate, as discussed further in chapter 4.

[39] Chapter 4 further explores some of the complexities of later-term abortions, but as a general rule, if a fetus is genuinely viable—i.e., not suffering from fatal abnormalities—a pregnancy would only be terminated early in the event of a critical health issue for the pregnant person, and in such case the fetus would be "delivered" rather than "aborted."

restrictions are tailored to the recognized state interests" (165). By first highlighting what the states gained—or, at least, did not lose—the Court demonstrates that it has not completely abandoned the states in favor of the medical community. In addition, the Court anticipated the states would pass new regulations in response to the *Roe* decision; when announcing the Court's opinions in *Roe* and *Doe*, Justice Harry Blackmun specifically observes that most state legislatures were in session and could move quickly to do so (Weaver 20), thus acknowledging the ability for the states to maintain some control legally, rhetorically, and temporally. Striking this balance between the two professional communities is an important part of persuading the medical community by finding common ground while also persuading the public by maintaining the Court's position as a member of the legal community. Because the Court is ostensibly in charge of legal decisions rather than medical ones, even while aligning with the medical community, it is essential that the Court continue to frame its decision in ways that are rhetorically legible as legal. Moreover, capitalizing on areas of agreement between the two conflicting sides allows the Court to make a more persuasive argument about the correctness and inevitability of its decision. Thus, the Court's opinion rhetorically identifies with the medical community as well as state jurisdiction.

Balancing Multiple Audiences by Weaving Medical and Legal Stories

As the final authority on the interpretation of the US Constitution, the US Supreme Court plays an essential role as storyteller, not only in the legal story of rights within the community, but also in the larger understanding of the values of the community, which are reflected in those rights. As storyteller, the Court makes choices about what to tell—or not—and how, and those choices contribute to public discourse in ways that materially impact members of the community. Indeed, many of the complaints about the *Roe* opinion are focused on the Court's choice to

center physicians, arguably writing women out of the story foundational to reproductive rights. Yet, I suggest that there are potential reasons for such choices given the goals of discourse. Discussing the importance of considering what values and/or issues are at stake as part of an analysis of exigence, Grant-Davie notes the connection between setting terms of the discourse and persuading the audience toward a state of identification (268). Thus, using its role as storyteller to frame the narrative in primarily medical terms was a rhetorical move critical to effectively persuading the medical community and the public toward identification regarding a broader acceptance of reproductive rights.

Because the legal conflict is between the states and the medical community, the Court weaves together the legal and medical stories to establish the inevitability and fairness needed to persuade its audiences. Although woven, it is undoubtedly the medical story that dominates the *Roe* narrative, even at the expense of the stories of those the expanded rights were meant to protect. In her critique of the medical-dominant narrative, Abrams argues that "despite the statement by the Court suggesting that broad principles of personal liberty supported the right to choose, *Roe* described the essence of the right in far narrower medical terms" (323). Gibson makes a similar observation, noting that "Blackmun answers the concerns for women's health and prenatal life by positioning each within a narrative of medical progress" ("The Rhetoric" 318). In a 1985 critique of the *Roe* Court's rationale in the *North Carolina Law Review*, then-Judge Ruth Bader Ginsburg suggests that "*Roe* announced a trimester approach Professor Archibald Cox has described as 'read[ing] like a set of hospital rules and regulations'" ("Some Thoughts" 381). Critically, though, this medical focus allows the Court to keep women's health at the forefront of the discourse, creating a space for both physicians and the public to agree that meeting the goal of saving women from notorious back-alley abortions was worth the changes

that were being made to the legal protections granted with respect to reproductive rights. Moreover, although women's individual stories were not at the center of the discourse, their health care was an issue with which the community could identify.

Echoes of the American Medical Association

Among the Court's goals are persuading physicians to perform abortions and, given the complex history between the legal and medical communities on the issue, reciprocating the AMA's position of deference to state legislatures. Reading the AMA's statements and the *Roe* opinion together reveals significant overlap between both the reasoning and language used by the AMA and the *Roe* Court and illuminates the AMA's role as co-rhetor in the complex rhetorical situation. Echoing the language of the AMA, the governing body of physicians, allows the Court to draw on that organization's ethos, thus strengthening its own argument to the medical community. Justice Blackmun's close reading of the AMA statements, as evidenced by checkmarks on the documents, which were found in his files (Greenhouse and Siegel, *Before* Roe 26), suggests his careful consideration of the AMA's arguments, including its reasoning, likely in an effort to craft his own argument in a way that would speak to the same audience. Furthermore, using the AMA as co-rhetor allows the Court to strengthen its argument with medical ethos for a public audience that viewed abortion as a medical decision.

The first step in framing the opinion around the medical narrative was classifying the issue as one of mere medical procedure. The *Roe* Court's articulation of the state's interest in abortion appears to have been taken directly from the AMA's 1970 Resolution on therapeutic abortion. In that statement, the AMA stated the following: "Whereas, *Abortion, like any other medical procedure*, should not be performed when contrary to the best interests of the patient…. RESOLVED, That *abortion is a medical procedure* and should be performed only by a duly

licensed physician and surgeon in an accredited hospital…" (221; my emphasis). Echoing both the language and the medical standards set forth by the AMA, the *Roe* Court held, "The State has a legitimate interest in seeing to it that *abortion, like any other medical procedure*, is performed under circumstances that insure maximum safety for the patient" (150; my emphasis). This move is important because it allows the Court to deemphasize the contentious moral concern and reframe the issue in medical terms, thus aligning with the medical community and creating the appearance of objectivity and inevitability.

Having defined abortion as a medical procedure, the Court is then able to rely on a physician's right to exercise their medical judgment, persuading a physician audience using the language of its primary governing body. In its 1967 statement, the AMA reported, "The policy which the Committee [on Human Reproduction] advocates is designed to afford ethical physicians the right to *exercise their sound medical judgment* concerning therapeutic abortion just as they do in reaching *any other medical decision*" (49; my emphasis). It went on to provide its official recommendation that a licensed physician "be permitted to prescribe and administer treatment for his patient commensurate with *sound medical judgment* and *currently established scientific knowledge*" (50; my emphasis). Again, echoing the AMA's language and justification, the *Roe* Court summarizes its holding: "The decision vindicates the right of the physician to administer medical treatment *according to his professional judgment* up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, *a medical decision*, and basic responsibility for it must rest with the physician" (166-167; my emphasis). Here the Court is borrowing the policy recommendation that was, as noted above, specifically intended to guide the legal community in its efforts to reform the laws on therapeutic abortion, thus persuading the

medical community by including its justifications. Importantly, this framework allows the Court to incorporate physicians' professional judgment and science-driven rationales, which would, in turn, offer a more objective position. Furthermore, it allowed women's health to remain the focus of the debate, an essential aspect given the shared goal.

Trimester Scheme: Mortality and Viability

In addition to supporting the language of the AMA classifying abortion as a medical procedure and relying on professional judgment generally, the Court also uses certain medical terminology and concepts, to further bolster its connection to the AMA and, thus, the physicians it needs to reach. In its summary of the decision, the Court recaps its decision and sets forth the framework commonly known as the "trimester scheme."[40] In sum, the Court holds that the state may not regulate abortion in the first trimester, may regulate in ways tied to maternal health starting in the second trimester, and may regulate in ways that protect potential human life starting at viability. Notably, the Court's explanation for setting up this framework is based on the existing state of medical knowledge and leaves room for medical advancement.

In its rationale for preventing state intervention during the first trimester, the Court specifically invokes scientific advances and statistics on mortality rates:

> With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of *present medical knowledge*, is at approximately the end of the first trimester. This is so because of the *now-established medical fact*, referred to above at 149, that, until the end of the first trimester *mortality in abortion* may be less than *mortality in normal childbirth*. (163; my emphasis)

[40] Despite the prevalence of this description in public discourse and later abortion cases, the *Roe* Court does not describe its framework this way and, in fact, only used the first trimester marker for outlining the individual right. While some people associate viability with the third trimester, the Court's framework specifically relies on viability, not gestational age.

In the referenced discussion that led the Court to this conclusion, the Court observes that the government's stated reason for intervening in what, at the time was largely viewed as a medical procedure, was to protect the woman from putting her life in danger.[41] Such an argument was necessary because without the fetus classified as a person, the pregnant person was the only person for whom the state could assert a public health justification for interference. Unlike public health issues where an individual's choice could put others at risk—a global pandemic, for example—the choice to have an abortion had no impact on the health of any other individuals. Notably, in its analysis, the Court uses the same rationale *and language* as the AMA does in its statement on the issue. In its 1967 statement, among the reasons for its revised position on abortion, the AMA observes that "the majority of [state abortion] laws were enacted about 100 years ago when a host of diseases exacted a high maternal death toll, when the technique of evacuating the uterus entailed an appreciable morbidity and *mortality*" (42; my emphasis). The AMA continues this line of analysis in its revised policy statement, noting that "the majority of physicians believe that, in the light of recent *advances in scientific medical knowledge*, there may be substantial medical evidence brought forth in the evaluation of an occasional obstetric patient which would warrant the institution of therapeutic abortion" (50; my emphasis). Thus, the Court relies on the position set forth by the AMA to guide its analysis, which, in turn, contributes to the persuasiveness of that analysis. Borrowing the ethos of the AMA adds credibility not only for the law-abiding public, but also for the physicians who would need to perform the procedure.

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[41] The idea of protecting women from themselves eventually comes full circle as a justification to deny women access to reproductive health care, an issue explored in chapter 4. Here, though, it should be understood as a more general health protection, akin to the justification for seatbelt laws.

Although the Court blocked state interference during the first trimester, many scholars are critical of the physician-centered language it used to do so: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (164). However, the second part of the Court's summary offers a potential explanation: "The State may define the term 'physician,' as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and *may proscribe any abortion by a person who is not a physician* as so defined" (165; my emphasis). In other words, while the Court created an individual right to obtain an abortion and prevented the state from interfering with that right during the first trimester, it did, through its language, maintain one area of regulation at any point during pregnancy: the requirement that abortions be performed only by physicians. This connects the legal right and medical opinion, addresses the AMA's primary concern regarding criminal abortions, and persuades the medical community that the law is conforming to its comfort level. Moreover, by making the issue one of definition, the Court leaves room for changes to be made over time as adjustments may be made to the definition of physician, no doubt in consultation with the medical community based on medical advancement.

Furthermore, in addition to supporting the timing of the decision, a review of the 1972 Gallup poll, also found in Justice Blackmun's files (Greenhouse and Siegel, *Before* Roe 227), provides additional insight into the Court's rhetorical choices with respect to framing the narrative. The headline reads, "Abortion Seen Up to Woman, Doctor," and the article begins, "Two out of three Americans think abortion should be a matter for decision solely between a woman and her physician" (A2). Gallup goes on to note that the June 1972 survey "reveals that a record high of 64 per cent support full liberalization of abortion laws," which was a "sharp"

increase from January when a similar poll "found 57 per cent of the belief that abortion should be a decision made by a woman and her physician" (A2). Specifically, the statement that participants agreed with that led to these results was: "*The decision to have an abortion should be made solely by a woman and her physician*" (A2). Significantly, the result from a survey in November 1969 "found 40 per cent in favor of '*a law which would permit a woman to go to a doctor to end a pregnancy at any time during the first three months*'" (Gallup A2; my emphasis). While the more than two years between the November 1969 and January 1972 likely accounted for some of the seventeen percent approval gain—and important shift to majority approval—given the rhetorical difference in the framing of the two statements, the language likely created some of the shift as well. Accordingly, while the holding in *Roe* reflected the three-month timeframe from the 1969 statement, it would have been reasonable for the Court to decide that framing the right as granted to women in consultation with their physicians ensured a greater chance of the most public support because that is the scenario with which a majority of Americans agreed.

In addition to its decision to deny the state the right to interfere during the first trimester based on medical science, the Court similarly relies on the medical community to frame the second point of potential state interference. Although the pubic generally understands the restrictions to be based on trimesters, the Court's analysis is actually based on viability, which is both defined, and able to be changed, by medical science. Having determined that the state's interest in protecting the health of the pregnant person began after the first trimester, the Court then had to determine at what point, if ever, the state had an interest in protecting the health of the fetus. In his extensive historical analysis, Justice Blackmun details many of the differing opinions. Specifically, he observes:

> It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. … As we have noted, the common law found greater significance in quickening. Physician and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. (160)

After setting up the possible options, the Court holds: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is *at viability*. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both *logical and biological* justifications" (163; my emphasis).[42] Significantly, by using viability as the crucial point in determining the individual legal rights, the Court both dismisses the previous common law focus on "quickening" and fundamentally connects legal rights and medical science.[43] This rhetorical choice also allows for future adjustments as science continues to advance, as noted by the Court's observation regarding the 4-week range. Such a fluctuation is not generally provided for in a legal system that prides itself on its perceived objective fairness and inevitability. The Court's heavy reliance on and incorporation of the AMA's position on abortion demonstrates its efforts to include the medical community as co-rhetors in the momentous opinion, which would

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[42] Although Justice Blackmun receives the majority of the credit—or blame—for the medical narrative, Hunter details the contributions of others within the majority. Justice Powell suggested viability as the appropriate intervention point, using the logic and biology language and pointing to case law in support of his position (184).

[43] Citing a medical dictionary, Justice Blackmun defines quickening as "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy" (132). Prior to the *Dobbs* ruling, this discussion raised the possibility of the current Court upholding pre-viability bans, such as the Mississippi 15-week ban, by going back to quickening over viability and holding that the use of a legal marker is preferable to a medical one, thus obtaining the desired result without officially overturning *Roe*. Although this is not what the Court ultimately did, it demonstrates the easily disrupted nature of the inevitability rhetoric and how easily the Court could have avoided overturning *Roe* in that case, thus highlighting the political nature of the move.

both offer medical credibility and justification for the shift in legal rights and create a more persuasive argument for both the physician and public audiences.

Psychological Factors and Social Progress

Importantly, the Court's adoption of the AMA's stance on abortion stretched beyond the risks, or lack thereof, related to the procedure itself. Although the *Roe* opinion is often criticized for failing to see women as humans with varying, subjective needs, the Court does consider, albeit briefly, the broader implications of pregnancy and child care. Specifically, the Court provides examples of detriment that could be caused if a woman were prevented from getting an abortion, including potential "psychological harm" and negative effects on "mental and physical health" (153). Indeed, the Court offers a wide range of factors contributing to these harms, including distress, inability to care for a child, and even the "continuing stigma of unwed motherhood" (153). The *Doe* opinion is even more explicit regarding the broader range of relevant factors, holding that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health" (192). Notably, discussion of these issues demonstrates a recognition of a broad view of what health is and what factors can impact it.[44] That the *Roe* Court was able and willing to recognize this broader view of health appears to be a stance more progressive than that which is asserted even in modern day, as evidenced by a continued refusal by lawmakers to recognize the inextricable tie between economic status and reproductive justice. Moreover, like much of the *Roe* opinion, this argument can be connected back to the AMA's official position. In its 1967 statement, the AMA reported on a discussion of

[44] Chapter 4 examines how this moment of perceived progress is later used as a way to block access to abortions rather than increase it.

the APA Task Force, which observed that "social concepts of health … must be considered in their most modern context if medicine is to approach this [abortion] problem with any understanding" (44), noting the importance of taking this broader stance in connection with the discussion of "modernization and change of laws to meet present health needs" (45). [45] Moreover, the Task Force considered the similar debate taking place in England, and believed that the English law under consideration, which was strongly supported by those in the medical and psychiatric professions there, was superior to the Model Penal Code offered by the American Law Institute specifically because it "takes into account the social as well as the physical health of the family in its consideration of indications for medical intervention in pregnancy" (45). The AMA's clear and strong support for consideration of social and mental health factors as part of the overall discussion of the appropriateness of abortion and revision of relevant laws provided the *Roe* Court with a medically-backed justification for its recognition of the broader issues. In addition, by specifically asserting this position, the Court directly sides with the medical community over the American legal community on this point, while also persuading its audiences specifically on the appropriateness of considering health these broader terms.

Legal Precedent and Co-Rhetors

Some scholars suggest that even the legal stories were overtaken by the medical ones, thus illustrating Abrams's aforementioned state vs. physician battleground. Gibson is particularly critical, arguing that rather than offering "new thinking on about the rights and autonomy of women," the Court "grounds the right to reproductive choice squarely within a narrative of

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[45] The APA Task Force was comprised of the AMA Committee on Human Reproduction, the Council on Mental Health, and staff members of the American Psychiatric Association (AMA, 1967: 44).

medical progress" ("The Rhetoric" 319). She goes on to contrast this directly with the discussion of the individual's right to privacy, which she describes as two brief paragraphs on privacy being "overwhelmed" by over ten long paragraphs on medicine and "repeated emphasis of the *physician's right* to practice medicine" (319). Even during drafting, concerns were raised about the prominence of the medical narrative. Greenhouse reports that one of Justice Powell's law clerks sent him a memo expressing concern that in a draft of the opinion Justice Blackmun had "'placed considerable emphasis on the role of the physician and the free exercise of his professional judgment,'" and the clerk "urged Powell to take the matter up with Blackmun" ("How" 41). However, though a fair criticism that the medicine overtook the law, the narrative of individual liberty tied to medical progress is an intertwining of stories rather than a usurpation, and though the medical portion was more salient in some ways, it could not exist without its legal counterpart. Constraints of legal context, such as precedent and required analytical frameworks, dictate the options available to the Court in explaining its holding. Because of the need to follow precedent, the decision is grounded in the right to privacy established in earlier contraception cases, thus creating moments where earlier Courts act as co-rhetor. In addition, as discussed above, in establishing the Court's alignment, the opinion leaves room for certain state interventions, particularly where the values of the states and physicians overlap.

Notably, the marriage of medical and legal story within the *Roe* opinion is, in part, a product of Justice Blackmun's efforts to gain as many votes as possible and create a strong majority. Detailing the internal discussions reflected in Justice Blackmun's released files, Hunter argues that "Blackmun functioned as the broker of a decision that combined the elaboration of privacy rights sought by Brennan, Douglas, and Marshall with the insulation of medical authority which Blackmun himself certainly favored and which was also sought by Douglas, Powell, and

Stewart" (187). Not only did uniting these rationales provide a robust 7-2 majority, but neither side alone would have reached the necessary five votes. Critically, while the Court may have used medical language to do so, it did establish a fundamental individual right to obtain a safe, legal abortion and significantly curtailed a state's ability to interfere. Although subsequent cases have found creative ways to allow conservative states to work around this right, the *Roe* Court provided a strong foundation and offered extensive protection for individuals in the pre-viability stage of pregnancy. Indeed, current abortion cases are in spite of *Roe*, not because of it, following crucial but obfuscated changes made to the legal underpinnings of abortion rights nearly twenty years later.[46]

In addition to criticizing the opinion's heavily medical narrative, scholars also object to *Roe*'s failure to ground abortion rights in women's bodily autonomy or equality, instead relying on the Fourteenth Amendment's right to privacy. In her law review article, then-Court of Appeals Judge Ginsburg was particularly critical of the *Roe* Court's rationale and the holes it left in women's path to equality.[47] In particular, Ginsburg expresses concern that the Court applies an equal protection analysis to gender discrimination cases, while using only due process, or privacy, for reproductive rights cases unless expressly linked to an instance of gender discrimination ("Some Thoughts" 375-376). As discussed further below, according to Ginsburg, a foundation of equal protection would have been harder to work around and may have resulted in a different outcome in economic access cases decided after *Roe*. Significantly though,

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[46] Chapter 3 explores these changes.

[47] The context here is relevant to the fact that she had not yet faced the closed-door complexities of the High Court's rulings. Although Justice Ginsburg remained a vocal supporter of reproductive rights and gender equality, her early years on the Court suggest that she did see the value in compromise and decorum. Chapter 4 examines more closely the shift toward her more widely known "notorious" dissents.

regardless of the potential benefits, the case presented to the Court was not strongly grounded in equality, instead favoring the privacy in medical decisions approach that contraception cases had been following. Even claims that equality was briefed—that is, argued directly to the Court by a party in its brief—can be tied back to existing privacy arguments. Pointing to what she calls a "disconnect between what the Court heard in *Roe* and what it chose to say," Greenhouse argues that Jane Roe's brief offered equality arguments, quoting the brief and noting that Roe "told the Court that under the Texas law, 'When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years,' perhaps causing her to forgo education and career and 'endure economic and social hardships'" ("How" 47). While this argument relies on the same foundation as a current understanding of gender equality, it is not clear they were intended that way at the time. In fact, the next sentences in Roe's brief directly connect the points to privacy and contraception: "Texas abortion law constitutes an *invasion of her privacy* with irreparable consequences. Absent the *right to remedy contraceptive failure*, other rights of *personal and marital privacy* are largely diluted" (qtd. in Greenhouse and Siegel, *Before* Roe 227; my emphasis). Because the Court is operating in a specialized legal context, it is essential to fully explore the constraints under which it was crafting its rationale. Employing precedent as a positive constraint, the parties rely on previous courts as co-rhetor, using existing language of privacy in contraceptive decisions, and the *Roe* Court follows suit.

Importantly, using the Equal Protection Clause as a justification for abortion rights in *Roe* would have itself been novel, meaning the Court would have been not only articulating a new individual right but also using a previously untested justification for doing so. Briefly, the equality argument as it applies to reproductive choice, contraception, abortion, or otherwise,

requires a multi-step legal analysis that implies discrimination rather than simply demonstrating its existence.[48] Arguing in 2007 that even if *Roe* were overturned, a constitutional argument could still be made to limit abortion restrictions under equal protection, Siegel observes that "*Roe* was decided several years before the Court adopted its equal protection framework for analyzing questions of sex discrimination," and argues that the *Roe* Court "gave constitutional protection to the abortion choice, without fully appreciating that it was protecting values of equal citizenship as well as personal liberty" ("New Politics" 1050-1051). Moreover, discussing the current state of gender equality at the time of *Roe*, Hunter notes that it had been only two years since the Court first ruled that sex discrimination violated the Equal Protection Clause in a case challenging an Idaho estate statute that gave preference to men as executors, a case filed by the ACLU and led by then-lawyer Ginsburg (168).[49] Accordingly, with sex-based equal protection in its infancy, applying equal protection in such an innovative way would have been less

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[48] Discrimination cases use a but-for analysis—i.e., but for plaintiff belonging to X protected class, the event would not have occurred. In a straightforward case where A is fired for being a woman, the analysis show that the only woman was fired and none of the men were, thus, but for being a woman, A would not have been fired. In an abortion context, the analysis has to first find that opportunities to lead to future options, child bearing/potential child bearing/caring for children negatively impacts those opportunities, those negative impacts necessarily prevent a person's ability to participate in society equally, and thus, but for being a woman, A would be able to participate equally (at least with respect to gender). From there, the analysis still has to show that having the option to obtain an elective abortion is a necessary solution. While there is evidence to support the multi-step analysis, it was not being done yet at the time.

[49] While this initial application of the Fourteenth Amendment to sex discrimination cases occurred prior to *Roe*, cases using equality arguments to attack laws based in gender stereotypes, such as assuming men are breadwinners and women are caregivers, continued throughout the 1970s (Siegel, "New Politics" 995).

persuasive, particularly where the foundation of medical privacy and contraception was already available as precedent.[50]

This is not to say, however, that the Court ignored entirely the potential harmful effects on women. Although framed as issues to be discussed with a physician, the *Roe* Court recognized that "[m]aternity, or additional offspring, may force upon the woman a distressful life and future," including the toll of child care, "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it," and the "continuing stigma of unwed motherhood" (153). This acknowledgment seems to reflect the concerns Greenhouse highlighted from Roe's brief, especially the claim that a pregnant woman "must often forego further education or a career and often must endure economic and social hardships" ("How" 47). Most importantly, the Court met the goal of establishing an individual right to obtain a safe, legal abortion and did so in terms that honored its legal context. Indeed, as Siegel explains, "*Roe* recognized the state's interest in regulating abortion to protect maternal health and potential life without subjecting expressions of those regulatory interests to scrutiny for gender bias as the Court's equal protection cases might; yet *Roe* sharply constrained government from acting on these regulatory interests, through the trimester framework that barred most regulation of the abortion decision" ("New Politics" 1051). In other words, though the rationale may not have been as broad as it could have been, the effects of the decision should not be discounted.

Although future-Justice Ginsburg is not wrong about the additional protections that could be afforded by grounding the right in equal protection, an endeavor that Siegel argues is still

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[50] As Hunter points out, "Although some amici presented a sex discrimination argument, there is no indication in the papers of Justices Blackmun, Brennan, or Douglas that members of the Court ever discussed a women's equality analysis" (172).

possible, the choice should be considered in light of the legal context, including the precedents available and the Court's efforts to persuade the public and medical community to accept the expanded right. To that end, it is not unreasonable to imagine that a larger audience would identify with protecting an individual's medical—and even sexual—privacy rather than with making the leap from overt sex discrimination to pregnancy having the effect of such discrimination, particularly where the kinds of economic issues that caused the effect were not as widely experienced. Thus, while it is fair to acknowledge how the Court's words contribute to shaping society and to consider how using equal protection might better serve all individuals, suggesting that the Court should have used the occasion of *Roe* to not only create new legal rights for women, but to do so using innovative language of women's autonomy and theories of equality, implies an absolute authority that the Court does not enjoy and denies the Court's need to persuade rather than dictate.

The Incredible Woman: Shrinking, Disappearing, and Returning

Given the essential function of storytelling in community building and in making room for marginalized voices within legal discourse, a rhetorical analysis of *Roe v. Wade* should critically examine the role of women's voices in establishing their right to obtain a safe and legal abortion. As such, an essential question to ask is what the Court did with women's stories when asserting its storyteller authority. Even though the decision's greatest impact was on the lives of women, numerous scholars have noted that women and their stories were noticeably missing from the opinion, ceding priority to a larger medical narrative which, in turn, conflicted with states' rights. These scholars astutely observe the lack of women's stories, or even humanity, as well as a perceived lack of agency that reduces them to an object position in their own pregnancy. As such, the absence of women's stories is viewed as a significant failure of the *Roe*

opinion, notwithstanding the expanded rights it provided and the status it enjoys, even decades later, as a symbol of women's progress. In an article for the *Cambridge Quarterly of Healthcare Ethics*, Martin highlights the Roe opinion's focus on a physician's medical judgment and notes, "Women, as individuals, virtually disappeared from the Court's discussion of the trimester framework" (311). Significantly, Martin sites this as evidence that "the Court was guided more by reason than empathy and devoted very little attention to the realities of pregnancy and abortion" (311). Highlighting the narrative space ceded to physicians, Henderson similarly observes that "[t]he story of women was almost nonexistent; the story of the law of abortion, of medical knowledge, and of doctors took its place" (1626). Owing to this absence from the narrative, she suggests, "In truth, *Roe* can be characterized as the 'case of the Incredible Disappearing Woman'" (1626). Notably, Abrams subtitles her discussion on the issue "The Incredible Shrinking Woman" (311). These admittedly catchy titles reveal a genuine concern for the Court's willingness to significantly impact women's lives without telling, or perhaps even considering, their stories, a situation particularly troubling given the all-male Court that presided over the decision. For many, it is difficult to see the decision as a victory for women when they do not see themselves at all. Thus, at first glance, it is challenging to suggest ways the Court contributes to relaying women's narratives. Indeed, although Court opinions often begin with detailed statements of fact, telling the story of the parties and the circumstances that brought them to the courtroom, the only personal details provided about Jane Roe are that she was "unmarried and pregnant" and "could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions" (*Roe* 120).[51] *Roe*'s companion case offers a few

[51] Notably, in his dissenting opinion, Justice Rehnquist asserts as his first reason for disagreement that even accepting the Court's ruling that states could not regulate the first

more details about its appellant, Mary Doe, including information about her husband, existing children, and financial hardship; however, the narrative of her life and actions is limited to two brief paragraphs (*Doe* 185). Yet despite the seemingly little attention paid to the lives of the women at the center of abortion rights, a close reading of the Court's reasoning and language reveals some consideration of women's essential part, albeit not as strongly as it might have. Thus, there are moments of women's stories within the decision, intersecting in different ways with legal, medical, and public audiences and told in ways that furthers the Court's persuasive goals.

Women Challenging Laws and Consulting Physicians

Significantly though, while many would argue that forefronting the medical story came at the cost of the individual stories, like the legal stories, women are not entirely absent from the opinion. One explicit example of the Court's privileging the rights of women over physicians is its discussion of standing, which is the legal right to bring a cause of action. While the law at issue in *Roe* specifically criminalized performing abortions but not receiving them, the Court found that only Jane Roe had standing to bring the suit, not the physician who had previously been arrested for performing abortions (126). This is true even though the Court had to create a legal fiction to allow Roe to have standing, since traditional protocol would require that her case be dismissed once she no longer needed an abortion. Specifically, the Court held that Roe had standing because she was "thwarted by the Texas criminal abortion laws" (124), thus articulating the way the law restricted women's rights even though it did not criminalize their specific behavior. Furthermore, while the intervening physician was granted standing in companion case

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trimester of pregnancy, nothing in the record indicates that at the time of filing her complaint Roe was in her first trimester, only that she was pregnant (171).

Doe, the pro-woman language is even stronger. Before considering, and ultimately granting, standing for the physician, the Court explicitly comments on the lack of necessity to do so: "In as much as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergy, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence" (188). Thus, while much of the Court's language in *Roe* seems to suggest it is privileging the physicians' rights over the individuals' rights, its language addressing who has the right to challenge the existing law reveals an attention to and primacy of the individual right, suggesting a motive of persuasion rather than neglect for the focus on physicians in other parts of the opinion. Moreover, the Court selects this moment to assert the women's story to make clear that, notwithstanding the medical focus, its primary goal is to benefit women in their efforts to obtain abortions.

In addition to its prioritizing of women on the issue of standing, a close analysis of the many times the Court directly mentions the rights being granted in the opinion reveals a careful progression that actively links a woman and her physician rather than presenting her as merely a passive patient. Many critics point to the summary at the end of the decision, which proclaims that the "decision vindicates the right of the physician to administer medical treatment" and that the "basic responsibility for [the abortion decision] must rest with the physician" (165-166), as evidence of the forgotten women.[52] However, while the summary is instructive as to the holding, the full breadth of the rights lies within the document as a whole. Tracing all the Court's references to reproductive rights suggests a pattern and paints a different picture:

> At the end of a detailed description of the history of abortion rights in American law: Historically, "*a woman enjoyed* a substantially broader right to terminate a pregnancy than she does in most states today" (140; my emphasis).

[52] See e.g., Abrams 303; Hunter 148n6; Martin 311.

> After describing various ways a pregnancy could be harmful for a woman's mental and physical health: "All these are factors *the woman and her responsible physician* necessarily will consider in consultation" (153; my emphasis).
>
> Describing the rationale of lower courts that struck down laws that banned abortion: "[N]either interest justified broad limitations on the reasons for which *a physician and his pregnant patient* might decide she should have an abortion in the early stages of pregnancy" (156; my emphasis).
>
> In the first conclusion, which provides the full rationale: "[F]or the period of pregnancy prior to this 'compelling' point, *the attending physician, in consultation with his patient*, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated" (163; my emphasis).

To be sure, there are problematic aspects of the Court's language, including its assumption that the physician is male. However, rather than ignoring the woman's role in deciding her own fate, the Court starts with the woman's position and moves progressively toward the physician's role, first adding the physician, then reversing their positions, and then granting priority to the physician, before finally failing to include the woman in the summary of the holdings. Similarly, in companion case *Doe*, the Court addresses the woman's right as distinct from the physician's right. In striking down a provision in the Georgia statute that required advance approval by a hospital's abortion committee, the *Doe* Court held, "The woman's right to receive medical care in accordance with her licensed physician's best judgment *and* the physician's right to administer it are substantially limited by this statutorily imposed overview" (197; my emphasis). Although the rights are connected, by highlighting them separately, the Court makes clear that the woman and the physician each have a right, restoring subject status to the individual. Indeed, to the extent the woman's right was dependent on the physician's willingness to perform the procedure, this was a practical problem to be resolved through persuasion rather than a matter of law.

Thus, while the Court did not forefront women and their stories in the *Roe* (or *Doe*) opinion, neither did they write them out completely. Because physicians were a primary

audience of the opinion, such a move may have been designed to demonstrate the connection between women and physicians in an attempt to remind physicians of their role and appeal to their sense of duty to their patients. Moreover, as Hunter observes based on her review of Justice Blackmun's notes, in drafting the opinion for the largest possible majority, Justice Blackmun was balancing an internal audience that was divided on whether to base the decision on a strong individual right to privacy or protection of medical judgment and self-regulation (187).[53] This language, particularly the progression of rights designation in *Roe*, may reflect the Court's efforts to resolve this debate in the most unified way possible, again preserving the strength of the majority. Furthermore, working within the constraints of a legal context required that the Court adhere to expectations of objectivity, both as a matter of form and audience expectations. Regardless of the reason for the Court's choice to minimize its relaying of women's individual stories, as discussed below, the decision was not issued in a vacuum and need not be considered in one. Given the public space occupied by US Supreme Court decisions, particularly ones as significant as *Roe*, answering the question of how the Court included and excluded women's stories should consider that the Court's is not the only voice speaking, especially since the Court is aware of how its words interact with those of others.

[53] Summarizing the issue, Hunter suggests, "In short, Blackmun functioned as the broker of a decision that combined the elaboration of privacy rights sought by Brennan, Douglas, and Marshall with the insulation of medical authority which Blackmun himself certainly favored and which was also sought by Douglas, Powell, and Stewart" (187). In addition, she notes the "[d]uring his oral history interview, Blackmun declined to elaborate on why he grounded the analysis in substantive due process rather than another constitutional provision," quoting his general response: "The main thing, of course, was to try to get the Court together, because it was in such a position of equivocacy among most of the justices" (187n285).

Press as Storyteller and Co-Rhetor

Because of the significant legal, social, and cultural impact of *Roe* and the complex rhetorical situation in which the case arises, an analysis can look beyond the opinion itself. Specifically, using a feminist lens of collective action expands the consideration of what "counts" as creating legal rights, and thus, widens the view of who the contributors are and where power might be located. Grant-Davie's model for compound rhetorical situations, which he says "can be found whenever public debate arises" (275), is especially helpful for analyzing collective action. Celeste Condit suggests that "rhetoric—understood as public persuasion—is a social not individual activity" ("In Praise" 105). Specifically with respect to reproductive rights, analyzing the Redstockings' abortion speak-out of 1969, Tasha Dubriwny extends Condit's claim and builds upon scholarship on consciousness-raising, identifying the magnification effect of bringing many voices together: "A theory of collective rhetoric models a process of persuasion that envisions the creation of novel public vocabularies as the product of the collective articulation of multiple, overlapping individual experiences" (396). According to Dubriwny, the internet provides increasing space for potential collective rhetorics and notes that the theory "has application even where multiple speakers are not co-present and audiences not as visibly active" (418). Although Dubriwny is extending the theory based on more recent communication methods, similar principles can apply to other means of sharing multiple perspectives on the same story, for example, the impact of *Roe v. Wade*. While the conversation did not enjoy hashtags for clustering in 1973, the case itself served as the unifying thread.

Moreover, Kristen Hoerl uses a similar argument to tie together messaging from the Oscar-winning but highly criticized film *Mississippi Burning* and the reporting that occurred in response. Although a commercial success, when the film was released in 1988, it also drew sharp

criticism for its inauthentic portrayal of Civil Rights era history, primarily by erasing the work of Black activists and overinflating the FBI's role as white saviors. Hoerl notes that while the critiques had merit, the film was constrained by Hollywood's genre conventions and perceived audience expectations. Moreover, she recognizes that through its narrative framing, "*Mississippi Burning* ultimately reinforced the legitimacy of White hegemony and obscured the perspectives of civil rights activists" (56). However, unwilling to write the film off entirely, Hoerl observes that in direct response to the film, many journalists provided alternative views on the Civil Rights struggle, thus bringing to the forefront perspectives that had previously been missing from mainstream memory (65). This new conversation even encouraged journalists and others to pursue avenues of justice that had been written off, ultimately leading to convictions in some previously cold Civil Rights cases (70). Hoerl argues that exploring the film and its press coverage together "highlights how depictions of the past not only provide sites of rhetorical action- but comprise intertextual rhetorical *processes*" (57). This expanded view of collective messaging is particularly important to consider how space is opened for counterstories from voices that are traditionally constrained in popular culture, and it provides a useful model for considering other messages that are reported to the public.

Accordingly, we can analyze each moment of legal intervention as a piece of a larger puzzle. Examining the Court's opinion as part of a collective of rhetors—legal, public, and journalistic—offers a more nuanced picture of how the *Roe* opinion tells stories and the tension between medical, legal, and individual stories. In addition to offering its own, albeit small, glimpses into the women's lives, the *Roe* opinion served as a catalyst, providing an opportunity for the press to serve as storyteller, one which reporters took. Though it is an important function of the Court to persuade the public, much of the public receives the message not directly from

the Court but filtered through the press. Reliance on the press would have been even more vital in 1973 when, prior to the internet offering easy access to the Court's own words, many members of the public depended only on press coverage to explain their new rights. Justice Blackmun's careful collection of news materials related to the issue of abortion (Greenhouse and Siegel, *Before* Roe 227) provides evidence that the potential value of the press was on his mind. In fact, he sent a draft of the announcement he read from the bench to Chief Justice Burger the previous week with the notation, "I anticipate the headlines that will be produced over the country when the abortion decisions are announced" (Greenhouse and Siegel, *Before* Roe 245). Thus, it is essential to recognize that press coverage, which was not constrained by the same legal standards or bound to persuade audiences in the same way, as part of the *Roe v. Wade* collective narrative. In other words, the Court could make the rhetorical decision to focus its discussion on physicians' role in order to persuade physicians to perform abortions and the public to accept the new rule within its existing value system, while believing the press would highlight women's stories in its reporting on the decision. Allowing the press to shoulder the rhetorical work of telling women's stories would allow the personal details to reach the public—and doctors who were also members of the public—without compromising the Court's objectivity, thus offering more persuasive value.

In reporting on the *Roe* opinion, the press acknowledged the medical aspect of the decision, but focused more on its material effect, particularly for pregnant women. The decision in *Roe v. Wade* was front-page news, despite having to share the news cycle with the unexpected death of former President Lyndon Johnson. On the day *Roe* was decided, the late edition of *The New York Times* ran the headline announcing the ruling immediately under Johnson's headline, proclaiming, "High Court Rules Abortions Legal the First 3 Months" (Weaver 1). The opening

sentence similarly frames the issue in terms of what women, rather than doctors, had gained: "The Supreme Court overruled today all state laws that prohibit or restrict a woman's right to obtain an abortion during her first three months of pregnancy" (1). In addition, both a subtitle and the opening paragraph highlight the 7-2 vote, illustrating the value of Justice Blackmun's efforts to strengthen the majority. The article goes on to explain the trimester scheme, reporting that "[f]or the first three months of pregnancy the decision to have an abortion lies with the woman and her doctor" (1), thus including rather than excluding the woman in the decision-making process and echoing the language of the Gallup poll that expressed the terms under which the majority of Americans believed abortions should be permitted. While one section is subtitled "Decision for Doctors," the medical narrative does not overshadow the legal narrative, and space is given to women's health, including the requirement that psychological factors be considered (20). The article does quote the opinion as justifying the prohibition of state interference until after the first trimester "because of the 'now established medical fact' that until then, fewer women die from abortions than from normal childbirth" (20), thus making use of the medical authority created through the Court's use of the AMA as co-rhetor. Although the article does not offer additional personal details about the two women who brought the cases, unsurprising given the short timeframe, it concludes by directly acknowledging their efforts, noting that Roe was the only party left with standing after the others were dismissed, and providing a few of the scant available details. The section begins, "Both of today's cases wound up with anonymous parties winning victories over state officials" (20), evoking emotion despite the lack of personal details and painting each woman as a David to the state's Goliath.

In a second example, a *Time Magazine* article published two weeks after the Court's decision illustrates the way the press could—and did—highlight women's personal stories

beyond what was included in the opinion itself. Under the headline "A Stunning Approval for Abortion," the article begins: "Soon after her illegitimate son was born two years ago, 'Jane Roe,' a divorced Dallas bar waitress, put him up for adoption. At almost the same time, 'Mary Doe,' an Atlanta housewife, bore a child who was also promptly adopted" (50). The end of the opening paragraph not only tells the stories, but also acknowledges and honors their material effect: "Thanks to the Texas waitress and the poverty-stricken Georgia housewife, every woman in the U.S. now has the same right to an abortion during the first six months of pregnancy as she has to any other minor surgery" (50). Thus, while the Court's decision may have focused primarily on a medical story, it led to a public conversation about a Texas waitress and poverty-stricken Georgia housewife. Furthermore, in addition to highlighting the women whose stories paved the way, the *Time* article, like the *New York Times* report, demonstrates how the press framed the right itself for the public, here explicitly comparing abortion to "any other minor surgery." I suggest that though this comparison does frame the right in medical terms, it deescalates the controversial nature by conjuring thoughts of minor procedures and supports increased identification by drawing on a situation that anyone in the public, not just those who might get pregnant, could understand.

Although the *Roe* Court's choice to frame the narrative so strongly as a medical story creates a focus on the medical community at the expense of women's stories and to some extent, of the legal stories, it capitalizes on shared values to achieve a common goal of protecting women's health from the potential dangers of illegal abortions. Moreover, using the AMA as co-rhetor adds medical authority to the argument and appeals to the public's existing understanding of abortion as a medical decision best handled between a woman and her doctor, while persuading physicians that it is acceptable to perform them. Moreover, the Court did include

legal and women's stories, both directly and through the press, in ways calculated to support its persuasive efforts while honoring its legal constraints. Succeeding at this persuasive effort was a crucial part of the Court's goal of creating a right to abortion that would protect women from the back-alley abortions that were causing substantial harm and death. Accordingly, although it is reasonable for women to expect to be centered in a debate over their bodies, there is more at stake in *Roe* than just rights declarations. Indeed, if a court, even the US Supreme Court, fails to convince its audience that its ruling is just, fair, and right, the very rights themselves become mere words. As Greenhouse and Siegel confirm after an extensive review of the public record surrounding *Roe*, the seven Justices in the majority "appreciated that the decision would provoke controversy, but decided the case on grounds that they had reason to suppose would find broad public acceptance" (*Before* Roe 227). Ultimately, while the Court's language may not have granted unfettered individual autonomy in the way some critics would have liked, the practical effects provided individuals the right to seek an abortion, and the medical community, significantly more room to provide it.

More than Words: Material Impacts Good and Bad

The final part of a rhetorical analysis of *Roe* assesses the results of the Court's rhetorical choices, particularly those that provide insights into future advocacy for reproductive equality. One result of the *Roe* Court's framing of the narrative was the privileging of physicians' medical judgment, which shifted power from the legal realm to the medical and caused an impact more complex than merely whose story took up more space in the opinion. First, physicians were essentially granted oversight authority with respect to reproductive choices. In addition, medical judgment was integrated as part of defining states' limits, which allowed for a check on state power by those with direct contact with pregnant people and their circumstances; of course, such

checks could go either way. Significantly, positioning the medical community as arbiter of both women's choices and state's limits, vested physicians with significant supervisory power on each side, often making judgment calls on issues of moral concern rather than medical. However, while women were considered largely within their role as patients, the discussion of consultation made them active participants in their own medical care, which offered them more agency than they had previously and prioritized health care. This, too, had downsides, as the material circumstances of some women were ignored. Finally, considering the press as conveying rights to the public as part of the compound rhetorical situation offers avenues for more diverse perspectives in the larger conversation around reproductive justice.

Transferring Power to Physicians

Beyond echoing the words of the AMA, the *Roe* Court shows great deference to medical judgment in the shaping of rights it granted. Companion case *Doe* is even more explicitly pro-physician, striking down a provision in the law requiring approval by two additional physicians holding that a physician who is licensed by the state "is recognized by the State as capable of exercising acceptable clinical judgment," and thus declaring that judgment alone "sufficient" (199). It is not only as against the state that the *Doe* Court sides with the physician. Responding to Mary Doe's claim that physicians may improperly rely on their personal objections to extramarital sexual relations, the Court asserts that "appellants' suggestion is necessarily somewhat degrading to the conscientious physician" (196).[54] Notably, the Court struck down the committee requirement that Doe was complaining about anyway, thus making its vehement defense of "the good physician" primarily rhetorical. Hence, the medical story is told, sometimes

[54] Chapter 4 examines how the Court later expresses the exact opposite view on physicians' integrity to reach the opposite result on abortion restrictions.

passionately, and features prominently in the discussion. As discussed above, there are rhetorical explanations for this connection between law and medicine, specifically as related to persuading both the public and medical audiences. Yet, regardless of whether the choice was an effective rhetorical strategy, the Court's decision to focus on the medical narrative, including the extent to which it relied on the medical community as co-rhetor resulted in a significant privileging of physicians' medical judgment, both in the narrative and in the right itself. Tracing the history of physician-focused discourse in abortion cases, legal scholar Rebecca Ivey observes, "Justice Blackmun, in *Roe*, cites the concept of the doctor's medical judgment as a baseline" (1463). Notably, this reliance on medical judgment was not merely a result, but by design. Citing Justice Blackmun's response to the Justices who sought a rationale based more clearly on constitutional grounds, Hunter highlights his concern that using an individual rights-based approach would "undercut self-regulation within the medical profession" (173). Specifically, Justice Blackmun tells his fellow Justices that having "worked closely" with those in the medical community, he "can state with complete conviction that they serve a high purpose in maintaining standards and in keeping the overzealous surgeon's knife sheathed" (qtd. in Hunter 173). Moreover, Justice Blackmun favored not only the medical community's self-regulation, but also the physicians' professional judgment. In an interview he gave as part of an oral history project more than twenty years after *Roe*, Justice Blackmun asserts, "I think to this day there ought to be a physician's advice in there. I don't believe in abortion on demand" (qtd. in Hunter 185). This view is reflected in *Roe*, where Justice Blackmun speaks not only for himself but for the entire majority, in both the inclusion of the language regarding physician consultation as well as the direct rejection of Roe's argument that an individual's right to terminate a pregnancy at any time for any reason is absolute.

Taking all of this together, the above argument demonstrates that the medical framework was intended, at least in part, to address the issue of women being harmed in illegal abortions while maintaining official oversight by relying on physicians' medical judgment and self-regulation. Since, as evidenced by the strong defense of physicians in *Doe*, the Court assumed that physicians were ethical and already aligned with women's health and medical privacy concerns, it could trust them to use their judgment in ways that furthered these goals. This framework also added a layer of ethics and oversight that would pacify those who felt only "worthy" women were entitled to abortions.[55] While this is understandably a frustrating position for those seeking abortions, the primary concern at the time was saving women from illegal abortions and dangerous pregnancies, and this line of argument would get the most support from both the public and the physicians who would provide abortions. Moreover, physicians were, at least theoretically, in a better position to assess the needs of individual patients than a state government that could only make blanket laws. Though the effect would be to allow physicians, who were predominantly male, to monitor women's reproductive decisions, it also allowed much-needed access to legal abortions in a way that the majority of the public could support.

Notably though, women were not the only group physicians were entrusted to monitor. Viability of a fetus relies not only on medical science, but also on professional judgment as the physician makes the determination of viability in any particular case. Therefore, the Court's

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[55] While arguing for a pregnant person's right to have complete control over reproductive decisions is a defensible position and laudable goal, it is not at all clear that even the most skilled rhetorician could have persuaded a majority of either a public or medical audience that it was right and inevitable. Indeed, even Jane Roe framed the issue as "the right to remedy contraceptive failure" (qtd. in Greenhouse and Siegel, *Before* Roe 234) which, while meant to connect Roe's case to the earlier contraception cases, also suggests a value judgment regarding who is entitled to receive abortions.

framework integrated both potential medical progress and the physician's judgment as part of defining state's limits, granting significant authority to the medical community to, in effect, control states' ability to intervene. Furthermore, by including the AMA as co-rhetor, the Court incorporates medical judgment into the opinion itself, thus impacting its reflection of society's values. For example, in its 1967 statement, the AMA explained its revised stance by pointing to what "the majority of physicians believe" about the effect of the medical advances on the appropriateness of abortion (50). The Court's choice to echo this language by justifying its decision using improved mortality rates affects the community's value system in two ways. First, in connecting the points about mortality rates and medical advancement with prohibiting the state from interfering in the first trimester, the Court labeled the advancements as "the now-established medical fact." This suggests, rhetorically at least, that the issue is not able to be debated. However, there is nuance between the change in mortality rates—which could be more firmly established using statistics—and the effect of that change on the appropriateness of abortion—which is more fairly considered a value discussion and was handled by the AMA by referring to the "majority." Yet, the Court gives no similar explanation for how one point led to the other, and by collapsing these ideas together, gives them both the weight of medical fact. Indeed, the *New York Times* article reporting on the decision directly quoted this language (Weaver 20). Moreover, even recognizing appropriateness as a value judgment, by drawing directly on the AMA's assertion regarding the majority of physicians, the Court is privileging the value judgment of the medical community over a more general population. This is an effective rhetorical move in its efforts to persuade physicians because it was physicians who would most likely be familiar with the AMA statement and thus recognize the Court's deference to its position. It also furthers the goal of persuading the public that the result is inevitable since it

appears to be based in medical fact. However, because the Court is supposed to reflect the values of the community in which it operates, privileging medical values over those of the general public serves to essentially police the public's beliefs as well.

Accordingly, the oversized pedestal on which the *Roe* Court places medical opinion, while arguably rhetorically justifiable, also creates power imbalances on virtually every side with respect to one of the most morally controversial issues in US law. On one hand, the opinion achieves its immediate goal of creating the right to obtain a safe, legal abortion while also making space for society's desire for some limits. On the other hand, though, it conveys significant power and responsibility to the medical community to reflect the community's values regarding abortion accurately and adequately. According to Hunter, rather than relying on medical expertise in the traditional scientific sense, the "abortion decisions cleared for physicians a sufficiently expansive legal and cultural space to insulate them as they resolved, patient by patient, the clash of incommensurate social values" (194). In other words, she says, "The Court in essence delegated juridical authority to physicians" (194). Although this delegation was likely well-intentioned and explicitly meant to benefit women, it essentially amounted to the medical community policing women on one side and the state on the other. Similarly, because state regulations are intended to reflect the values of the community, allowing physicians to be the arbiter of whether women received abortions instead of the state, allows physicians to replace the public's judgment with their own, a situation that could go either way for women. Furthermore, while the alignment of the legal and medical communities may have supported the delegation at the time, it relied on continued alignment to be effective. As later chapters explore, this gives those opposed to abortion another line of attack by questioning the very ethics that were supposed to maintain "decency" around the decision.

Agency and Access but Only for Some

Another significant impact of the Court's medical narrative is that it positions women as patients, and as with privileging medical judgment, this issue has both positive and negative results. One critique of *Roe* is that even where women are not entirely absent, they lack agency, existing in the narrative only as a passive patient. Arguing that the *Roe* opinion affirms that "institutions of patriarchy and medicine, with their continued privileges, are valued above women," Gibson asserts that "[p]hysicians are agentic and women are passive or nonexistent; a demonstration that the doctor knows best" ("The Rhetoric" 320). Abrams makes a similar claim, suggesting that "*Roe* does not emphasize the decision-making autonomy of the woman," instead deeming her "a passive object in her pregnancy" (302). In this way, the woman is not only passive in her own narrative, but becomes an object in the medical story, thus allowing the medical story to grow in power. However, while not disputing that the medical narrative in *Roe* does not offer women as much agency as it might have or discounting the significance of the Court's words in shaping how society views women and their decision-making capacity, I suggest that a more nuanced reading of the opinion demonstrates space for women's agency that is greater than zero. Although the critiques see women only as passive patients, in all but the final instance of framing the right, the woman is included references to consultation, sometimes even prioritized. As such, while she may not be able to make the decision entirely alone, a situation unlikely as a practical matter anyway, rather than being merely a passive patient, she is described as an active participant in her own medical care. Moreover, simply positioning women as patients does not make them inherently passive, especially in a medical context. Particularly in 1973, before some of the pharmaceutical options available today, abortion generally was a medical procedure. In fact, Jane Roe framed the issue as a medical one. Quoting from her brief,

the Court notes that Roe "wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'" (120). Accordingly, given that there existed other, albeit sinister, methods of obtaining an abortion, especially since the law did not criminalize receiving one, the issue here was obtaining a safe, clinical abortion. In other words, Roe first positioned herself as a patient seeking to procure a medical procedure.

Importantly, while the progress in *Roe* was incremental, it did significantly improve women's access to legal abortions. Prior to *Roe*, abortions were only permitted when multiple physicians deemed them "therapeutic," which not only made access extremely uneven depending on what individual providers were willing to view as necessary, but also put pregnant women in the position of having to plead their case to physicians in potentially degrading ways. And all of this assumed that women knew such an option was even available to them. As such, as Siegel pointedly observes, "*Roe* emancipated women from the hazards and humiliations of a 'therapeutic' abortion regime" ("Dignity" 1774). In addition, although like *Roe*, the *Doe* Court's language ties a woman's rights to her physician's care, it also explicitly recognizes the impact to women, even while supporting physicians' right to exercise their medical judgment. In discussing the expanding list of factors that could be considered as impacting health, including emotional and psychological factors, the Court finds that allowing for a greater range of factors gives physicians more room to exercise their best medical judgment and that such room "operates for the benefit, not the disadvantage, of the pregnant woman" (192). Thus, the Court indicates its intent to improve women's health and patient care. Furthermore, with women seen as patients, their health could take priority, which allowed the discussion to acknowledge material impacts in ways that abstract liberty discussions often cannot and, in turn, improve material outcomes. Moreover, by collapsing the legal narrative into the medical, the Court made

it possible for this entanglement to continue well into the future; however, as this dissertation demonstrates, this situation becomes problematic in the hands of less diligent rhetors.[56]

Although there were positive effects of the Court's medical narrative, there were also negative ones, some of which became increasingly troubling over time. Most significantly, while *Roe* improved access to abortion for many, others were left out. Critiquing *Roe* and its rationale in her law review article, Ginsburg observes, "It is a notable irony that, as constitutional law in this domain has unfolded, women who are not poor have achieved access to abortion with relative ease; for poor women, however, a group in which minorities are disproportionately represented, access to abortion is not markedly different from what it was in pre-*Roe* days" ("Some Thoughts" 377). In a series of cases debating the use of Medicaid funds for abortion only a few years after *Roe*, the Court drew a distinction between blocking a woman from obtaining an abortion and easing the pathway there, holding that the right established in *Roe* only required attention to the former. Ginsburg, however, suggests that had *Roe* used an equal protection justification, the outcome may have been different, essentially arguing that if abortion were understood as an equality issue, the state would have had a duty to ensure equal access, including allowing Medicaid to pay, rather than merely protecting privacy (385). Obviously, I do not intend to take issue with the future Justice's constitutional interpretation, both because of her ethos and because I agree with her on the point. However, I emphasize that it does not appear that the *Roe* Court intended this result or could have necessarily predicted it, nor did the Court ignore economic issues entirely.[57] Hunter points out that Justice Blackmun's files contained

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[56] Later chapters interrogate how moving away from a health-centered focus contributes to decreased rather than increased access.

[57] Chapter 3 examines the evolution and impact of these Medicaid cases further.

notes to himself on an earlier abortion case that indicated a concern for economic factors and the potential issues poor women may face traveling elsewhere for an abortion (164). This concern is reflected in the opinion where, as noted above, the only personal information offered about Jane Roe is that she could not afford to travel to another jurisdiction (*Roe* 120). Given the goal of expanding the right to abortion and the need to persuade its audiences, appealing to concerns about the dangers to women's health caused by illegal abortions was arguably the Court's strongest case, while incorporating concerns about economic disparities where possible. Even fifty years after *Roe*, much of the public appears largely unmoved by the plight of the economically disadvantaged, particularly those disadvantaged beyond a level with which most can identify. That said, the continued lack of access for many, including those who are poor, rural, young, and/or racial minorities, is a weakness of the foundation set up in the *Roe* decision and should be considered as new progress is forged.

Finally, though access issues are exacerbated by the omission of women's stories in the opinion, which decreases the likelihood of empathetic identification by legal, medical, and public audiences, there are opportunities for intervention in the discourse wake caused by official court opinions. Constrained by its legal context, the *Roe* Court depersonalizes the issue in order to reflect the needed perceived objectivity. It also focuses on the medical narrative, using its position of professional power to influence the other essential group of professionals, the physicians, and to make its case based on values to which the public had already agreed. Yet, discounting women's lived experiences threatened to disconnect the rights from the individuals who most needed to exercise them. Pointing out that the "faceless" and even "nameless" women were "disembodied accumulations of medical and social data," Henderson argues that "[a]chieving empathy for such disembodied women may have been extremely difficult" (1629).

Such empathy is a crucial part of ensuring a just legal system, particularly for traditionally excluded voices. However, while the critique of language may be fair, the resulting silencing assumes the decision tells no stories outside the document's four corners. Examining it as part of the work done by a collective of rhetors, that is a compound rhetorical situation, allows for an understanding of its value despite its shortcomings, which, in turn, opens a discussion about how activists may best use all available means. Although the medical narrative dominated the Court's opinion, the women's stories were incorporated in the next step of rights creation, as the explanation moved from the Court to the public. While the Court offered few personal details, the press was able to, and did, add the individual narrative back into the story as it translated the opinion for the public, contributing to increased empathetic identification with those seeking abortions. Indeed, the *Time* article told not only the stories of Jane Roe and Mary Doe as part of its reporting, but also the stories of the many women who immediately sought abortions from medical facilities ("Stunning Approval" 50-51). This both reflects the public position and continues the argument that abortions are not just allowed, but socially acceptable, a necessary part of fully realizing a newly granted right. Yet, while the press was the primary rhetor of its articles, the Court opinion was a necessary part of the rhetorical situation, generating the news event that was being reported and the creating the legal right that was being conveyed. Storytelling serves an essential function in community building and in amplifying marginalized voices within legal discourse, and, thus, in addition to critiquing the narrative choices made by those in positions of power, scholars and activists should also consider what other parts of the larger compound rhetorical situation, such as press reports, may grant access more freely in order to make the best use of those opportunities.

Expanding Available Means

This rhetorical analysis of *Roe v. Wade* allows recognition of its positive impact, notwithstanding its admitted shortcomings, and challenges the suggestion that the opinion ignores women, by looking more critically at the rhetorical choices made by the Court in order to meet its intended goals. Assessing the opinion's result, Abrams suggests, "The irony of *Roe* is that the constitutional parameters set by the Court for regulating abortion provide far greater protection of women's self-determination and autonomy than could be discerned simply from reading the Court's minimalist description of the right to choose" (325). I argue that this result is not irony, but instead reflects a careful rhetorical choice in order to effectively expand individual rights in new ways. Despite the potential flaws in the stories that were told and excluded, the Justices, as skilled legal rhetors, penned a landmark opinion within a complex rhetorical situation. Having the support of the medical community was a crucial part of persuading the public, which was already pre-disposed to view abortion as a medical procedure, and of making the right to obtain an abortion meaningful. Using the language of the AMA, the governing authority of the medical community, helped strengthen its argument to the physicians who were an essential part of the individuals' ability to exercise their new right. Indeed, in her critique, Ginsburg acknowledges that if the *Roe* Court had stopped at invalidating the Texas law without creating the detailed, medical-based framework, "physicians might have been less pleased with the decision" ("Some Thoughts" 382). I am not suggesting that there are not valid, significant concerns about the Court's rhetoric in *Roe* and its impact on society's view of women and reproductive rights. Moreover, I am not claiming that forefronting individuals' stories would not have been an effective rhetorical choice even for an audience of physicians. In fact, one medical resident who opted out of abortion training noted the persuasive power of narrative: "I am

astounded by narratives from senior clinicians who recall the horrors of illegal abortion in the days before *Roe v. Wade*. These stories make me second-guess my decision [to opt out] on a near-daily basis" (Singer et al. 58). Instead, I maintain that an analysis of the Court's opinion in *Roe v. Wade* should consider the complexity of the rhetorical situation including constraints the Court faced in creating a solid legal foundation and, as a practical matter, to persuade the medical community to perform the procedure.

This effort is not meant to rehabilitate *Roe*, but to begin the analysis of the broader narrative of reproductive rights, particularly how as rhetoric shifts and stories are retold, the rights themselves change. Abrams argues that because the Court focuses on the physician's right to exercise "his" judgment and thus makes the choice granted to women dependent on that judgment, "it subsumes the choice protected by *Roe* within the physician's medical judgment" (304). I suggest that rather than subsuming the choice, it intertwines the stories so that they are inextricably connected. As noted above, the *Doe* opinion specifically points out that women are the beneficiaries of the expanded allowance of physician discretion. And it is that intertwining of the stories that demonstrates the essential position of co-rhetors in the narrative. As such, continuing to trace the narrative of reproductive rights reveals how the rights granted to individuals in *Roe* weaken as constraints are ignored and co-rhetors are not honored. Analyzing *Roe*, while a laborious process, sets the stage for how the stories were first told. In the next chapter, I move ahead nearly two decades and examine a case that tells women's stories in ways that were absent in *Roe*; however, those stories arguably come at a cost. Despite including a narrative that is focused on women's needs rather than doctors' rights, including an acknowledgement of equality issues, by excluding the medical narrative the opinion creates space for an abortion debate detached from health risks and compromising empathetic

identification. In hindsight, the equality gains were rhetorical, and the individual right set off down a path of destruction. While the *Roe* narrative is not perfect, intertwining rather than subsuming allows for some agency, which, once identified, can be capitalized upon and expanded. Moreover, as becomes increasingly clear as the number of physicians willing to perform abortions decreases, exacerbating access issues, the medical providers are a part of the reproductive rights story.[58]

The goal of this analysis, practically speaking, is to gain insight that furthers an understanding of how rhetoric affects reproductive rights and to discover ways to ensure additional voices become part of the narrative. Understanding a Court opinion like *Roe* as one part of collective efforts to convey the law and rights to the public, expands the space in which individuals' stories contribute to the creation and understanding of those rights. This, in turn, offers two potential areas of increased efforts, both of which could apply to other individual rights. First, recognizing the complex balancing of the Court's persuasive efforts and its use of both internal and external co-rhetors to do so informs those who speak to the Court, directly and indirectly, in crafting the most effective narrative. In addition, recognizing the reciprocal relationship between the Court and the community it governs reveals the potential affordances of publicly telling individuals' stories in the broadest terms possible and making space for a diverse array of voices, genres, and media, especially while capitalizing on ongoing legal events, which tie the stories and rights together. While the post-*Dobbs* stories are difficult to hear, they are

[58] By noting medical providers' role in the issue of reproductive rights, I do not intend to imply any inherent authority over patients or deny the existing biases within the medical community, biases which significantly disproportionately affect Black women. Stories of post-*Dobbs* medical crises highlight the urgency and importance of recognizing the medical impacts and suggest the need for increased connection with the medical community coupled with a focus on addressing biases and improving patient outcomes.

essential to the governed community's understanding of individual experiences and, thus, to expanding empathetic identification. In 1973 collective rhetorics of significant US Supreme Court opinions included stories told by journalists, and in the twenty-first century they extend to online activity, like the social media hashtag #YouKnowMe, started by a celebrity in May 2019 after disclosing her teenage abortion and used by others who shared their abortion stories. As such, rather than suggesting it is a rhetorical failing of the *Roe* Court to exclude women's stories, one can recognize the specialized work the opinion does, including generating the news event that continued and magnified relevant stories. Without Roe there can be no *Roe*, and vice versa.

CHAPTER III: *PLANNED PARENTHOOD V. CASEY* (1992):

SAVING LIBERTY OVER RIGHTS

On June 30, 1992, *The New York Times* announced "High Court, 5-4, Affirms Right to Abortion But Allows Most of Pennsylvania's Limits" in large all-capital letters across the top of its front page, accompanied by small photos of the three Justices credited with saving the landmark case *Roe v. Wade* (Greenhouse A1). This news, announcing the United States Supreme Court opinion in *Planned Parenthood v. Casey*, highlights the unexpected decision by the conservative Court and includes quotations from the opinion forcefully affirming the importance of *Roe*. Given this framing, it is unsurprising that in general, the public heard only that *Roe* remained the law of the land and, thus, believed the right to an abortion remained unchanged. However, a closer analysis of *Casey* reveals that the Court's reverence for and confirmation of *Roe* was primarily rhetorical. From a practical perspective, the changes to the individual right to obtain a legal abortion were so significant that it left the protections a mere shell of the original. Initially, the ruling was viewed as a victory for abortion rights and a confirmation that the right was grounded in an individual's control over their body rather than a doctor's right to practice medicine. Moreover, the new undue burden standard appeared to provide a more flexible consideration of how state restrictions impact individual liberty as compared to *Roe*'s seemingly rigid trimester scheme. However, in the three decades since *Casey* was decided, that flexibility did not broaden the legal understanding of individual obstacles or increase access. In hindsight, the opinion itself foreshadows the trouble to come when the jointly authored opinion, despite finding that a 24-hour waiting period would require multiple trips to the doctor, ruled the requirement was not an undue burden. Since then, the undue burden standard has been used

repeatedly to chip away at abortion rights, primarily by restricting access to the procedure through burdens that are undue in practice, even if not in theory. This substantial increase in restrictions revealed the extent of the changes made by *Casey*; however, the cause was rarely identified, as many remained unaware of *Casey*'s prominence in abortion jurisprudence until it was being overturned in *Dobbs v. Jackson Women's Health Organization*.

While on the surface this analysis may seem like a legal one, I argue that the disconnect between the reception of *Casey* and its negative impact on the individual right to an abortion are a direct result of the rhetorical choices made to meet competing goals and persuade necessary audiences. Specifically, the Court needed to meet the conservative goal of returning abortion regulation authority to the states, effectively overturning *Roe*, while persuading a public that still supported *Roe* that it could rely on the Court to honor its duty of precedent and that its current decision was right and just. In this chapter I examine the Court's goals, its efforts to meet those goals within the constraints of the specific case and the broader legal system, and the impact those choices had on the individual rights, including the public's understanding of those rights. This rhetorical analysis reveals how the Court uses—and arguably manipulates—the constraint of precedent to paint itself as duty-bound—avoiding responsibility for the original decision—and to explain its legal analysis in ways that reach its desired, if inconsistent, result. Furthermore, the Court's framing of its story within the opinion gives the appearance of honoring women but judges their choices and puts them at odds with the society of which they are a part, while cutting the medical community out of the conversation entirely in an effort to create a new conflict and avoid directly repudiating *Roe*. As such, this analysis calls into question the stability of precedent as the Court shifts to using it as a positive constraint to restrict rather than expand individual rights and avoids the negative constraint on its own power. Finally, because an assessment of

whether a given restriction is "undue" is necessarily subjective and requires empathetic identification, within the context of a legal system constrained by objectivity, the Court's perceived attention to the impact of regulations on individual women was reduced access rather than increasing it as those in positions of power struggled to apply it or identify with women whose life experiences significantly different.

Although largely overlooked by scholars and the public, *Casey* drastically altered the reproductive rights landscape more legally than rhetorically. Despite claiming to preserve the essence of *Roe* and being lauded for doing so, the *Casey* Court approaches the right to abortion and its role in preserving that right in a vastly different manner than *Roe* had, thus significantly altering the course of the discourse around reproductive rights and individuals' ability to exercise those rights. Whereas the *Roe* Court focused on the goal of making abortions available, the *Casey* Court focuses on preserving its own legacy, opting for language that sounds like the Court is concerned with the connection between abortion and equality but providing a diminished right to obtain one. In addition, the Court's strong language in support of precedent and women's rights obscured the true impact of its decision as it was reported to the public, thus giving the governed community a false sense of security. A first step in correcting this course is acknowledging the significant impact of the *Casey* decision, including the long-term effects of the Court's rhetorical choices. As an initial matter, the significance of *Casey*'s impact argues for a greater position within the reproductive rights discourse, particularly because the disconnect between its language and the rights it grants illuminates the judicial power created by the Court's rhetorical choices. In addition, because the scholarship that has discussed *Casey* largely praises the centering of women over physicians and the creation of a more subjective standard, complicating the understanding of the rhetoric of the opinion and its impact on the reproductive

rights is an important step in more accurately assessing progress and future goals. Significantly, this consideration of the Court's expansion of judicial power through rhetoric and possibilities for a more individualized legal system have potential applications well beyond reproductive rights, particularly given the increasing politicization of the High Court.

From *Roe* to *Casey*: Developing Context

For nearly two decades, the individual right to obtain a safe and legal abortion, as articulated by the US Supreme Court in *Roe v. Wade*, provided reproductive freedom for many, even though it was plagued with access issues and under near-constant threat of revocation. Despite the general public's acceptance of leaving decisions related to first trimester abortions up to a woman and her physician, an acceptance that had been reported by the news media prior to *Roe*, and the expressions of excitement over having reproductive options immediately following the decision, a growing conservative political voice began pushing back on the availability of abortions. Given the strength of the 7-2 vote in *Roe*, changing the outcome would require a significant legal and rhetorical effort. Because the High Court granted an affirmative individual right to seek an abortion in the first trimester of pregnancy, neither state nor federal lawmakers could simply legislate it away; instead, it would take a new version of the Supreme Court to "clarify" its earlier decision. While waiting for the make-up of the Court to shift in its favor, conservatives began chipping away at the foundation of *Roe*, opening up questions related to the appropriate level of judicial scrutiny and the state interest in potential life. In a series of decisions leading up to *Casey*, the Court made small moves, sometimes in dissent, to set up the appropriate change once the votes could be obtained. This history is important rhetorically because it influences the rhetorical situation, including the options available to the Court in making its argument. Precedent has become a critical constraint by the time the Court hears *Casey*,

operating as both a positive and negative that, in some ways, overtakes the analysis of the individual rights themselves.

Many of the access issues that have prevented some women from exercising their right to obtain an abortion and eventually became part of the strategy for diminishing the right began when the Court separated the right's existence from economic reality of exercising it, asserting that only the former was a government matter. In 1976, the US Congress passed the Hyde Amendment to the federal Appropriations Act, which bars the use of federal funds under the Medicaid program for abortions except in very narrow circumstances. The following year, in *Maher v. Roe*, the US Supreme Court upheld a Connecticut regulation that provided Medicaid benefits for childbirth expenses, but not for abortions unless deemed medically necessary. The vote in *Maher* was 6-3, including three in the majority who had previously voted with the majority in *Roe*.[59] The majority drew a distinction between state-imposed barriers and the state's unwillingness to address barriers for poor people: "The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation" (474). The dissent, by contrast, argued that withholding funds for abortion coupled with the offer of funds for childbirth did materially impact a woman's decision, and they argued that, given *Roe*, coercion for the purpose for encouraging childbirth was improper (483). A few years later, in *Harris v. McRae*, the Court again upheld the Hyde Amendment, this time even where a regulation refused Medicaid funds to pay for medically necessary abortions. This decision was a closer 5-4, and again the majority and dissent articulated the same distinction between a theoretical analysis of economic barriers and

[59] The three Justices were Chief Justice Warren Burger, Justice Potter Stewart, and Justice Lewis Powell, the latter of whom wrote the majority opinion.

an examination of real impact. Relying on its previous decision in *Maher*, the Court held that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category" (316). This precedent of treating economic barriers as outside state concern and ignoring the material effect of such barriers becomes an essential tool in the *Casey* rationale, both legally and rhetorically. Significantly, because precedent's use as a positive constraint is not limited to a specific issue, this rationale regarding economic barriers could apply in other contexts as well, medical and beyond.

In addition to the Medicaid cases, other cases testing various state restrictions, including hospital, parental consent, and informed consent requirements, made their way to the High Court. Although most restrictions were struck down, the votes were getting closer as the Court gained conservative-voting Justices. In one notable example, *Hodgson v. Minnesota* in 1990, the Court ruled a two-parent consent restriction unconstitutional but allowed a one-parent consent restriction with judicial bypass. *Casey* would rely on this precedent as well to establish authority for thin distinctions among groups of women impacted by its assessments of burdens. Finally, discussions of examining whether restrictions "unduly burden" the individual right made appearances in various dissents beginning with Justice Sandra Day O'Connor in her first abortion case, *Akron v. Akron Center for Reproductive Health* in 1983, as well as certain concurring opinions, again as the Court's conservative-voting numbers grew. While the *Casey* opinion would craft its own version of the undue burden standard, this history was critical to its ability to do so with the requisite amount of deference to precedent.

The US Supreme Court issued its decision in *Planned Parenthood v. Casey* on June 29, 1992, the last day of the term. In a highly unusual move, a joint opinion was co-authored by

Justices O'Connor, Anthony Kennedy, and David Souter, delivering the judgment of the Court and, on certain issues, the opinion of a 5-4 majority.[60] Unexpectedly, the Court emphatically honored the precedent of *Roe* and reaffirmed the right to an abortion. The opinion speaks in particularly compelling terms about *stare decisis*, which is the Court's duty to adhere to previous decisions. Moreover, the Court offers a strong endorsement of women's personal liberty, asserting, "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society" (852). The majority further agrees to strike down one provision, the spousal notification requirement, holding that views suggesting that women are legally subordinate to their husbands "are no longer consistent with our understanding of the family, the individual, or the Constitution" (897). Noticeably missing is the influence of the medical community, which had permeated the *Roe* decision, as women become the central focus instead. Indeed, the majority agrees to uphold the regulation that dictated the definition of a medical emergency, and four of the five vote to uphold increased medical reporting requirements. The previous marriage between legal and medical professionals had seemingly come to an end.

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[60] Although there are unofficial understandings regarding individual authorship for certain parts, the primary opinion in *Casey* is officially authored collectively by all three Justices, which is an exceedingly rare occurrence and, thus, an intentional statement. This situation is different from the more commonly known concurring opinion and the release of certain decisions without author. Justice Stevens and Justice Blackmun, the author of *Roe*, joined the joint opinion for some sections, most notably the discussions of due process, precedent, and the spousal notification provision, the only restriction not upheld. They each also filed their own concurring opinion. Although there is significant legal difference between having a majority and having only a plurality, the rhetorical distinction is primarily related to whether the joint authors may have accommodated the other two Justices in the same way any Court opinion operates. For clarity, in discussions of particular sections, I use "Court" for sections that received the vote of all five, and "joint opinion" for sections that did not.

Despite the appearance of a positive result for women's rights, the joint opinion authors alone announce a new standard of review, a middle ground approach of the undue burden standard as an intermediate level of judicial scrutiny. According to the joint opinion authors, "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (877).[61] Although the joint opinion acknowledges that the standard had been used in several previous cases, including by two of its authors, Justice O'Connor and Justice Kennedy, "in ways that could be considered inconsistent," the authors make no effort to justify or explain any previous discrepancies beyond noting their existence and stating their intention to now "set out what in our view should be the controlling standard" (877). This was perhaps an attempt to obscure any legal or rhetorical disagreement in order to maintain their united front. In addition, the joint opinion upheld all the other restrictions, including informed consent language, 24-hour waiting period, and parental consent requirement, summarily rejecting the petitioners' arguments with respect to each with minimal discussion. Unfortunately, this resulted in a vague understanding for how to apply the standard going forward. Moreover, although the Court claimed to be upholding *Roe*, the *Casey* decision changed the existing right in material ways. Most notably, by explicitly rejecting *Roe*'s trimester framework, the joint opinion significantly altered the terms under which states could restrict abortions. Under *Roe*, any restrictions before viability had to be based solely on maternal health rather than the potential life of the fetus, and no restrictions were allowed in the first trimester. *Casey* both opened up the entire pregnancy to

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[61] Although this definition appears to allow for the possibility that a law would be invalid if its *purpose* was to create a substantial obstacle regardless of its effect, applications of it generally gloss over that distinction, particularly as morally driven motivations are increasingly permitted.

restrictions based on fetal life and gave states significantly more latitude that they had had under strict scrutiny. These rhetorical claims implicated material bodies. Rhetorically, the new undue burden standard created a shift in legal protections that opened the door to many of the increasingly material conservative restrictions on access to abortion, including the recent surge in so-called "heartbeat bills, which can ban abortions as early as six weeks. Under *Roe*, there would have been no question as to the unconstitutionality of such laws. Most remarkable is that the opinion authors use rhetorical techniques, such as a heavy reliance on precedent and filtering women's stories, to craft a narrative that persuades its audience it has upheld *Roe* and honored women over physicians, while returning substantial authority to the states and obscuring the changes to the individual right.

Between a Rock and a Precedent: Saving *Roe* to Save the Court

Whereas the *Roe* Court focused on a primary goal of protecting women from dangerous illegal abortions by expanding their right to access legal ones, the *Casey* Court was faced with renegotiating the balance of state interference on behalf of the perceived moral values of its citizens and federal efforts to set a baseline of rights that would be available to everyone regardless of state attempts to interfere. Perhaps foreshadowing the early overt politicization of the Court, the goals of the *Casey* decision reflect competing interests within the legal system itself. The Court, given its solid conservative majority, wanted to walk back the protections created in *Roe*, some members seeking to reverse them entirely, and return the issue of reflecting society's moral values about abortion to the individual states.[62] Moreover, because all court decisions have the goal of persuading the public and the Court affirms and reflects the

[62] This scenario is essentially the result in *Dobbs*, decided thirty years later. Chapter 5 briefly considers the connection between *Casey* and *Dobbs*.

community's values, the Court had to balance its own moral judgments with public ideals. Further, because of the legal system's reliance on precedent and tradition, and the need to persuade the public toward compliance, in part by assuring certainty, the Court was constrained in how it could make its desired changes and not risk the very authority by which it was doing so. In other words, to avoid destroying itself, the *Casey* Court had to essentially overturn *Roe* legally in a way that would not draw attention. And, using their storytelling authority and sharp rhetorical skill, they did.

Leading up to *Casey*, the fundamental right to abortion as identified in *Roe* had been under attack, primarily by conservatives, during virtually the entire almost two decades since it was first articulated. Although the right had been shaken, particularly for those for whom economic barriers inhibited access, it had largely withstood the various assaults intact. What made *Casey* more significant than previous post-*Roe* cases, however, was the shift in the make-up of the Court. By the time *Casey* was decided, of the seven Justices who voted with the majority in *Roe*, only Justice Harry Blackmun, the opinion's author, remained. Significantly, five of those six Justices had been replaced with conservative Justices who had either previously voted against abortion rights or were expected to do so, and thus it appeared probable that conservatives finally had the votes to overturn *Roe* (Friedman 12).[63] In fact, both sides were so sure of this likelihood that Planned Parenthood pushed the case to be fast-tracked in order to get

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[63] The six Justices from the *Roe* majority had been replaced with John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas. Of those, only Justice Stevens had demonstrated support for abortion rights, while, in opinions on cases between *Roe* and *Casey*, Justices O'Connor and Kennedy expressed a willingness to limit abortion rights and Justice Scalia wanted to overturn *Roe* completely. Justices Souter and Thomas had skirted questions related to abortion in their recent confirmation hearings but were not believed to be pro-choice and certainly not to the level of the Justices they replaced (Friedman 11-12).

a decision before the 1992 presidential election thinking that if *Roe* were overturned, they wanted it to be in time for voters to respond (Friedman 12-13). As such, the primary goal of the *Casey* Court was to use its conservative majority to shift the balance of power away from the federal government and return it to the individual states. Moreover, the expectation, by both political actors and the public, that the Court would overturn *Roe*, acted as a constraint as it navigated its rhetorical choices in articulating the unexpected decision.

Because the Court has to persuade the community that its rulings are just and should be followed, how the Court set forth the revised rights was as important as what those rights were, thus creating a secondary goal of persuading the public, many of whom were skeptical of the coming decision. To meet this goal, the Court generally considers public opinion, particularly on controversial issues, as part of ensuring it is making the most persuasive argument possible to the public.[64] Although there was a lot of public debate following *Roe*, the response was not as one-sided as the Court's new conservative majority might suggest. Though Gallup rephrased its abortion questions after the *Roe* decision, it did continue to poll the public on their views regularly, and the January 1992 poll revealed that 84% of respondents thought abortion should be legal at least in some circumstances, with 31% supporting legality in all cases (Gallup). While the "certain circumstances" that the majority supported could cover a wide range of possibilities, the responses make clear that the public was not particularly interested in going back to the pre-*Roe* days of illegal abortions. Moreover, those opposed to reversing *Roe* were making their views

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[64] In his book tracing the history of the Court's interaction with the press, Richard Davis asserts that Justices "believe that their written opinions can affect how the public responds, not only to the Court's own policy resolution in the case at hand but also to the Court itself" and are "sensitive to the effects their decisions have on public opinion and their own institution's role, as well as to the imperatives of 'selling' their actions to a sometimes skeptical public" (10).

known in particularly public ways. In early April 1992, less than three weeks before the Court heard oral arguments in *Casey*, some 500,000 members of the public offered its opinion by marching from the White House to the Capitol in support of abortion rights (De Witt A1).[65] The public's interest in *Casey* remained high even during oral arguments, as the courtroom was filled beyond capacity and officials took steps to accommodate extra spectators (Greenhouse, "Abortion and the Law" A1). Thus, the stage was set for a long-anticipated showdown over abortion rights and a chance to right the alleged wrongs created when *Roe* was decided. However, both legally and rhetorically, revisiting and reshaping existing rights is a significantly different endeavor from creating rights in the first place, and meeting the goal of public persuasion required that the Court recognize the public's expectation of the security afforded by adherence to precedent.

While the conflict in *Roe* had been a battleground of doctors versus states, health consequences versus moral high ground, the official legal conflict in *Casey* is between the states' right to dictate the bounds of citizen behavior and federal checks on such interventions.[66] Although some women's experiences are more prominent in the *Casey* decision, their place in the conflict is still only secondary to those who are battling. Here, women who wish to maintain

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[65] According to a *New York Times* report, the crowd was estimated to be between 500,000 and 700,000 by police and organizers respectively, and either way was twice the size of the abortion rights demonstration three years earlier (De Witt A1). The *Times* report specifically tied the march to a sense of heightened urgency in the face of the anticipated oral arguments for *Casey*. An NPR report on the event gave voice to some of the marchers, including two who explicitly recalled the days before *Roe* and expressed their concern about returning to the days of "back-alley butchers" (Flintoff).

[66] I use this framing of the conflict because the primary issue in *Casey* was whether to overturn *Roe*, thus placing the constitutional right *Roe* articulated at the center. I do not intend to deny the material impacts of the outcome for women or suggest that this is how a discussion of reproductive rights *should* frame the conflict. I argue later in this chapter that recentering the debate as only a legal issue created space for ignoring many of those material consequences.

control over their reproductive decisions are represented by the federal government in its attempt to curtail the states, but the debate manifests as a governmental power struggle rather than a genuine concern over whether individuals have access to reproductive health care. Moreover, while the medical community attempts to remain engaged, the Court relegates them to joining the women in comprising the battlefield. Significantly, though, there is a secondary conflict in *Casey* between what the Court wants to do and what it has to do because of the rules it has mandated for itself. Although rooted in precedent as constraint, the Court's internal conflict works as a separate conflict here because rather than simply affecting the available means of persuasion, it also impacts the decision itself and, thus, the rights being granted.

Despite the potential material impacts on individuals' reproductive choice and the resulting effects on their lives, *Casey* was primarily grounded in a political and rhetorical conflict between liberal and conservative forces. News reports about the Court's decision to hear *Casey*, thus taking up abortion rights for the first time with the new restriction-friendly majority, make clear that there were significant political implications involved. Reporting for *The New York Times*, Linda Greenhouse relays the general consensus that the Court will likely uphold most if not all of the state regulations at issue and notes that several of these restrictions are essentially identical to ones struck down over the past decade ("High Court Takes" A1), subtly revealing the potential contradiction the Court would be facing by reversing course without adequate justification. As designated beneficiaries of federal protections, generally championed by the liberal side of the political aisle, women were an implied part of the conflict, represented by the federal government. Although some scholars have praised the *Casey* decision as offering more

recognition of women's place in the debate than *Roe* had,[67] the material effects of the decision on women was subordinate to the political and rhetorical debate. Moreover, while there were some members of the public who voiced concern for women's rights and vehement support for their reproductive choices, being at the center of such a public debate presents women as objects of that debate rather than real individuals facing potential impacts to their lives. In addition, having been delegated some of the oversight authority for the federal right established in *Roe*, the medical community is another party, as evidenced by Planned Parenthood's place in the lawsuit.[68] Notably, though, like women, physicians' rights were tied to federal authority, thus putting at risk both their delegated oversight role as well as their ability to freely exercise professional judgment in pursuit of patient care.

Importantly, the legal system's reliance on precedent to maintain its authority created a secondary conflict, internal to the Court itself—past, present, and future. Although the unique discourse around abortion cases suggests the existence of the right is always up for debate, the careful balance of authority and persuasion that is required for laws to work meant the answer in *Casey* could not be as simple as making a different decision. When the High Court was deciding whether to intervene in the decision of individual states to outlaw abortion in *Roe*, it could have gone either way. Having intervened, though, to reverse course with no changes other than the composition of its members threatened the integrity of the Court because it called into question not only abortion rights but the efficacy and inevitability of the judicial system itself. As Patricia Martin observes in her analysis of the case, "the unjustified rejection of *Roe* would violate the

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[67] Daly 138; Greenhouse, "How" 53; Ivey 1464; Manian 250; Martin 313

[68] The petitioners in the case, who filed suit to stop Pennsylvania's law before it took effect, are "five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services" (*Casey* 845).

Court's obligation to those who had accepted *Roe*," regardless of whether they agreed with it (313). Further, because public opinion had not swung significantly away from at least some protection for abortion rights, the Court had little on which to base a different decision.[69]

Balancing Competing Interests: Siding with One Side and Persuading Another

In *Roe*, the High Court had aligned largely with the medical community, using it as co-rhetor to demonstrate its identification with their shared goals as a persuasive technique and aligned with the states in only small ways, primarily when the states' goals were already the same as the medical community. In *Casey*, the Court makes a similar move, except it aligns primarily with the states and aligns with the federal government on behalf of women only in discrete moments and often in illusory ways. However, because of the secondary conflict in this case, the persuasive needs shift, and thus identification operates differently. First, unlike in *Roe*, the Court does not need to persuade the states that they are aligned, and thus does not need to demonstrate its identification with the states' interests.[70] Instead, its primary persuasive goal is persuading the public that the decision is just and right and inevitable, notwithstanding its apparent reversal for political reasons, and therefore that the new rights conform to the community's understanding of how the legal system is supposed to function. This goal is

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[69] This can be contrasted against the change in public opinion that made room for the Court in *Brown v. Board of Education* to essentially overrule an earlier decision. Although public opinions on race had not completely changed, there was enough of a shift to give the Court room make its argument regarding the issues with the "separate but equal" doctrine previously established in *Plessy v. Ferguson*.

[70] At issue in a case regarding individual constitutional rights is the states' right to interfere. The determination thus applies to all states whether or not a particular state chooses to be more restrictive than previously permitted. I refer to states collectively because the law applies to them collectively; I do not intend to apply that all states were seeking to increase their abortion regulations either before or after *Casey*. The states that benefit from the *Casey* decision are those that want to increase regulations. Notably, though, which specific states might be fit such a description can change depending on state-level legislative control.

particularly important because from a practical standpoint, the Court is not upholding precedent the way the system is designed, instead using the previous decision merely for its words rather than its holding. Next, although the *Casey* opinion is often praised for greater consideration of women's interest, this observation contrasted against physicians, who were centered in *Roe*. Yet in *Casey* the Court's alignment with states was in direct contrast to women's individual rights, thus moving the law away from not only the medical community but also women and, significantly, their health. In addition, the *Casey* Court's failure to align with women on issues such as economic barriers to access and informed consent was in spite of the direct negative impact of women's health, a complete reversal of the motivation of the *Roe* Court. Finally, despite the medical community's continued interest in the issue, the Court cut them out of the conversation entirely, revoking physicians' oversight authority and distancing itself from its previous alignment with them.

States' Rights and Public Opinion

Although the changes made to the fundamental individual right to obtain a legal abortion that were made in *Casey* went largely unnoticed, the opinion demonstrates a significant shift toward alignment with states' right to regulate abortion and, thus, a corresponding retreat from federal protections. Some scholars have suggested this re-alignment was an effort to address competing interests, which had become more vocal following the *Roe* decision. Writing three years after the *Casey* decision, Patricia Wald, former Chief Judge for the United States Court of Appeals for the D.C. Circuit, describes *Casey* as a "midcourse correction" of judicial overreach in *Roe*, believing the trimester framework to be too restrictive and unnecessary to the question that had been before the *Roe* Court (1411). Looking back more than fifteen years in 2009, legal scholar Neal Devins argues that the *Casey* decision represented a legal and rhetorical

compromise that balances the interests of those who seek abortions with those concerned about unborn life (1329). However, notwithstanding language that seems to center women more than *Roe* had, examining the disconnect between what the Court said and what it did reveals that rather than balancing the interests suggested by Devins, the *Casey* decision balances the Court's interest in returning substantial control over abortion regulations to the states with its need to persuade the public and follow precedent.

Because the Court's primary persuasive goal was convincing the public of the decision's justness, and thus protect itself, the Court also aligns with the public and demonstrates its rhetorical identification with public expectations. Although there is no evidence of a specific Gallup poll in any released files related to *Casey*, as there had been in Justice Blackmun's *Roe* file, there is evidence that the Court, particularly the authors of the joint opinion, was aware of public opinion and gave it some consideration in an effort to demonstrate its alignment with the governed community's values. Arguing that *Casey* was properly decided, Devins claims that "*Casey* mirrored public opinion in 1992 and it mirrors public opinion today," noting the results reflect public opinion regarding limited support for abortion with some regulation (1338). Similarly pointing to the Court's middle-ground approach, Richard Davis offers *Casey* as an example of "the Court mirroring public will," noting that the "decision hewed closely to extant public opinion on abortion" (6). Indeed, as he observes, the joint opinion acknowledges the public acceptance of *Roe* as part of its rationale (6). Specifically, the Court observes that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail" to support its finding that "[t]he Constitution serves human values, and while the effect of reliance on *Roe* cannot be

exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed" (856). Moreover, the opinion reflects an understanding of the nuances of public opinion. Specifically, in addition to asking general views on legalized abortion, which the majority of respondents supported, the January 1992 Gallup poll asked specific questions about abortion restrictions that mirrored those being considered in *Casey*, including the twenty-four-hour waiting period, providing alternatives with informed consent, and both parental and spousal notification. Each of these restrictions was supported by at least 70% of respondents (Gallup). This parsing of public opinion offers a possible explanation for how the Court, especially the conservative Justices, felt secure in drawing the line at not overturning *Roe* and making abortion illegal while allowing all but one of the restrictions.

Despite claiming to uphold *Roe*, the *Casey* Court made critical changes to the individual right that aligned with state control of abortion regulation, most significantly by moving the state interest in fetal life from viability to conception and establishing a new standard of review that would allow substantially increased state interference in individual reproductive choices. The goal of community persuasion made the constraint of precedent more crucial, as the Court contended with how to change its mind based solely on a change in membership, a problematic endeavor in a system that is explicitly designed to not be subject to political whims. Further, since a decision to not overturn *Roe* would be unexpected, the persuasion calculus had to include an explanation to both the public generally and the conservatives who had worked to put this Court in place. The *Casey* Court's rhetorical choices in aligning with the states reflect its goal of persuading the public and maintaining its own authority as part of a functioning legal system.

Pointing to the Court's recognition of the connection between birth control and women's equal participation in society, Greenhouse suggests that *Casey* was the "peak" of the Court's

understanding of women at the center of their own reproductive decision-making and how those choices are essential to equality ("How" 43). Although some of the Court's language and rationale may have given the appearance of a greater alignment with the interests of women, this was created by placing the women's interest in contrast with physicians; by moving away from alignment with physicians, it seemed like a shift toward women. However, the changes made by the Court to the protections afforded reproductive rights moved considerably toward aligning with states' rights. Significantly, while in theory state control would not necessarily be contrary to women's interests, particularly since women are members of the state community, because federal protections are, in many cases, for the purpose of limiting state interference, there is a direct conflict between the interests of the states and individuals seeking to exercise their rights to reproductive choice. Indeed, the *Casey* joint opinion explicitly granted states the right to "persuade" a woman away from making her own choices, thus aligning directly with the states' interests not just in governing their citizens, but also in controlling their behavior. Defining the issue, the joint opinion authors assert, "What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so" (877). Without recognizing the power imbalance of the state acting in its official capacity as the "others" from which a woman is not entitled to protection, the joint opinion continues by recognizing the state may "express profound respect for the life of the unborn," and holding that unless a state regulation creates a "substantial obstacle" to the right to choose, "a state measure designed to *persuade her to choose childbirth over abortion* will be upheld if reasonably related to that goal"

(877-878; my emphasis).[71] These legal and rhetorical changes create a situation that allows—indeed requires—constant balancing of competing interests when considering who could control reproductive choices and in what circumstances. Unsurprisingly, the individual most directly affected by these choices is rarely prioritized.

Material Changes to Reproductive Rights

Because establishing a state interest is the necessary first step to any state regulation, the first significant change in the protections afforded by *Roe* is the redefinition of the state's interest in the behavior of its pregnant citizens. Briefly, the state interest is the stated reason for government interference in individuals' actions. For example, a government mandated drinking age may be based in the state interest in individuals' health and welfare based on health risks and impaired driving accidents. In this example, the state interest gets balanced against an adult individual's right to make their own choices about drinking. Legal challenges can be raised over different aspects, including the balancing of the state interest and right, the connection between the interest and regulation, and the existence of the interest at all. In *Roe*, the Court had used the trimester scheme, along with its determination, after substantial review of history and disciplines, that there was no consensus on when life began, to establish a compelling state interest in the health of the mother following the first trimester and an interest in the potential life of the fetus as of viability.[72] However, supporting her argument that *Roe* opened the door by creating any state interest in potential life, legal scholar Caitlin Borgmann notes, the state interest that *Roe*

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[71] Notably, the joint opinion recognizes the right of both the state and "the parent or guardian of a minor" to express such profound respect for the unborn (877), thus creating an even larger space of conflict for pregnant minors.

[72] Although Court opinions use different terms to refer to the state interest in the fetus, some of which include "life," such as fetal life or unborn life, this interest is different from an individual's right to "life" under the Fourteenth Amendment.

allowed at viability meant that “the state was permitted to act in furtherance of its interest in fetal welfare, an interest separate from and potentially in conflict with the woman’s well-being” (“Winter” 697). The *Roe* Court’s analysis of timing was a crucial part of the right it established because it meant that no state regulations with the intent of intervening on behalf of the fetus in any way could apply before viability. Therefore, as Borgmann points out in her analysis of the importance of the health exception, “in pre-viability restrictions the state’s and the woman’s interests were by definition aligned” (697). The *Casey* joint opinion changed the crucial timing, however, and found that the state’s interest in protecting potential life begins at conception, which, in turn, opens the door for any number of pre-viability regulations.

Although Borgmann’s focus is connected to the significance of the health exception requirement of abortion regulations, it reveals the critical impact of both the timing and nature of alignment of interests. Reframing these observations reveals the larger alignment because by changing the state interest, the Court takes states and women out of a previously established alignment and then aligns the law with the states. Further, because the alignment with states is presumed to be with the interests of the fetus, which, in turn, is presumed to be in conflict with the interests of women, changing the temporal balance from viability to conception leaves no time when the state’s interest in maternal health is not competing with its interest in fetal welfare, and since the state has indicated a clear preference for the latter, this leaves maternal health with virtually no existence at all. Indeed, the undue burden standard, which accounts for the second major change made by the *Casey* joint opinion, indicates women are getting abortions *in spite of* the state not because of it, reflecting no state interest in maternal health. As such, Borgmann asserts that “by officially inviting” the conflict between the state’s fetal interest and women’s health into the period before viability, “*Casey* clearly paved the way for far greater

state encroachment on the right to abortion in the name of fetal welfare" (716). In other words, by legally and rhetorically changing the moment of state interest in fetal life from viability to conception, the joint opinion significantly and materially widens the temporal scope of the balancing of interests, creating substantially more space for aligning with states' rights, both in the case before it and in the future. To be clear, while constitutional law may be providing a modicum of balancing between women and fetuses, states that are pushing for increased abortion regulations are doing no such balancing in their own law, completely eschewing their interest in, and responsibility to, maternal health. Moreover, the position of the states suggests that women's interests are necessarily out of alignment with fetal interests, a problematic assertion.

A second way the *Casey* Court rhetorically and materially changed the rights granted in *Roe* involved the standard of review. The *Roe* Court had used strict scrutiny as the standard of review, which means that any restriction that a state placed on access to abortion had to be narrowly tailored to address a compelling state interest by the least restrictive means possible. The result of this standard is that few restrictions would be able to pass the test and state interference would be significantly limited. Conservatives wanted to instead use a rational basis test, which would mean a restriction only had to be reasonable and related to any state interest, thus allowing the vast majority of state restrictions to stand. Rather than taking sides, the joint opinion in *Casey* creates a new standard, undue burden, which uses women-centered language, but places the burden on women seeking abortions to establish that the state is unduly interfering with their right to do so. Moreover, as opposed to the trimester scheme's clear guidelines related to the timing of pregnancy, markers that would operate the same for all pregnant people even where there might still be debate about access within those timeframes, the new standard purports to consider the restrictions as they apply to different groups of women. While this level

of assessment has the potential to allow for increased access, it has equal potential to go the other way depending on whether those in power identify with the issue, and hindsight reveals reality has been the latter. Accordingly, the undue burden standard demonstrates strong alignment with states' interests, both because it shifts away from the previously nearly insurmountable strict scrutiny standard and because its inherently subjective standard gives courts, higher and lower, significant room to repeatedly side with state restrictions. Indeed, although some of the Court's language expresses a greater consideration of women, there is only one regulation for which the Court uses its new undue burden standard to align with women's interests over state interference—the spousal notification requirement.

Narrow Identification with Women

Comparing the joint opinion's application of the undue burden standard to the spousal notification requirement and restrictions with economic impacts reveals that any alignment with women's interest is largely illusory and tenuous at best, defaulting to state control regardless of material impact, granting priority to perceived public opinion while simultaneously allowing itself, and future courts, significantly more control based on personal concerns of the judiciary. Notably, the *Casey* Court struck down the spousal notification restriction, aligning with women's interests in that singular circumstance, notwithstanding public support for such a restriction. However, this deviation can be explained by the Court's ability to identify with women in situations of domestic violence. First, the growing understanding, particularly within the legal community, of battered woman syndrome[73] provided the Court with a legal framework and

[73] While early labeling was focused on women as victims, situations of domestic violence and the lasting effects are not bound by gender.

factual understanding of the complexity of the issues involved.[74] In addition, because the defense relied on storytelling to work, it created an opportunity for empathetic storytelling.[75] Such stories could be found both within the cases—and the news that reported on them—as well as in the scholarship. The petitioners' own briefs in *Casey* also told stories of domestic violence in more vivid, personal detail than they recited other facts.[76] Thus, these stories, both immediately before the Court and those lingering in its memory, provided an understanding of how women in domestic violence situations would be burdened by the regulation even if the Justices themselves had not been faced with such a situation. While the stories created an opportunity for the Justices to identify with women in domestic violence situations, the existing legal framework allowed the Court to align with both women and the law simultaneously, which dampened the sting of not aligning with the states on this singular issue. Finally, representation on the Court may have influenced the Court's ability to identify with a woman in this circumstance, particularly the idea of ceding control to her husband. Howard Ball observes ten years later that the spousal notification provision was struck down because Justice O'Connor found it personally offensive and thus approached Justice Kennedy about it (109). While such a situation speaks to the importance of representation on the High Court, it also illustrates the fragile nature of rights

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[74] Although not an official diagnosis, the theory behind the affirmative defense is that the combination of the cycle of violence and learned helplessness leaves people in situations of domestic violence unable to perceive their available options, such as leaving. The theory was growing in notoriety within the legal community in the late 1980s and early 1990s, thus putting domestic violence at the forefront of legal discourse and likely the minds of the ustices at the time *Casey* was decided.

[75] Although the defense relied on expert testimony to explain the psychology behind learned helplessness, the key was providing the compelling, gruesome details of the victim's life to evoke empathetic identification by the jury, thus leading them to understand the victim's motivation in a way that allowed them to justify her actions.

[76] Specifically, they quoted testimony of Bonnie Jean Dillion from the district court, detailing a grisly attack (Friedman 30).

making, particularly rights that are supposed to be fundamental to all individuals in the governed community.

The Court's alignment with women on the issue of spousal notification can be directly contrasted with its failure to identify with respect to economic limitations, instead aligning with conservative values and bolstered by precedent. Most notable in *Maher* and *McRae*—the Medicaid cases decided between *Roe* and *Casey*—is the opposite positions of the majority and dissent regarding the material impact of economic barriers on the exercise of constitutionally guaranteed rights. In *Maher*, the majority claimed to be "not unsympathetic to the plight of an indigent woman who desires an abortion," but then made vague references to the Constitution not promising to cure "every social and economic ill" (479). Similarly, in *McRae*, the Court makes clear that it sees no connection between its protection of individual rights and the resources an individual may require to exercise those rights, critically, even in matters of health risk. Again, this distinction could be used by future courts and legislatures to deny access to any constitutional right. Conversely, in his *McRae* dissent, putting the effect of the regulations in practical terms and invoking the original aims of *Roe*, Justice Thurgood Marshall rhetorically argues, "If abortion is medically necessary and a funded abortion is unavailable, [such women] must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term" and asserts that the Court's decision "represents a cruel blow to the most powerless members of our society" (338).[77] Accordingly, it is by applying the rules to specific scenarios

[77] In his dissent, Justice Marshall points out there are numerous medical conditions, such as cancer, diabetes, sickle cell anemia, and heart disease, which might make an abortion medically necessary for a woman, but for which Medicaid would not pay (339).

and empathizing with the women who face these impossible decisions that the dissent truly considers how to provide the promised right to a safe and legal abortion.

In *Casey*, the Court received briefs arguing for consideration of the costs of the state regulations and the burdens those costs would place on women. For example, the petitioners specifically point to the district court's finding that the twenty-four-hour waiting period would result in additional material costs, such as transportation and lodging, and would most significantly impact lower-income women, those who had to travel great distances, and those who could not explain their prolonged absence (Friedman 68-69). In theory, the undue burden standard creates space for considering the effects of regulations on women. However, with such strong precedent of ignoring the stories of poor women and, given the disparate impact, of women of color, it is unsurprising that such stories of the state restrictions negatively affecting poor women, even to the point of acting as a bar to access, were unsuccessful. Instead, the *Casey* joint opinion merely dismisses such concerns noting, "Numerous forms of state regulation might have the *incidental effect* of increasing the cost or *decreasing the availability* of medical care, whether for abortion or any other medical procedure" (874; my emphasis), showing no consideration of liberty or health factors.[78] Having already wiped their hands of the plight of women who lacked resources to exercise their right to choose, the joint opinion is unable or unwilling to identify with the impact these new regulations will have on those with limited economic resources, instead aligning with state interests, even at the risk of women's health.

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[78] Troublingly, the opinion compares its rationale here to the "substantial flexibility" states are granted in establishing their own voting rules (873-874), which, in our current climate, does not bode well for individual liberty on either front.

The Birth of Control through Informed Consent

Finally, continuing the trend of the economic cases, the Court aligns with the states over potential health concerns by endorsing state efforts to regulate reproductive choices through informed consent. Among the state restrictions upheld by the *Casey* joint opinion is the state's use of informed consent to dictate new boundaries, including the twenty-four-hour waiting period (887). While the Court's willingness to dismiss the health risks of the waiting period is itself an alignment with the states, so, too, is this new vehicle for control. Although thirty years later such use of informed consent seems commonplace, this decision in *Casey* is novel and rhetorically and materially alters the landscape of abortion regulations. Briefly, informed consent stems from tort law and the principle that when physicians commit acts that might otherwise be considered battery, such as cutting a patient open for surgery, those acts are allowed because the patient consented to them. However, for the patient to give consent, they must fully understand what they are consenting to, including the risks involved. In addition to avoiding lawsuits, medical ethics requires that physicians provide informed consent as part of good patient care. Until *Casey*, the Court had recognized physicians' responsibility and self-regulation in this area and had refused to allow states to interfere in the physician-patient relationship for their own purposes. However, in *Casey*, the joint opinion overrules the earlier decisions, again turning away from its previous alignment with the medical community. Specifically, the joint opinion relies on its newly established view regarding the state's right to express its interest in unborn life, including stating a preference for childbirth: "As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth

over abortion" (883). As is the theme in *Casey*, the Court uses the medical community as the cover for turning away from its own precedent.

Significantly though, this move shifts alignment not only away from physicians, but also patients. In her analysis of *Casey*'s impact on future abortion restrictions, Reva Siegel explains that informed consent "is designed to provide the patient information that facilitates her autonomous decisionmaking" ("Dignity" 1755). She goes on to suggest that the goal "is not to intervene in a patient's understanding of her own self-interest" but "to provide the patient information about possible benefits and risks of various courses of treatment that would enable the patient to make the medical decisions that—in *her* judgment—best serve her own self-interest and the interests of others dependent upon her" (1756). Yet, she argues, "*Casey* seems to authorize regulation that deviates, in some degree, from the ordinary informed consent dialogue designed to facilitate the patient's aims" (1757). Accordingly, although informed consent is intended to be for the benefit of patients, by shifting the goal from informing patients about health risks to informing them about the state's moral concerns, the joint opinion rhetorically also shifts alignment. Indeed, this shift is not a neutral one. As Maya Manian points out, "*Casey* permitted states to mandate information *biased against abortion* under the guise of abortion-specific 'informed consent' legislation" (250; my emphasis). Thus, rather than providing women with the necessary information to make an informed choice, including their physician's ethical counsel, allowing states to use informed consent laws to persuade women against abortions is directly interfering with women receiving necessary information, subverting the goal of informed consent and putting women's health at risk. Thus, although the *Casey* joint opinion frames its decision as based in women's health—"reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not

fully informed" (882)—the alignment is with states over women. Notably, in the January 1992 Gallup poll, eighty-six percent of respondents favored "A law requiring doctors to inform patients about alternatives to abortion before performing the procedure," suggesting the Court was bolstered by public support for this new use of informed consent and prioritizing persuading the public over protecting individual rights or even health (Gallup). Given the purpose of informed consent, regulations related to it should, by definition, be aligned with patients and their health. Yet, here, the Court authorizes informed consent regulations to serve the states' interests, not only moving away from alignment with women, but giving the appearance of the opposite, while simultaneously backing away from the medical community.

Silent Treatment for the Medical Community

Although the *Casey* Court generally refrains from direct attacks on the medical community, many of its moves to re-align with states' rights necessarily mean retreating from its previous alignment with the medical community. The joint opinion uses repudiation of the trimester scheme and viability marker to cloak its changing of legal standards, and it implies a critique of medical ethics by allowing states to directly dictate informed consent standards. Significantly, this scapegoating of physicians in order to align with the states and persuade a public audience means cutting the medical community out of the conversation, one in which that community was still participating and, given the potential health implications, in which it should have been included. In recognition of the growing efforts of states to intrude upon abortion decisions, at the 1991 Annual Meeting of the American Medical Association (AMA), delegates passed a resolution strongly condemning "any interference by the government or other third parties that causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient" (1991: 412). The AMA further

resolved to work with organizations and both the legislative and executive branches of government to oppose regulations that restrict physician-patient communications and, notably, to "inform the American public as to the dangers inherent in regulations or statutes restricting communication between physicians and their patients" (412). This resolution makes clear that the AMA was concerned about increasing informed consent restrictions, that it considered them to interfere with patient care, and that it believed the solution included conversations with both government entities and the public.[79]

In addition to the general resolution, at the 1991 meeting the AMA commissioned a study to compare the morbidity and mortality rate from illegal abortions pre-*Roe* to the current rate (364). Notably, the stated purpose of the study was "to educate and improve the understanding of the American public" and the results were to be "published in a manner that is accessible to legislators and the public by the 1992 Annual Meeting" (364). Thus, in the year leading up to the *Casey* decision, the medical community was actively involved in discussing issues related to abortion and planned to make its case to both the government and the public. Released the following year at the annual meeting, the mortality report notes the context of "continued heated national debate on abortion" and declares its purpose "to enable the voting public and *government officials* to make informed decisions concerning the medical procedure based on scientific facts" (June 1992: 318; my emphasis). Arguably the shift from "legislators" to "government officials" was a signal to the Court, particularly given the impending decision in *Casey*. The report concludes that as abortion restrictions increase, there will likely be "a small but measurable increase in mortality and morbidity" (327). This report makes clear that not only

[79] *The New York Times* reported on the AMA resolution under the headline "Doctors Condemn Abortion Ruling," demonstrating the public attention to the issue.

will new restrictions like the ones at issue in *Casey* not offer better protection for women's health, but they will increase women's health risks, particularly for women who will be most impacted by having fewer resources and/or are already at higher risk, namely poor, rural, young, and, most significantly, women of color. Moreover, it uses the same mortality language that had been previously embraced by the *Roe* Court. In addition to the AMA's efforts, a group of medical organizations tried to make their voices heard directly by filing an amicus brief in *Casey*.[80] In expressing their intertest in the case, the group noted that the challenged regulations "seriously interfere[] with a woman's ability, in consultation with her physician, to obtain an abortion" (Friedman 82), thus parroting the language of the right as established in *Roe*.

Despite the AMA's efforts to address the Court's concerns, including issuing a report directly aimed at it, the *Casey* opinion does not reflect consideration of the AMA's position, and certainly not to the extent the *Roe* Court had. The *Casey* Court was unconcerned with the medical story, paying no attention to the increased health risks or the concerns raised regarding the legislative interference with providing health care. Indeed, the statutory definition of "medical emergency," which petitioners argued is too narrow to allow for proper medical judgment, is the one regulation all five Justices agree to uphold (880). This move signals a shift away from the Court's previous alignment with the medical community and demonstration of its identification by using the AMA as co-rhetor, as it had done in *Roe*. Moreover, while the *Roe* Court may have included the medical authority to add credibility as it worked to persuade the public that abortion rights were important for medical care, here, the Court is effectively dividing

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[80] These organizations included the American College of Obstetricians and Gynecologists, the American Medical Women's Association, and the American Psychiatric Association.

the public and medical community in order to persuade the public that the appropriate alignment is with the states. Notably, the singular use of the AMA's authority in the opinion is a reference to a domestic violence report within the discussion of the spousal notification requirement, the one regulation the Court strikes down (*Casey* 891). Thus, the *Casey* Court seems to understand the role that the medical community could play in the debate, but only chooses to include them when their words otherwise lined up with the decision the Court wants to reach.

Narrative Control and Telling Stories

While examining the Court's alignments in *Casey* illuminates the considerable negative impact to the individual right to obtain a safe and legal abortion, exploring how the Court frames the narrative in the opinion reveals that a significant danger lies in the contrast between what the Court said and what it did. Despite the many health implications inherent in abortion regulations, the *Casey* Court shifts abortion rights discourse from a medical narrative to a legal one, putting itself at the center. The primary theme of the Court's narrative is its adherence to precedent, thus honoring its duty and demonstrating that the system is working as intended. In addition, the *Casey* narrative highlights women's role in the conversation and embraces arguments tied to gender equality, suggesting increased individual autonomy; these persuasive efforts are successful in that the decision is largely celebrated for its language and lauded for its progress over *Roe*. However, despite the purported honoring of precedent and the seemingly progressive framing of the narrative, the joint opinion manipulates the words of previous Courts to create the illusion of support and mask the changes to the individual rights. Moreover, the opinion provides so little guidance regarding the new standard, which is inherently subjective, that in addition to shifting oversight authority from individual treating physicians to a monolithic legal system, the protection for individuals is diminished through arbitrary application. In other words, as a

practical matter, women end up with even less autonomy regarding their reproductive rights than they had under physician-centered *Roe*. Furthermore, while the new undue burden standard requires a greater consideration of women's needs and choices, and thus the *Casey* Court gives more voice to retelling women's stories as part of the opinion, its filtering of those stories coupled with its cavalier dismissal of the burdens caused in nearly all situations, weakens women's position within the community and places their interests outside of the states without allowing space for their participation in shaping their own community values. Finally, all of the weaknesses of the Court's narrative in the *Casey* decision, particularly those related to persuading the public, are exacerbated by the press, who reports the results to the public with the same misdirected focus and minimal recognition of the effects on those for whom the federal rights were meant to protect.

The Court's Hero Story

Although praised for centering women, *Casey* is a Court story. The opening line of the opinion—"Liberty finds no refuge in a jurisprudence of doubt" (844)—sets up liberty as the damsel in distress and the Court as the hero who saves her. While the Court offers language about women's due process rights, its primary concern is protecting its own legacy. At the outset, it announces its decision to reaffirm *Roe* "[a]fter considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*" (845-846), thus highlighting its primary motives of following tradition and precedent and preserving the institution. Even describing the personal liberty that should be afforded to women, the Court concludes by asserting that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given *combined with the force of* stare decisis" (853; my emphasis). Likely the effort of conservative

Justices to explain why they did not do as expected, the opinion makes its case for inevitability not just based on guaranteed rights, but because the previous Court left them no choice.

Indeed, the explanation of why *stare decisis* forces this result, by far the most substantial section in the opinion, begins by noting the Court's "obligation to follow precedent" (854), and concludes by asserting, "The Court's duty in the present case is clear" (868). Yet, that duty is not to women, but to its own survival. Specifically, the Court finds, "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both *profound and unnecessary damage to the Court's legitimacy*, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today" (869; my emphasis). Even while upholding "the essence of *Roe*," the Court allows for the possibility of the previous decision being in error—thus eschewing any responsibility for maintaining the individual rights it claims to value—and makes clear that its top priority is itself. Martin suggests that "the Court explained its decision to uphold *Roe* "with a profound sense of duty" and "sought to maintain its legitimacy so as to maintain its authority" (313-314). The Court claims that its concern with legitimacy is for "the sake of the Nation to which it is responsible" rather than for itself (868), and in her analysis of its explanation, Martin asserts that the Court "perceived an essential link between its legitimacy and the nation's perception of its own values" (314). However, given the inextricable connection between the two—the Court and the nation's values—this seems to be a distinction without a difference. While possible that the Justices are not saving the integrity of the Court for their own personal gain, they are positioning the law over the needs of women, which implies that the two are distinct and incompatible. Such a framing not only sets up the Court as hero, but positions women as the foil for seeking the right to obtain an abortion in the first place.

In the opinion's concluding section, only a single paragraph long, the Court summarizes not the individual rights it is protecting, as it had done in *Roe*, but instead returns to its duty to honor precedent, referring to the US Constitution as a covenant running across generations and labeling its decision to uphold *Roe* as an invocation of that covenant (901). Peter Brooks highlights the Court's use of the covenant narrative to persuade the audience that this decision is principled and fits within a larger sequence (21-22). Thus, the Court is both solidifying its authority by positioning itself within the larger national story while also implying that it had no control over the decision it had to make. In addition though, it ends its story the same way it began, by making itself the hero who saved the troubled liberty, often personified as a woman. As this narrative framing demonstrates, the Court's primary motive is to explain to both the public generally and the conservatives who expected a different outcome why the Court is ruling unexpectedly and to persuade them to accept the result as just in order to preserve its own legitimacy. In his analysis of narrative and law, Paul Gewirtz suggests that authors of Supreme Court opinions use rhetoric to establish their authority, which depends in part on "the courts' broader ability to generate prospective agreement that they are doing the right thing" and provides the joint opinion in *Casey* as an example of this, noting "the intensity and fine-tuned grandeur of Justice Souter's discussion of *stare decisis*" (11). Although *stare decisis* is an essential part of the US legal system, prioritizing itself meant de-prioritizing women. Moreover, the Court's choice to highlight its duty to follow precedent had a cascading effect that would blunt the public understanding of and response to the changes made to the *Roe* protections and its almost universal alignment with state interests.

Rights Framing and Misdirection

While the true effects of *Casey* would not be immediately felt, there is a critical distinction between the way the Court frames the rights that flow from the opinion and how those rights function to protect an individual's right to obtain a safe and legal abortion. In *Casey*, the Court famously preserves the "essence of *Roe*," thus declaring its intention to maintain the individual right to seek an abortion. Moreover, it does so by privileging women over physicians, offering a seemingly progressive take on the individual right, particularly given the conservative majority. In addition, the *Casey* Court relies on the language of *Roe* to create the appearance that the changes it makes are supported by rather than contrary to the landmark decision, thus hiding the detriment of those changes. Finally, it substitutes the previously clear guidelines with a vague and arbitrary new standard, thus creating significant room for state legislatures to impose, and future courts to approve, increasingly restrictive regulations. In so doing, the *Casey* decision essentially overturns *Roe*, while getting credit for saving it, and establishing a system that would permit virtually any restrictions without needing to overturn *Roe* in the future.[81]

Although the precise material benefit that flowed from such language may be unsettled, there can be little debate that the *Casey* Court's words are more focused on women and the effects of reproductive choice on their liberty than *Roe* had been. In one particularly poignant section, the Court asserts that when a pregnant woman is faced with a choice regarding

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[81] Although beyond the scope of this analysis, it is worth noting that this effort may have been successful at settling the debate had the goal been solely to return the issue to the states. However, because the conservative platform includes overturning *Roe* as a political battle cry—such that it became imbedded in conservative identity—the need to overturn *Roe*—or at least seek to—remains, regardless of how much authority the states are granted. Indeed, following the official overturning of *Roe* in *Dobbs*, conservative activists are calling for nationwide legislation that would further restricting abortion rights beyond the previously articulated intention of returning the issue to the state level.

pregnancy, "Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture" (852). Discussing this portion of the opinion, Greenhouse notes both the framing effect and the connection to an earlier case, illustrating how the discourse builds and acts as a positive constraint for future Courts. Specifically, she observes that this language "expresses a distinctly woman-centered view of the abortion right" and draws on Justice Blackmun's words in an earlier case, placing them "on a somewhat grander rhetorical scale" ("How" 53). Moreover, writing a few years after the decision, law professor Erin Daly argues this language indicates growth, suggesting that the Court recognized the far-reaching effects of abortion for both women and men, again expanding their understanding of whose liberty was at stake (138). Notably, this progress for women is often attributed to the Court's retreat from the medical community. For example, Martin, a legal scholar writing for the *Cambridge Quarterly of Healthcare Ethics* the year after the decision, observes that "the Court protected the abortion decision solely as a woman's decision and not as a medical decision to be made with a physician's guidance," which she argues was a result of the Court's recognition that "abortion involved a unique, deeply personal decision that required constitutional protection" (313). Rebecca Ivey similarly highlights that "[u]nlike *Roe*, *Casey* characterizes the abortion decision as a *non-medical* decision made by the *woman*, not the physician" and observes that "the women's rights discourse moves from a privacy rationale to one invoking individual liberty" (1464, 1471). Even though also recognizing potential weaknesses, Christina Whitman likewise asserts that among the positive outcomes of *Casey* is that "the focus shifts from medical privacy to individual liberty" as well as the disappearance of "professional medical decisionmaking" (1984). Indeed, citing Daly and others, Manian highlights this trend, observing, "Numerous scholars have noted the

shift in rhetoric from *Roe*'s emphasis on the physician's interest in abortion decision-making to *Casey*'s emphasis on women's interest in abortion decisionmaking" (250). Accordingly, many scholars saw *Casey*'s shift away from physicians as both recentering women and progressing toward an increased focus on their individual rights.

In addition to framing the right in a way that emphasizes individuals' difficult choices, the Court expressly supports the right with language of gender equality, a move viewed as a significant step forward. As Greenhouse observes, "it was in *Casey* that the equality rationale for the right to abortion made its first appearance" ("How" 53). Although the Court stops short of explicitly invoking equality in a constitutional sense, there are several ways in which the idea of gender equality is raised. For example, the Court asserts that abortion is a unique behavior because "the liberty of the woman is at stake" and that the "destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society" (852). Analyzing this language, Manian argues that equality is central despite the missing Equal Protection Clause, as "the opinion made repeated references to the impact of reproductive rights on women and the effect of abortion restrictions on women's ability to achieve equality in society" (249).[82] Accordingly, by recognizing the impact of reproductive choice on an individual's other life options rather than framing it merely as another medical decision, the Court signals its understanding of the right as more than medical privacy.

Although the equality language was overwhelmingly viewed as progress, not everyone was particularly optimistic. Perhaps as a preview of what was to come, in her analysis of the case

[82] While the analysis in this chapter focuses solely on the primary opinion in *Casey*, it is worth noting that in his concurring opinion, Justice Blackmun, the author of *Roe*, does specifically invoke the Equal Protection Clause in response to the state's assertion that women must accept their "natural" status as mother (928).

for *The Journal of the American Medical Association* (JAMA) shortly after the decision, Janet Benshoof, one of the attorneys for Planned Parenthood, notes a disconnect between words and results. Like others, she acknowledges the Court's shift to focus on gender equality and its "strong language linking reproductive choice to women's self-determination" (2251).[83] However, despite the language gains, she is unconvinced that the material effects will similarly manifest, arguing that "the standard the Court set forth to evaluate the Pennsylvania restrictions and future laws reveals a lack of substance behind these rhetorical reassurances" (2251). Thus, while the issue received little discussion within the scholarship, there was some inkling early on that the discrepancy between what the Court said and what it did would prevent women from exercising their reproductive rights as celebrated.

Past Voices: Law over Medicine

Although the *Casey* Court says it is upholding *Roe* and offers language that honors a woman's liberty and equality rights to make reproductive choices, because its primary goal is saving its own authority rather than maintaining an individual's right to obtain a safe, legal abortion, its actions do not follow its words. The primary changes made to the rights established in *Roe* are shifting the state interest from viability to conception and changing the standard of review to undue burden. As Borgmann observes, "These changes were far more than modest adjustments to *Roe*. Rather, they *altered the very nature of the abortion right*, demoting it from a fundamental right to something more enigmatic and certainly more fragile ("Winter" 681; my emphasis). However, because public opinion polls suggested the public would not be receptive to the Court overturning *Roe* and doing so amid public objection would threaten the Court's own

[83] Ironically, it was this equality language that Benshoof told the readers of JAMA was "[o]ften lost in reports of the fate *Roe*" (2251), as opposed to the Court's essential gutting of *Roe*.

legitimacy, the Court upheld *Roe* rhetorically, supporting precedent through its rationale. Examination of the opinion's narrative in framing the rights it preserves reveals that the authors rely on the reverence of precedent and use previous Courts as co-rhetors to rearticulate the individual right in state-friendly ways while preserving the Court's own legacy. Moreover, the opinion retreats from the previous medical framework as a way to obscure the reality of the new changes. Critically, after replacing the framework established in *Roe*, *Casey* fails to offer enough guidance for applying the new standard to provide the protection its women-centered approach suggests is forthcoming, thus impeding access even further.

With the benefit of hindsight, it is apparent that expanding states' interest in "potential life" from post-viability to throughout the pregnancy fundamentally alters reproductive rights and leaves *Roe* a shell of its former self. Examining the impact of *Casey* on later cases, Borgmann asserts, "*Casey*'s greatest blow to abortion rights was its expansion of the state's right to restrict abortion in the name of the fetus. The decision's other major drawbacks—its weakening of the standard against which to measure abortion restrictions and its failure to affirm unequivocally the primacy of women's health—can be traced to this fundamental departure from *Roe*" ("Winter" 703). Indeed, it is this change that has opened the door to the increasingly restrictive pre-viability laws. Moreover, the analysis that leads to this shift alters the discourse around reproductive rights, introducing the concept of rights for a non-viable fetus. Tracing the history of the "fetal life discourse," Ivey observes how the *Casey* Court was critical of the lack of weight given to fetal life in prior cases and, thus, "upheld a woman's right to an abortion while emphasizing the legitimacy of the state's interest in the *potential* human life of the fetus" (1457). Significantly, she claims that *Casey* "is where the fetal life discourse took on its present-day shape and legal function" (1457). Again, the potential for growing restrictions from such

discourse is virtually limitless. Given this significant change, one may wonder how the unequivocal message that flows from the opinion is that *Roe* has been saved. While this messaging comes in part from the Court's declaration that it had done so, coupled with strong language about duty and tradition, it is also due to the joint opinion's reliance on the *Roe* Court as co-rhetor, manipulating the previous opinion's language to fit its new goals, thus giving the appearance that the reconceived right is supported by the original landmark decision.

In its discussion of states' interest in fetal life, the joint opinion quotes the *Roe* language multiple times, thus offering the support of the previous Court for its own ideas. After affirming a woman's right to terminate a pregnancy pre-viability, the joint opinion asserts that "the other side of the equation" is the state's interest in fetal life, supporting its assertion with language from *Roe*: "The *Roe* Court recognized the State's 'important and legitimate interest in protecting the potentiality of human life'" (871, quoting *Roe* 162). The joint opinion goes on to quote the same language two additional times, including specifically noting the "clarity" with which the *Roe* Court spoke (871, 875). The joint opinion offers a critique that not enough weight has previously been granted to the interest in fetal life, but rather than directly criticizing the *Roe* opinion, *Casey* blames the issue on later courts for their application of *Roe*. Specifically, the joint opinion asserts that the quoted portion of *Roe* regarding the state's interest in potential life "has been given too little acknowledgment and implementation by the Court in its subsequent cases," and suggests that those later cases cannot all be reconciled with *Roe*'s recognition of the state's interests (871). Notably, the joint opinion offers to correct the imbalance, declaring "In resolving this tension, we choose to rely upon *Roe*, as against the later cases" (871), thus first creating a conflict, then siding with the foundational case to boost the credibility of its own analysis.

Notably, the *Casey* joint opinion is so selective in its use of *Roe* as co-rhetor that it alters the meaning of the previous Court's words and conceals the changes it makes. First, in quoting *Roe*'s language, the joint opinion asserts that it was *Roe* that established states' interest in fetal life and suggests its alterations are simply a matter of timing rather than changing the right. Here, though, the timing is an essential part of the right since moving the states' interest in the fetus to conception prevents maternal health from ever taking priority. In fact, the section in *Roe* that *Casey* relies on declares, "We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, … and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct" (*Roe* 162). Yet, the *Casey* joint opinion fails to acknowledge or give any weight to the states' interest in women's health, instead relying only on the potential life language, and frames the women's interest only as contrary to the state. Indeed, the *Casey* joint opinion specifically asserts, "In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty" (876), thus revealing its view that the state's interest is singular and focused only on the fetus, rather than the dual interest asserted in the language it quotes.

In addition, the *Casey* Court goes to great lengths to reaffirm viability as the point at which states may restrict abortion rights, relying heavily on its duty to uphold *Roe* and praising *Roe*'s rationale: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce" (871). The opinion bases its adherence to viability on both precedent and the fairness and workability of viability as a line (870). However, to accomplish this, the opinion makes a distinction between informing and restricting that belies *Roe*'s original intent. Specifically, the

opinion states that the state may "from the outset…show its concern for the life of the unborn, and at a later point," that later point being viability, "the right of the woman to terminate the pregnancy can be restricted" (869). Yet, because the joint opinion allows the state to "show its concern" in ways that it acknowledges amount to restrictions for some individual woman, but not a large enough group collectively, its adherence to the viability marker is hollow. This move allows the joint opinion to build its argument on the ethos of *Roe* without having to observe to *Roe*'s outcomes. Such a move persuades the public with precedence and appeases conservatives by allowing increased restrictions, both in the present case and in the future. Accordingly, *Casey* fundamentally alters the individual rights granted in *Roe*, thus effectively overruling the earlier decision; however, it does so in a way that not only hides the changes, but also garners the Court praise for honoring precedent.

In addition to relying on the words of the *Roe* Court, the joint opinion faults the trimester framework specifically, as if that part of *Roe* is somehow outside of the legal foundation of the right and does not need to be followed in order to uphold *Roe*. In her analysis of the changes since *Roe*, Borgmann argues that the *Casey* Court accomplishes the seeming impossible task of allowing nearly all of the state restrictions while claiming—successfully—to be "reaffirming" *Roe*, by "radically revising *Roe*'s 'essential holding'" ("Winter" 680). Rather than relying on the trimester framework established in *Roe*, the Court asserts that *Roe*'s "essential holding" contains three parts: 1) a woman has the right to choose an abortion pre-viability "without undue interference from the State"; 2) the state has the power to restrict post-viability abortions if the law contains a health exception; and 3) the state has "legitimate interests from the outset of pregnancy" in maternal and fetal health (846). Without getting into a full analysis of the ways is which this "essential holding" arguably deviates from *Roe*'s actual holding, the most relevant

changes are the “without undue interference” qualification, particularly in first-trimester abortions, and a recognition of a state interest in fetal life sufficient to allow for any interference based on that goal in pre-viability abortions.[84] Next, Borgmann claims, “The joint opinion’s authors, having modified *Roe*’s holding, now went further, openly ‘reject[ing] the trimester framework’ as 1) ‘misconceiv[ing] the nature of the pregnant woman’s interest’ and 2) ‘undervalu[ing] the State’s interest in potential life’” (681, quoting *Casey* 873). The joint opinion offers the new undue burden standard and shift in state interest to conception to address these “flaws” (681). Accordingly, the *Casey* joint opinion gives the appearance that it is upholding precedent but makes changes to states’ ability to implement restrictions, thus materially altering the individual right to obtain a safe, legal abortion.

Crucially, while Borgmann illustrates the legal analysis of how the Court said one thing and did another, its rhetorical choices are also important. After redefining *Roe*’s essential holding, the *Casey* joint opinion declares, “The trimester framework, however, does not fulfill *Roe*’s *own promise* that the State has an interest in protecting *fetal life or potential life*” (876; my emphasis). Again, the *Casey* joint opinion first creates a conflict and then sides with *Roe*, in this instance against an internal component of that very decision. Significantly, after identifying the state’s distinct interests in protecting both “the health of the pregnant woman” and “the potentiality of human life,” the *Roe* Court stated that “[e]ach [interest] grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling’” (*Roe* 162-163). Specifically, the *Roe* Court holds, “With respect to the State’s important and legitimate

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[84] Notably, this restructuring of *Roe*’s holding is part of the opinion that enjoys the support of a majority of the Court, thus making it binding in the future. This alone substantially alters the right.

interest in *potential life*, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of *fetal life* after viability thus has both logical and biological justifications" (163; my emphasis).[85] Therefore, the *Roe* Court leaves no doubt that the trimester scheme is an integral part of the right, not a severable application framework as *Casey* suggests. Moreover, the *Roe* Court explicitly identifies viability as the *sine qua non* for the state interest in fetal life, an issue the *Casey* joint opinion glosses over by collapsing "fetal life or potential life." However, by claiming allegiance to *Roe*'s holding and explicitly rejecting only the trimester scheme, a framework decried as giving too much authority to physicians by both sides, the joint opinion preserves its legitimacy by aligning with the states not at the expense of precedent, but instead the medical community.[86] As such, the *Casey* joint opinion is rejecting medicine rather than law.

Having rejected medicine, the joint opinion aligns with state interests without expressly turning its back on its predecessors in changing the standard of review by using prior opinions, albeit dissenting ones, to craft a new standard, thus avoiding taking sides in the strict scrutiny/rational basis debate. Although a discussion of standards of review may appear to be largely technical legal jargon, the standard of review is central to determining the permissible level of state interferences and thus is at the core of a conflict over states' rights. The basis for which standard of review should be used is how fundamental the right is to the individual; in

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[85] The *Roe* Court's use of "compelling" here is more than an adjective describing importance. Because the Court was using the strict scrutiny standard—the standard the *Casey* joint opinion replaces with undue burden—the determination that a state interest is compelling was a required part of allowing state interference of any amount.

[86] Indeed, the *Casey* joint opinion specifically invokes the criticism of *Roe*'s trimester scheme, calling it "a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard" (869).

other words, the more fundamental the right, the harder it is for the state to infringe upon it. The *Roe* Court had relied on previous decisions related to family planning when deciding on strict scrutiny, but conservatives argued that abortion need not fall into the same category. However, simply switching to a rational basis review would have required a direct rejection of *Roe*, which the Court sought to avoid. Crucially for *Casey*, a third option to the standard of review question was created and used by the joint opinion authors to avoid damaging the Court's legitimacy by unequivocally gutting *Roe* without adequate justification. Up until *Casey*, there had not been a majority willing to adopt the undue burden standard, so it remained only an idea rather than a reality; it did, however, remain a topic of discussion in abortion cases and opened up a new possibility for the *Casey* Court to write its way out of completely affirming or overturning *Roe*. Indeed, the joint opinion explicitly invokes the earlier uses of the standard, ostensibly to reconcile inconsistencies by Justice O'Connor and Justice Kennedy; however, this discussion also highlights the prior use of the standard, minimizing the fact that the current decision is making significant changes. Specifically, the joint opinion observes, "The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent" and then follows its statement with an eight-line string citation, including eight previous cases stretching back to 1977, even before Justice O'Connor first articulated and named the standard in 1983.[87] This move allows the Court

[87] Notably, even this statement involves rhetorical maneuvering, as the opinion's use of the word "concept" seems to be what justifies the citations to earlier cases, which clearly did not invoke the standard by name. Indeed, among these citations are *Maher* and *McRae*, the Medicaid cases, and the primary overlap is the Court's indifference to barriers with which the Justices cannot identify. A benefit to relying on these cases for recognizing the "concept" of undue burden, in addition to their age, is that it provides support from cases that had majority support, and thus the official weight of the High Court, as the more recent cases were concurring and dissenting opinions by Justice O'Connor and Justice Kennedy.

to justify the existence of the standard by relying on earlier opinions, thus giving the appearance of following precedent, which the Court has set up as being a foundational governing influence.

Vague Rules Lead to Arbitrary Outcomes

With respect to the newly created undue burden standard, much of the application problem stems from what the Court did not say. Establishing the new standard using detailed explanations of prior existence, the joint opinion provides virtually no guidance for actually applying the undue burden standard, creating a problem for future courts, particularly given the contrast to the clear guidelines that had existed under *Roe*. Indeed, Borgmann argues that the new standard fails to follow even basic principles of rhetoric: "Their attempt to elucidate the test, however, offered no method or standards by which to determine what constitutes a 'substantial obstacle.' Instead, the joint opinion's explanation was conspicuously question-begging: 'In our considered judgment, an undue burden is an unconstitutional burden'" ("Winter" 682-683). Importantly, this vagueness not only makes the standard difficult to apply, but because of the stakes involved, it makes the individual right subject to arbitrary enforcement of protection, thus making the right itself arbitrary.

Not only did the undue burden standard have the potential to be applied in an arbitrary manner going forward, the *Casey* Court's own application reveals how fragile it is and how it is subject to the whims of individual members of the Court. One example of this is the seemingly inexplicable distinction the Court draws between the spousal notification and parental consent provisions, which it then uses to reach the desired result. Despite similar concerns between spousal notification and parental consent, the joint opinion spends less than a page summarily dismissing the latter as having been previously addressed (899). Yet, the AMA in particular had raised the issue of minors in domestic violence situations and reached the conclusion that

physicians should encourage but not require minor patients to get their parents' consent (June 1992: 206-209). Indeed, the AMA report found that waiving parental consent only for minors who had reported abuse would not be sufficient because "[v]ictims of family violence are characteristically secretive about the abuse they have suffered, and minors are particularly reluctant to reveal the existence of abuse in their homes" (208), thus following much the same logic as the Court uses in the spousal notification discussion: "Many [pregnant women] may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania" (893). While the Court relies on domestic violence reporting by the AMA in its reasoning for striking down the spousal notification provision (891), it ignores the medical community, as well as the lower court findings, on the parental consent issue. As Borgmann asserts, to reach this conflicting conclusion, the joint opinion "manipulated the undue burden test by tinkering with the relevant pool of women to be considered in assessing the burdensomeness of each restriction" ("Winter" 685). In other words, rather than considering how each restriction would burden women differently, the joint opinion authors redefine how they determine who is being burdened in the first place, using rhetorical classification as a way to manufacture the necessary distinction. For the spousal notification restriction, the Court considers the burden only on married women seeking an abortion who do not want to tell their husbands and do not qualify for one of the statutory restrictions, which leaves such a small group that the domestic violence issue creates a "substantial obstacle" for a "large fraction" of them (895). By contrast, to justify the disparate result, the Court explains parental consent judgments "are based on the *quite reasonable assumption* that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart" (895; my emphasis), which

suggests a pool of all minors rather than a narrower group of those who did not want to get their parents' consent.

This example is noteworthy for two reasons. First, it highlights the danger of ignoring the previous medical co-rhetors when crafting a narrative related to medical issues. In a report from the AMA's 1992 Annual Meeting, the Council on Scientific Affairs conducted an impact study on mandatory parental consent and found that it "does not appear to significantly increase the proportion of adolescents who consult their parents about a pregnancy," instead having "the unintended effect of increasing health risks to the adolescent by delaying medical treatment or forcing the adolescent into an unwanted birth" (292). Thus, while pregnant minors may generally benefit from consulting with their parents, as a group they do not benefit from a law requiring them to do so. However, instead of using the available medical information, the Court's "quite reasonable assumption" imbued with its ethos becomes the accepted position.[88] Second, this example demonstrates how easily the Court can employ such a malleable standard to reach its desired result, even inconsistently within its own decisions. Citing the conflict between the spouse and parent provisions, Borgmann pointedly suggests, "the Justices provided little guidance for how to determine when, or for whom, a law operates as 'a restriction,' and indeed they appeared to exploit that term's ambiguity by applying it in seemingly inconsistent ways to

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[88] It is worth noting how the Court's "quite reasonable assumptions" highlights other weaknesses in its ability to identify with individual women and, thus, accurately perceive their burdens. First, despite having just detailed pages of troubling facts about domestic violence, the Court assumes, without evidence, that parents do have their children's best interest at heart and that the minor simply cannot perceive it. Next, its willingness to accept a single parent consent to address potential abuse, ignores the evidence it accepted regarding the women who are fearful of potential violence by generally assuming the mother will act against the father's wishes on behalf of the minor, or at the very least lie about it. Finally, the Court fails to consider how the various burdens that work against women, such as increased cost for travel and explaining a delayed absence, will have to apply to two people in the case of a minor that must now bring a parent.

different provisions" ("Winter" 685). Defining the pools consistently would have likely led to a similar result for the two restrictions, while defining them in more or less narrow terms allows the Court to create the appearance of an objective, inevitable application by sidestepping rather than addressing its conflicting conclusions. [89] Moreover, in its short discussion of the parental consent provision, the joint opinion simply states it is unwilling to reconsider its position on minors, demonstrating how precedent acts as a constraint, in this case a positive one, allowing the Court to avoid giving issues full consideration even where otherwise making significant changes to the rights at issue.

Moreover, despite the legal system's stated reliance on objectivity, such an ambiguous standard creates an opportunity for, and practically requires, infusion of a Justice's personal views. As Borgmann describes the analysis in *Casey*, "Indeed, the joint opinion's determinations in *Casey* about which restrictions were permissible seemed to reflect little more than the Justices' own views as to which kinds of burdens were acceptable" (683). Particularly evident in the spousal notification discussion, Ball argues that Justice O'Connor's undue burden standard gave her significant room to decide whether regulations were permissible on a per-case basis (112). Going forward, Devins argues in 2009 that *Roe* is secure because rather than "risk[ing] backlash" from overturning *Roe*, "the Justices would manipulate the *Casey* precedent to support favored policy positions" (1334). [90] Thus, the fragile standard is problematic not only because of its instability and unpredictability, but also because it requires a substantial amount of ongoing adjudication by both lower courts and the High Court, a circumstance for which the system is not

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[89] Chapter 4 considers how a future Court uses the "fraction" language to reduce protections for women rather than expand them.

[90] Chapter 4 examines the example Devins provides, "upholding or invalidating partial-birth legislation" (1334).

designed and which leaves the individual right subject to constant reassessment by future courts, now armed with an ambiguous standard. This continuing assessment is exacerbated by the subjective nature of the undue burden standard because determining whether a restriction is undue requires understanding regarding the interference being caused by the restriction. Indeed, to be successful in showing an undue burden requires a compelling level of identification with jurists who are particularly far removed from the most underserved communities.

Other omissions by the Court demonstrate how their failure of identification interfered with creating a standard of review that would protect the individual right to obtain an abortion, regardless of the language purporting to do so. First, the Court leaves intact the understanding that undue burden does not apply on any individual basis. In the earlier appellate case in *Casey*, then-Judge Samuel Alito dissents from the Third Circuit's decision striking down Pennsylvania's spousal notification restriction as an undue burden, providing his own assessment of Justice O'Connor's previous explications of the undue burden standard and noting, "Since the laws at issue in those cases had inhibiting effects that almost certainly were substantial enough to dissuade some women from obtaining abortions, it appears clear that an undue burden may not be established simply by showing that a law will have a *heavy impact on a few women* but that instead a broader inhibiting effect must be shown" (3d Cir., 722; my emphasis). Significantly, the *Casey* Court implicitly disputes Alito's conclusion based on how he calculated the number of women impacted—limiting the number to those who did not want to notify their husbands—but does not challenge his point about the impact necessary for a restriction to rise to the level of undue burden. Similarly, Borgmann points out that the standard "examined how onerous each restriction was as if no other restrictions existed, ignoring how a woman would fare under the mounting obstacles as the Court upheld restriction upon restriction," labeling a "critical

problem," what she describes as "the test's indifference to the cumulative burdens that multiple restrictions impose" ("Winter" 688). Critically, this indifference by the Court is not only to the cumulative burdens, but also to the real individuals who face them. As both of these issues illustrate, the Court's framing of reproductive rights under the undue burden standard leaves little protection for individual women, especially the most vulnerable, while contributing to a narrative of whose burdens do and do not entitle them to federal protection.

Despite leaving the door open for further review, the Court did not revisit the application of the undue burden standard, suggesting that it is unwilling to fix any of the issues caused by its ambiguity. The reality of the altered rights is reflected in the scholarship that follows. Writing shortly after the opinion, Daly recognizes some of the weaknesses but argues that the *Casey* decision is still a step forward because it demonstrates the Court's willingness to consider the impact of unwanted pregnancy on real women's lives rather than simply observing and making pronouncements from the perspective of doctors, husbands, and fathers, which, she says, reveals a shift in how the Court views those it governs and opens possibilities for continued moves toward equality (149). However, a decade after the decision, Whitman, a professor of both law and women's studies, examines the impact of the Court's opinion, pointing out the disparity between language and rights, describing the opinion as "reaffirm[ing] *Roe* in language sensitive to *Roe*'s importance to women generally and, simultaneously, limit[ing] constitutional protections severely, with an almost callous disregard for the women most in need of protection" (1982). Importantly, the vagueness and ambiguity created by *Casey* applies not only to future courts trying to assess undue burdens but also to states trying to work around controls on restrictions. Despite highlighting ways that *Casey* improved upon previous abortion cases, Daly makes clear how the new undue burden standard provides "substantially less protection" than the

standard under *Roe*. She somewhat prophetically suggests, "it is quite possible that *Casey*'s real legacy will be a collection of cases in lower and higher courts that uphold increasingly restrictive abortion laws as not imposing undue burdens" (148). A real legacy indeed.

Filtering Women's Stories: Judgments Stated and Implied

In addition to telling its own story, the Court also tells women's stories, which some argue indicate progress over *Roe*'s focus on physicians; however, these stories are filtered in a way that significantly weakens any gains and reveals the conflict inherent in the Court's narrative. The undue burden standard casts a spotlight on how the *Casey* Court framed the women's stories it retold, and despite having at its disposal the stories it needed to more authentically represent the governed community in its own storytelling, the women's story told by the *Casey* Court was full of empty promises and othering. As discussed above, two examples where the Court considers women's stories in making its alignment clear are the issues of spousal notification and economic barriers. Although in the former case the Court comes down on the side of women, neither story is retold in a way that genuinely honors the struggles of women. Similarly, the stories it ignores entirely, like the prevalence of abortion, misrepresents community values it claims to represent and others those who seek abortions from its version of mainstream society. Finally, the Court's newly conceived use of informed consent places women outside their own medical decisions, framing them as incapable decision makers and othering them from both physicians and the state, a community in which women should be included.

The subjective nature of the undue burden standard amplifies the storytelling authority of the High Court. Assessing how a particular state restriction burdens women seeking abortions requires the Court to consider, and potentially retell, the stories of those women. However, because the Court is analyzing whether state burdens are "undue," it is necessarily offering

judgment, backed by its own ethos, as part of telling women's stories. Thus, the Court's choices regarding which stories to tell or exclude and how those stories are framed, affects not only the rights, but also the significance afforded to the value judgment. In other words, if the Court ignores a story or tells it in a way that dismisses the impact, it is making an affirmative dismissal of the issue.

Compared to *Roe*, the *Casey* Court did provide more of the individual stories that inform complex abortion decisions; however, it used its storytelling authority to filter those stories in significant ways. As Kenneth Burke's discussion of terministic screens makes clear, selection is an essential rhetorical choice. Here, women's stories contribute to the context in which *Casey* was decided, shape the means of persuasion available to the Court, and offer the Court an expanded view of experiences that foster increased identification with the governed community. However, although the Court's narrative purports to recognize the role of reproductive choice in women's equality, it does not account for the individual experiences of women, despite the subjective standard it champions. Notably, these stories were available, both publicly and within the legal system. For example, in addition to the petitioners' own briefs, an *amicus* brief (interested opinion beyond those required) by prominent medical organizations offered substantial information regarding the risks of illegal abortions, including the prominence of these risks pre-*Roe*, and detailed the "substantial harm to women's health" that would result from each of the state restrictions (Friedman 83, 95). Further, an *amicus* brief by the NAACP and twenty-three other organizations concerned with the lives of poor women, particularly poor women of color, provided compelling arguments on the effects of the state regulations on poor women, including stories of two teenagers who died, one from an illegal abortion because she was too afraid to tell her parents and one who was shot by the man who impregnated her when he learned

of her intention to abort (Friedman 123). Moreover, though uncommon and largely focused on extreme situations, media reports of women seeking abortions did exist in the early 1990s.[91] Some women also started publicly telling their own stories, such as Deborah Salazar, who, in 1990, published an essay in *Harper's Magazine* that detailed her experience getting an abortion, reflecting on her privilege to do so and on an impending decision from the Supreme Court in another abortion case, *Webster v. Reproductive Health Services*. Yet, despite the personal and compelling nature of women's stories related to abortion, rather than relying on the women as co-rhetors, the *Casey* Court makes only vague gestures to women's intimate suffering and offers no legal support to address the issues. Moreover, none of these women or their difficult choices can be seen reflected in the unbothered dismissal of any concerns about upholding nearly all the restrictions. Thus, the issue Greenhouse first raised with respect to *Roe*, the disconnect between what the Court heard and what it said, becomes more significant, a significance that would only continue to grow as future courts and legislatures follow the *Casey* Court's lead in selecting what is worth telling.

The only issue for which the Court seems to support women's concerns is the spousal notification discussion. Here, the Court is able to identify with women who are in domestic violence situations, and thus not only strikes down the restriction, but also endeavors to tell the women's story through its opinion. However, its need to persuade the public and its reflection of

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[91] In one example, Eric Schmitt reported for *The New York Times* on a pregnant car accident victim who was in a coma with little chance of recovery. Although doctors agreed that an abortion would provide the best chance for a positive outcome, and her husband desired that they perform the abortion, a two-week court battle ensued, waged by outside objectors. The compelling story has a happy ending as the patient wakes up and progresses toward recovery following the eventual abortion, but it illustrates the struggle between women as objects of debate and individual subjects.

the reasons for its identification contributes to a significantly skewed retelling. Notably, the twelve-page section on spousal notification is as long as the other four sections on specific provisions combined, reflecting the Court's efforts to persuade the public despite its approval of the restriction, but also resulting in an emphasis on the value of the domestic violence story above all others. While the discussion includes some recognition of needed changes to traditional gender roles, likely owing to Justice O'Connor's concerns, the primary focus, including the justification for shrinking the pool of potentially burdened women, is domestic violence. Given the outsized space afforded to the discussion of domestic violence, both within the discussion of the specific restriction and the restrictions collectively, including the ethos gained by this section including a majority of the Court, the opinion controls which parts of the women's stories are elevated. Furthermore, telling the women's story within this context means positioning the women as victims. As legal scholar Paula Abrams puts it, rather than relying on "the recognition of women's constitutional independence" in rejecting the spousal notification requirement, "it is the potential of domestic abuse that leads the plurality to conclude that the provision constitutes an undue burden" (309). Thus, she argues, the "joint opinion's emphasis on domestic violence draws heavily on stereotypical views of women as victims" (309). In other words, women did not avoid telling their husbands about their decisions to have an abortion because of their individual liberty or their bodily autonomy, but because they were unable to take care of themselves in certain circumstances and use the existing safeguards against abuse. Accordingly, while the Court did stop the state from unduly burdening a woman's choice in one respect, it did so at the cost of further infantilizing her.

The disproportionate emphasis on the domestic violence story is exacerbated by the stories acknowledged and summarily dismissed by the Court, even in the face of increased health

risks. The only personal detail offered by the *Roe* Court, that Jane Roe could not afford to travel to another jurisdiction to obtain an abortion, implied an acknowledgement that economic barriers to access are at issue in considering an individual's right to obtain an abortion. In *Casey*, however, the joint opinion explicitly acknowledges the economic impacts and increased health risks created by many of the state restrictions yet declines to protect the individual right.[92] In so doing, the opinion not only weakens the right, it sends a strong message through its analysis regarding the value of certain women's stories and thus the women behind the stories. Addressing the twenty-four-hour waiting period, the joint opinion acknowledges the district court's findings that for many women the waiting period will result in "a delay of much more than a day" and increased burdens such as costs and having to explain their whereabouts (885-886). Critically, the joint opinion says about these very real women with the fewest resources that their burdens are not undue, holding "These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden" (886) and summarily dismissing their concerns.[93] The joint opinion goes on to declare, "Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle *even as to the women in that group*" (887; my emphasis), making clear that the burdens of some individual

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[92] This position should not come as a surprise to careful observers. In his dissent from the Third Circuit's opinion, then-Judge Alito observes that in previously articulating the undue burden standard, "Justice O'Connor has concluded that regulations that simply increase the cost of abortions, including regulations that may double the cost, do not create an 'undue burden'… even though it seems clear that such increased costs may well deter some women" (3d Cir., 721).

[93] It is also worth noting that although the joint opinion bases its finding on the waiting period in part on the evidence that "a 24-hour delay does not create any appreciable health risk" (885), it does not revisit the health risk assessment after accepting that for many women the delay will be much more than a day.

women do not matter, particularly in contrast to the burdens of abused women.[94] Similarly, despite health concerns the AMA saw as significant enough to stop short of requiring physicians to obtain parental consent against their judgement—unless required to do so by law—and clear parallels to concerns raised by the spousal notification restriction, the joint opinion easily dismisses objections to the parental consent requirement without discussion.[95] In so doing, the authors misrepresent the minors' stories, implying they would benefit from the law, and minimize their significance. Arguing that the opinion's analysis seems to reflect merely the personal views of the joint opinion authors on what burdens are undue, Borgmann argues, "The Justices appeared determined to uphold a state-directed information and twenty-four-hour waiting period requirement, even in the face of extensive proof that it burdened the abortion decisions of many women and increased the risks to their health" ("Winter" 683). Significantly, though, the story they tell in taking this position sends its own message. By acknowledging, yet dismissing, the burdens of certain women—poor, rural, and young women—the Court suggests to the community that it should also dismiss such burdens.

In addition to undervaluing certain stories, other stories the *Casey* Court fails to tell, particularly in its quest to appease conservative supporters and justify its unexpected decision. As one significant example, Abrams argues that among the stories the Court consistently fails to

[94] Thus, it seems, despite the Court taking future Justice Ginsburg up on her 1985 suggestion to rely more on equality than medical privacy, the results for economically disadvantaged women were worse rather than better.

[95] Although the AMA report makes clear that parental guidance is an important part of medical care, it notes concerns with parental consent, including the potential for domestic violence and minors' right to privacy. Moreover, the report found that due to the secretive nature of potential domestic violence concerns, providing a waiver in cases of abuse would not be enough of a safeguard (June 1992: 208). This reasoning tracks the Court's analysis of the spousal notification requirement, yet is not applied to the parental consent discussion.

tell is the frequency of abortion, noting that according to 2011 data from the Guttmacher Institute, almost half of pregnancies in the US are unintended and approximately forty percent of those are terminated by abortion (330).[96] Critically, she notes, omitting the frequency, particularly in conjunction with allowing the state to state to overtly persuade women against abortion, sends the message that it is both uncommon and morally wrong, thus further contributing to the stigma (330). *Casey* is no exception to this trend, offering no consideration of why women choose abortions. Indeed, the Court not only fails to consider women's motivations, it makes its own judgments on women's choices clear. While the "suffering is too intimate and personal" language is often cited as evidence that the Court is expanding its acceptance of reproductive choice and equality, read in the context of the preceding sentence, it foreshadows the true nature of the Court's position. After noting the anxiety and pain associated with carrying a child to term, the opinion suggests, "That these sacrifices have from the beginning of the human race been endured by woman *with a pride that ennobles her in the eyes of others* and *gives to the infant a bond of love* cannot alone be grounds for the State to insist she make the sacrifice" (852; my emphasis).[97] In much the same way the Court allows the state to "persuade" a woman toward childbirth even when constitutionally required to accept her choice, the opinion here makes clear what the Court believes is the noble choice as well. Significantly, because the Court has been entrusted with retelling women's stories, this framing diminishes women's choices and the reasons for them to lacking nobility and love for their "child." Like much of

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[96] Although her cited data is almost twenty years after the Casey decision, abortion prevalence has been trending downward, indicating that abortion was even more common in 1992 (Guttmacher Institute).

[97] This portion of the opinion is generally attributed to Justice Kennedy, and chapter 4 explores further how he uses a mother's love narrative to shape society's view of proper behavior.

Casey, this stands in stark contrast to the story *Roe* told, which albeit brief, considers physical and mental harm from pregnancy, childcare, inability to care for a child, and stigma associated with unwed mothers (*Roe* 153). Accordingly, despite giving the appearance of progress for women, the story the *Casey* Court tells, particularly about women who seek abortions, places them back into the pre-*Roe* shadows.

Even while purporting to protect women's rights, the Court tells women's stories in a way that suggests it is not only the rights that need protecting, but the women themselves, thus diluting the gains made in the women-centered narrative. In part, this narrative implies women need protection from physicians and sets up distrust in their medical care by suggesting that without the state's intervention and direction, women will not receive the full information necessary for their consent. Perhaps even more problematic, the Court implies that women need protection from themselves.[98] In their book on feminist legal theory, legal scholars Nancy Levit and Robert Verchick highlight the view of equality theorists that the *Casey* Court's efforts to protect women suggests that women are not capable of making their own decisions (135). For example, they assert, by requiring a woman to wait twenty-four hours in case she changes her mind, the Court is implying "that women were not capable of independently making one of the most important decisions of their lives without being told by the state to 'go home and sleep on it'" (135). This approach makes clear that even where the Court claims to be offering women bodily autonomy in addition to privacy, it weakens that offer by following it with mandated unsolicited advice, dictated by lawmakers rather than coming from medical professionals as a genuine part of medical care. Manian similarly observes the negative effect of the informed

[98] Chapter 4 examines how the Court further expands the woman-protective narrative.

consent regulations more generally on women's ability to make their own decisions, arguing that the "*Casey* opinion characterized women as incapable decision-makers in need of the State's 'protection' provided through biased information disguised as 'informed consent' legislation" (226). She further highlights how the biased nature of the information exacerbates the issue, noting that although informed consent is designed to "protect[] patient autonomy" in medical decisions by making sure they have all the information, "patients cannot be self-determining if given information biased towards one outcome" (250). The language used in the joint opinion highlights these concerns. In their articulation of the undue burden standard, the standard meant to protect women's rights and praised for its subjective promise, the authors of the joint opinion hold, "Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is *thoughtful and informed*" (872; my emphasis). They go on to hold that "the State may enact rules and regulations designed to encourage her to know that there are *philosophic and social arguments of great weight* that can be brought to bear in favor of continuing the pregnancy to full term" (872; my emphasis) and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such *profound and lasting meaning*" (873; my emphasis). Not only does this framing suggest that women are incapable of making decisions, it also places women squarely against the state, and thus the community in which they are supposed to be members. Particularly coupled with the Court's failure to tell the story of how common abortion is, the story it tells here positions women as outside society rather than members of it and paints those who seek abortions as against the social order—notably without acknowledging that those women's decisions should be contributing to the very social order the Court is adjudicating.

In sum, while the *Casey* Court relies on women's stories to institute its newly created undue burden standard, the joint opinion manipulates and filters those stories, both weakening the right and damaging the discourse of reproductive rights. Moreover, these stories are told as if in direct competition, othering women, particularly those who might seek an abortion, from a legal system that should include them. Accordingly, through the Court's telling of women's stories, those who even consider abortions can only be understood as outsiders who must be saved from their own bad decisions, leaving no space for a more positive view of women. As such, it is difficult to celebrate the increased centering of women when the truths of so many are significantly distorted. Critically, the negative effect of these distortions is exacerbated by the High Court's recursive role of both reflecting and creating the governed community's values.

Reporting and Praising

The *Casey* opinion's narrative, carefully constructed to obscure the decision's negative impacts to reproductive rights and to protect the Court's own legitimacy, is picked up and repeated by the press as it reports on the decision. Examining the treatment of *Casey* by the press is particularly important because activists on both sides were directly relying on the public opinion that would grow out of the press reports. In a *New York Times* article in advance of oral arguments, Greenhouse reports on the parties' plans to take the issue to the public ("Both Sides").[99] As with the scholarship, the press shows minimal interest in the decision beyond the first few days. In their article on abortion and journalism, Maggie Jones Patterson and Megan

[99] Greenhouse quotes the litigation director for Planned Parenthood as viewing their audience as "the 10th Justice, the American people," while a pro-life lawyer said, "our job becomes not just convincing five Justices, but convincing governors, legislators, and voters." The latter also suggested they "may both be hampered by ambiguity" ("Both Sides" B11). As it turned out, the end result was marred by both ambiguity and misdirection.

Williams Hall observe, "With rare exception, the popular press ignored the Supreme Court's breakthrough opinion in *Planned Parenthood v. Casey*… although the fact that both sides disparaged the decision should have alerted them that the abortion story was taking a new turn" (101). Furthermore, the reporting that does occur largely echoes the Court's focus on saving *Roe*, failing to provide the public with any critical understanding of the diminished rights.

In contrast to *Roe*, the press reporting on *Casey* does not fill in storytelling gaps, instead focusing on repeating the Court's hero story and celebrating it as victor, especially the authors of the joint opinion. Despite *Casey*'s changes, significantly limiting the individual right to an abortion set forth in *Roe*, the press coverage focuses almost exclusively on reporting that *Roe* had been upheld rather than overturned as most people expected the new conservative Court to do. Next to the front-page *New York Times* article reporting the decision, the newspaper displays pictures of the three joint opinion authors and provides selected quotations, each featuring strong language highlighting the importance of precedent, beginning with the opinion's opening line: "Liberty finds no refuge in a jurisprudence of doubt. ... The essential holding of *Roe v. Wade* should be retained and once again reaffirmed. . . ." ("The Supreme").[100] Accordingly, such

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[100] The other quotations deemed representative of the opinion by the *Times* are:

"The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. No evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973. . . ."

"An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions. . . ."

"A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today."

reporting suggests that the High Court had upheld the rights created in *Roe*–not merely *Roe*'s essence—based on its deference to previous decisions. Moreover, later in the paper's first section, the *Times* Editorial Board opens its article on the decision, pointedly titled "This Honorable Court," with a similar focus: "The Supreme Court yesterday *preserved liberty for American women* and, because of three moderates, honor for itself" (A22; my emphasis). The article goes on to refer to the changes made to the *Roe* standard of review as "modifications" and "adjustments" (A22), language which belies the true legal impact of those changes. In addition to creating a false impression regarding the status of reproductive rights, this narrative fails to seize the opportunity to tell any stories beyond those of the opinion itself or consider the effects of the many restrictions the Court allowed.

However, not all reporting on the *Casey* decision was positive. In another *Times* opinion article two days later, the material impacts of the decision are recognized, highlighting those most at risk. Specifically, the Editorial Board notes that although the decision was "honorable," arguably a nod to its earlier piece, "it still puts American women into two classes" ("The Women with Undue Burdens" A18). It goes on to define those two classes: "There are those who, given residence in the right states or the money to get to one, can still easily exercise their right to abortions. And there are those—the young, the rural and the poor—who cannot" (A18). While this critique complicates the decision somewhat, it does not personalize the women who lack resources in a way that evokes empathy, particularly not to an audience already primed to see economic issues as the individual's own fault. Yet at least one journalist was able to fully capture the issues within days of the decision. Sheryl McCarthy, a Black woman and former student of Ruth Bader Ginsburg at Columbia Law, discusses the decision the following day in her column for *Newsday* aptly titled "Abortion's Empty Rhetoric." Noting how activists on both sides of the

debate were proclaiming the decision a disaster and how political strategists were already trying to capitalize on the case, McCarthy argues that reproductive rights activists ignore the real women—poor, rural, and young women—who were already having difficulty accessing abortion and for whom things got worse under *Casey* (8).[101] McCarthy's analysis makes clear that the pieces of the puzzle were available for those willing to put them together.[102] Unfortunately though, *Newsday* served a small audience in Long Island, New York, and the message does not appear to have reached particularly far.

Though largely celebrated in the short-term and forgotten over time, the legacy of *Planned Parenthood v. Casey* is the conflict it both creates and occludes, altering the path of reproductive rights and opening the door—and eventual floodgate—for increasingly restrictive state regulations. Indeed, even while highlighting the improved narrative for women, Ivey identifies the central conflict in the case: "*Casey* most explicitly addresses abortion as a liberty right, though the undue burden test it applies allows greater state intrusion on the woman's right than in *Roe*" (1470). Abrams similarly observes the conflict and acknowledges its connection to the narrative. Pointing to *Casey*'s recognition that the concept of liberty includes claims that a woman controls her body and destiny, she suggests, "the joint opinion, in many ways, embodies the narrative of woman as the capable and autonomous decision maker" (326). However, she goes on to note that because the undue burden test invites additional restrictions and shifts the burden of proof from the state to the woman, the Court actually diminishes protections for

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[101] Specifically, she observes that pro-choice leaders were saying things such as "*Roe* is dead," and a pro-life organizer accused the three conservative opinion writers of "stabb[ing] the pro-life movement in the back" (8).

[102] Notably, McCarthy identifies a significant but unrecognized issue, the increasing lack of abortion providers.

women's autonomy (326). Therefore, she asserts, "The undue burden test of *Casey* thus embodies conflicting narratives about women and abortion" (326). Borgmann is more pointed in her critique and the potential motives of those creating the narrative, arguing that "the majority opinion's sweeping language, celebrating the importance of reproductive freedom for women's autonomy and equality, *masked, perhaps deliberately*, the decision's alarming retreat from the lines the Court drew in *Roe*" ("Winter" 678-679; my emphasis), thus drawing an explicit connection between the Court's rhetoric and the failure of the general community to recognize the impacts of the decision on its rights. Accordingly, the Court not only significantly diminishes an individual's reproductive rights, its narrative obscures these results, intensifying the damage.

Beyond the Four Corners: *Casey*'s Impact Spreads through Time and Space

At the time of her writing in the year following the *Casey* decision, Martin was optimistic that although the ruling chipped away at the rights granted in *Roe*, the Court's focus on women and their stories would ultimately result in increased understanding and rights. Specifically, she reasoned that "as new evidence and new arguments are developed, the story of women's lives can be told in greater detail and the meaning of reproductive freedom can be explained more concretely" (316). While her assessment seems accurate in terms of what was possible, this vision failed to come to fruition as many states continued to test the limits of what counts as an undue burden until *Casey* was overturned by *Dobbs*. This result is not surprising given the Court's insistence on treating the standard as if it were objective, a hallmark of legal discourse, even though what counts as an "undue burden" can vary significantly for different individuals. Moreover, turning women into objects of debate creates additional opportunities for the community to judge their choices and classify them by resources. Finally, the Court's narrative

shift from a medical story to a legal one, results in consequences, intended or not, that contribute to the ongoing diminishment of individual reproductive rights.

Hidden in Plain Sight

The results of the *Casey* Court's choices in framing its narrative are significant and stem from both what it did and what it did not do while exercising its storytelling authority. Perhaps the most significant impact of the *Casey* decision comes from the Court's successful messaging regarding saving *Roe*, thus masking the other effects and lulling the community into believing their rights were protected. Since it was largely viewed as upholding the status quo, there was little fanfare around the case or concern for its future consequences, and most abortion rights discourse considered *Roe* to be the controlling word on abortion rights until *Dobbs*. As Borgmann observes, "*Casey* is widely known for upholding *Roe v. Wade*, but many do not comprehend the extent to which *Casey* in fact dismantled *Roe*'s protective framework" ("Winter" 678). Whether or not intended, the Court's language creates the impression that *Roe* has been "saved" and masks the true nature of the changes to the legal rights and the material impact of those changes. As such, the damage caused by the changes were exacerbated by the subterfuge. An accurate understanding of the impact to reproductive rights is essential both for exercising those rights and for the community's efforts to shape societal value systems. By obscuring the changes it makes, the Court diminishes the currently existing rights and creates space for continuing changes into the future, while minimizing resistance because the community is less likely to notice. Furthermore, because of the press focus echoing the Court's savior narrative, this complacency extends beyond scholars. For a majority of the public, who understand Court decisions only through a press filter, particularly in a time without easy access to Court documents via the internet, the reporting leaves the impression that at the crucial first

opportunity the newly conservative Court had to overrule a woman's right to obtain a safe and legal abortion, *Roe* had been saved. To the average member of the public concerned about reproductive rights, this was a victory and there was nothing to protest, a far cry from the rally held on the eve of oral argument. Given the Court's duty to not only create but reflect public values, public response is a critical part of rights making.

Decreased Protection for Reproductive Rights

While shrouding its changes in a veil of honoring *Roe* makes an enduring impact on reproductive rights, the Court's other narrative choices also affect society beyond the decision itself. Specifically, the rhetorical choices made in creating and applying the new undue burden standard leave individuals seeking abortions with fewer rights and more judgment. First, the subjective nature of the new undue burden standard weakened protections for women not only because of the authority granted to individual members of the Court, but also because of the ongoing application problems for future courts. Scholars disagree on whether the problem lies with the standard or how it is being used, or, to use a construction defect analogy, whether it is a design flaw or builder error. In his analysis of *Casey*, Donald Judges, a constitutional law scholar and law professor, expresses concern that the Court's introduction of a new and previously un-tested standard would aggravate inequality and arbitrariness with respect to abortion access and that the resulting new state regulations would increase health risks due to delays, while at the same time failing to prevent abortions in any significant way (226). Where others see space for subjective analysis of individual women's burdens, Judges sees an unworkable standard that will create more problems than it solves. Conversely, other scholars suggest that it is not the standard itself causing problems, but the way later courts apply it. In 2006, almost fifteen years after the *Casey* decision, Linda Wharton, Susan Frietsche, and Kathryn Kolbert, three members of the

legal team representing the plaintiff-reproductive health care providers in the case, reflect back on the case and its impact, including an analysis of the undue burden standard and its application post-*Casey*, arguing that rather than completing an individualized analysis of whether particular regulations created an undue burden, lower courts simply allowed and disallowed the same regulations that the *Casey* Court had (357).[103] Notably, though, this is an unsurprising result given the constraint of objectivity under which the legal system operates.

Constraints operate whether or not they are acknowledged by the rhetor, and I suggest that the progress envisioned following *Casey* was doomed to fail, ironically for the reason that many feminist scholars at the time were hopeful: whereas many believed that the undue burden standard would allow for a more subjective consideration of the obstacles real women faced, the reality is that the standard had to be applied within a legal system that is founded on principles of both precedent and *objectivity*. Though there is room for debate regarding the practice of genuine objectivity, because the legal system considers objectivity to be central to its goal of fairness and justice, even assuming the best intentions of the three Justices who authored the joint opinion, simply directing courts to apply a subjective standard within an objective system was unlikely to lead to the intended result. In addition, as evidenced by the lower courts' continued rulings simply authorizing the same regulations that were allowed in *Casey* with no regard for the potential burdens in their own jurisdictions, applying a subjective framework is unworkable on even a state-level basis, let alone a more individualized one. Moreover, this was exacerbated by the vague way in which the *Casey* Court itself applied the standard, offering little guidance for

[103] Given the potential differences related to access in different states, this was, theoretically at least, not the intended process. That a regulation did not create an undue burden in Pennsylvania, did not mean it did not do so in another state, such as one with fewer providers and longer distances to travel.

how application should work. For such a review to be effective would require constant empathetic identification between the judges and the women who were burdened by restrictions. As discussed above, it is likely that the Court struck down the spousal notification provision because it was able to identify with women who were in situations of domestic violence. Thus, it is unsurprising that the young, poor, and rural women, especially women of color, are continually told that their burdens were not problematic enough to be undue.[104] As such, even assuming that the Justices did desire to consider the material consequences of abortion regulations, the constant identification required for such an endeavor is too much, particularly for judges who were already positioned so far from the most vulnerable individuals.

In addition to the lower courts' struggle to apply the new standard, the design flaw of the undue burden standard is repeated in the scholarship analyzing *Casey*, which leads to flawed assessments of both the risks and potential progress. In his argument downplaying the impact of *Casey* even years later, Devins contends that "very few states pursue legislative initiatives that extend the *Casey* template and those states that pursue such legislation have comparatively few abortions" (1343). Not only does this argument ignore the fact that fewer abortions likely is the point of burdensome regulations, it also discounts the risk of states passing increasingly restrictive laws, a risk which has become apparent in recent years. Notably, this analysis seems to fall victim to the same failure of identification that the Court did by dismissing the regulations that did not seem burdensome to the author and declaring that these laws "do not come close to

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[104] As one example, a district court in Ohio found that although implementing a new waiting period would increase the cost of obtaining an abortion by twenty-five percent, which would be about one hundred dollars, the judge summarily concluded, without analysis, that the increased cost did not amount to an undue burden (Wharton et al. 361-362). It is not unexpected that a federal judge would be unable to identify with a person for whom an extra one hundred dollars was an unimaginable cost and, thus, was unable to appreciate the burden it created.

outlawing abortion" (1343), with little regard for whether an individual who wanted an abortion would have access to it. Similarly, among scholars who perceive *Casey* as a step forward in the goal of a legal system that addressed individual needs, the standard's flaws are unrecognized, thus impeding the analysis. In their analysis of the opinion for the *Quarterly Journal of Speech*, communication scholars Patricia Sullivan and Steven Goldzwig highlight the Court's willingness to consider the point of view of real women, rather than using only a vague objective standard:

> In sum, when the Justices viewed the Pennsylvania Abortion Control Act through the interpretive lens of the undue burden standard, they asked how each provision would influence the lives of women and their constitutionally protected right to choose abortion prior to fetal viability. Although observers might disagree with the reasoning in the opinion, it seems apparent that the Justices moved beyond abstractions in assessing the law and asked questions about the impact of the provisions on real women. (179)

Thus, they focus their analysis on the perceived progress for women. Significantly, their next statement previews what will become the roadblock for such progress: "All provisions, with the exception of the spousal notification requirement, were upheld as constitutional because they represented *structural or technical barriers* for women seeking abortions as opposed to substantial obstacles" (179; my emphasis). This framing demonstrates a disconnect between barriers that are perceived as merely technical and the material impact for women, particularly those with the fewest resources, and repeats the joint opinion's views regarding the "incidental effect" of increased costs.[105] It also reveals the primary weakness with the *Casey* holding, illustrating how despite a new standard that purports to consider the impact of restrictions on "real women," the analysis treats these "real women" as a monolith, one that does not include those most in need, such that it fails to offer even a modicum of protection to so many that it claims to include. As these defects make their way into the scholarship, they overemphasize

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[105] It also seems to eschew any obligation of the courts or states to address structural barriers, even where such barriers impact the exercise of fundamental individual rights.

progress and mask the continuing threats to reproductive rights. Moreover, they re-enter the discourse backed by the ethos of the scholars, thus perpetuating their impact. Significantly, although the undue burden standard articulated no longer applies following *Dobbs*, an analysis of its weaknesses is useful for considering future possibilities for a legal system that more adequately accounts for the real lives involved.

Increased Public Value Judgments

The impacts of *Casey* go beyond diminishing the individual rights and changing the legal discourse. Because the Court's language shapes society's perception of itself, a shift in how the Court views individuals seeking abortions could grow to a shift in societal views, and thus the same subjective assessments and failure of identification contributed to more value judgments about women and whether they "deserved" abortions. These valuations then flow back into the legal system through its consideration of public opinion and affect society's view of women and their choices more generally. Abrams includes the *Casey* decision in her discussion of how the language of the Supreme Court contributes to abortion stigma, asserting that the new standard "allows states to incorporate mistrust of women's judgment into social policy" and that allowing states to dissuade a woman from choosing an abortion positions "the state's interest in protecting prenatal life as a valid challenge to the woman's judgment" (306-307). In her analysis of the distinction between the state having the authority to "persuade" a woman against abortion but not "coerce" her, Abrams asserts, "This mythical distinction in fact operates by shaming. The state may not directly coerce the woman but it has the Court's blessing to shame her into a different decision" (336). Indeed, as laws are a reflection of societal values, a state's ability to encourage a particular choice is necessarily a suggestion that society itself values the choice, making the

opposite choice shameworthy, and the Court uses its position of authority to reinforce this framing and stigmas that flow from it.[106]

The *Casey* Court similarly implies societal judgment of women's choices through its new use of informed consent. As Manian observes, "The government acts disingenuously when it claims that biased legislation serves to provide 'informed consent' for women when in fact the goal of abortion 'informed consent' laws is to impose the government's normative views about what decisions women *should* make" (254). Furthermore, because Court opinions not only reflect but also create societal values, by upholding the state's judgment here, particularly while arguing it had no choice in allowing some individual rights due to precedent, the Court is providing even further support that such a judgment is the correct one. Thus, the state, backed by the Court, makes clear its disapproval of a women's choice to have an abortion, which, in turn, encourages a similar opinion by the general society. Again, this position completely discounts women's position as members of the community.

The narrative of the *Casey* opinion impacts not only public opinion about abortion rights but also women's choices and their standing in the community based on their resources. Subjectively applying the new standard necessarily creates a situation where the *Casey* Court makes value judgments about women seeking abortions, judgments which permeate the women's story as told by the Court. These value judgments, which are connected to victimization, are in turn, adopted into public discourse. First, the undue burden standard positions those who seek abortions as outside of and against the state rather than as members of the society being governed. As Abrams puts it, "Once the abortion procedure is deemed aberrant, it is predictable

[106] Chapter 4 considers how a future Court explicitly expands the concept of persuasion from state actions to public debate.

that women who seek the procedure will be considered deviant" (332). I suggest that once framed as deviant, the abortion-seeking woman may be victimized in a way that allows the Justices, and public, to view her as worthy of receiving the procedure notwithstanding the deviance. One example of existing worthy victim narratives involves how women became pregnant in the first place, such as questions about birth control, implying that they are only worthy if they first tried to be "responsible" in avoiding pregnancy and were "victimized" by failure of birth control, as well as arguments in support of rape and incest exceptions to abortion regulations.[107] Furthermore, in *Casey*'s narrative specifically, the focus on domestic violence in the spousal notification discussion creates an additional subset of worthy victim, where women in abusive situations are worthy of the Court's, and by extension society's, understanding and the right to avoid additional challenges to seeking an abortion. Such victimization also creates a space for those who argue against abortion to see themselves in the event they or someone close to them ever obtains one. Conversely, poor, young, rural, and marginalized women are not afforded the same consideration because their circumstances are solely their own fault, or at least, not the state's problem to rectify. As such, the women's story, as filtered through the Court, reflects value judgments about women's choices and actions with little regard to resources. These judgments further separate certain women from acceptable societal norms, not only for the purpose of obtaining abortions, but more generally as well.

Finally, this newly framed debate divided those who might seek abortion into two groups specifically based on their available resources. This division creates a divide-and-conquer model

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[107] Indeed, in connecting abortion cases to previous cases involving intimate family planning issues, the Court suggests that the "same concerns are present when the woman confronts the reality that, *perhaps despite her attempts to avoid it*, she has become pregnant" (853; my emphasis), thus explicitly invoking the worthy victim/responsible woman narrative.

for responding to abortion support and minimizes the likelihood of identification with all women by obscuring the extent of the detriment and providing a more palatable middle ground within the public discourse. As McCarthy aptly notes in her analysis of *Casey*, the young/poor/rural group had always been struggling to exercise their reproductive rights due to their lack of resources, a problem made worse by *Casey* regardless of how women-friendly the Court's language is. However, the new rights framing allows members of the community to simultaneously argue for abortion rights while agreeing to "reasonable" compromises in the interest of protecting "unborn children" without any real risk to their own ability to exercise their right to an abortion should they need to. Moreover, some abortion supporters, those with perhaps little interaction outside their own circles, may be left unable to conceive of the types of situations, such as the level of poverty, that would make regulations more than a mere inconvenience, and, thus, be unable to empathetically identify with those for whom the regulations create an undue burden. In her critique of *Casey* and its successors, Borgmann avidly asserts, "The fact that affluent, adult women still enjoy access to abortions should never obscure the disturbing reality that too many other women—particularly those who wield the least political power—are completely denied abortions thanks to the restrictions *Casey* allows" ("Winter" 716). Despite being responsible for protecting the fundamental individual rights of all members of the US community, in *Casey*, the High Court not only invites classification by resources but also creates and encourages such classification and division. Indeed, the success of its efforts to reframe reproductive rights depends on it. As with other value judgments, public opinions about resource classification are likely to extend beyond issues of abortion.

Erasing the Medical Narrative

Not only did the subjective standard of review offer less in terms of progress that many originally hoped, so too did the Court's choice to center women at cost of excluding physicians. While some saw the shift away from a medical narrative as a sign that women were gaining control over decisions related to their bodies outside of the watchful eye of physicians, shifting the story that is competing with the women's story from a medical story to a legal one changes the stated focus of the abortion debate from women's health to legal rights, a change that has significant consequences that radiate out from the decision. First, the narrative shift changes the alternative to allowing access to safe and legal abortions. In their analysis on the press's reporting on abortion, Patterson and Hall highlight the perception that following *Roe*, the "[b]ack-alley abortions that had claimed the lives and health of so many American women were ended" (99). This understanding becomes a critical part of abortion discourse, and the *Casey* Court furthers this position by framing the issue only in terms of impacting access in order to further the state's interest in potential life. Accordingly, instead of the concern being that if women could not access abortions, they might suffer injury or even die in "back alley" abortions, it becomes assumed that denying access will result in women changing their minds and forego having abortions, the latter alternative being considerably more acceptable within societal discourse.[108] Further, in the context of enforcing an individual's legal right, the health risks for existing pregnant people take a backseat to the potential of new life, thus discounting the genuine

[108] Although *Casey* solidifies the narrative shift away from dangers of illegal abortions that were a central focus in *Roe*, the ease with which those who would remain able to obtain safe and legal abortions appear willing to sacrifice those who would not, and, as McCarthy points out never had been since the Hyde Amendment and the cases that followed, begs the question whether the goal had ever been to protect the "unworthy" victim from back-alley abortions in the first place.

impacts to pregnant people's health. This conclusion is easier to reach and explain persuasively by removing the medical story that had dominated *Roe*. Yet these risks were, and are, real, as evidenced by the AMA's report on morbidity and mortality.[109] Moreover, the narrative not only discounts health risks but also contributes to them by perpetuating the stigma associated with abortion, exacerbating access issues. Moreover, the *Casey* Court's shift away from *Roe*'s medical narrative chips away at the ethos of the medical community. Similar to the way the Court's implied value judgment of women affected the public's perception, so, too, did its judgment of physicians.

Although the Court largely avoids including the medical community at all, because its narrative choice is in such stark contrast to the *Roe* narrative, a part of *Roe* that had been highly criticized, the absence is understood as an affirmative choice and, thus, a rejection of medical authority. This choice reflects the conservative position for addressing earlier abortion cases. As Nan Hunter observes, following *Roe*, "[a]nti-abortion conservatives…used a rhetoric of de-legitimating medical authority as one path to undermining the logic of *Roe*" (189). In addition, she claims, as the Court becomes more conservative and, thus, more restrictive regarding reproductive rights, "it used a counter-rhetoric of the unreliability of medical judgment as a primary discursive mechanism" (192). Even where not explicitly attacking the medical community, the Court's view of physicians, which would be passed to the public, shines through. Finally, the Court employs a divide and conquer approach with respect to abortion, similar to its efforts to separate women by resources. As Abrams notes, beginning with *Casey*, "the Court has validated laws that distinguish abortion from other medical procedures" and "defer[red] to the

[109] As the AMA makes clear in its report, increases in restrictions on abortion would likely lead to "a small but measurable increase in mortality and morbidity" (June 1992: 327).

legislative treatment of abortion as unique" (330). Even if such distinction is motivated by needing to reach a particular outcome on abortion law, the effect is to treat abortion procedures, and by extension abortion providers, as a separate group within the medical community. Additionally, as Abrams observes, the Court's repeated reference to "abortion doctors" suggests that they are a particular type of doctor separate from and less than other physicians (332). This separation negatively affects the standing of the "abortion group" both within the medical community and the larger society.[110]

The impacts of the *Casey* Court's narrative are not limited to the public's reaction, instead rippling out into the medical community as well. Even before the *Casey* decision, doctors were moving away from performing abortions.[111] Two and a half years before *Casey*, in a front-page *New York Times* article titled, "Under Pressures and Stigma, More Doctors Shun Abortion," Gina Kolata explicitly notes the reported connection between fewer providers and increased difficulty for those seeking abortions (A1). Notably, Kolata quotes a medical director for Planned Parenthood as observing that having only a few doctors perform abortions contributes to the idea that abortion is "dirty" and "not an appropriate or legitimate medical procedure" (A1), thus highlighting the breadth of the shame issue and its cyclical nature. Moreover, many of the damaging *Casey* regulations are designed, or at least have the effect of, inhibiting patient access. However, as Benshoof notes in *JAMA*, these "restrictions would present less of a blockade if a greater number of physicians performed abortions" (2256). Thus, the negative effects of the state

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[110] Chapter 4 further considers the othering of abortion providers.

[111] As reported in the *New York Times*, in 1985 the American College of Obstetricians and Gynecologists polled 4,000 of its 29,000 members and reported that "84 percent said they thought abortions should be legal and available, but only a third of the doctors who favored abortions actually performed them and two-thirds of those who did abortions did very few" (Kolata A1).

restrictions will be exacerbated by the growing shortage of doctors willing to perform abortions. Yet, the Court contributes to the shortage problem by further othering abortion providers and allowing state lawmakers to quite literally put words in their mouths, even against standard medical practice, rather than supporting the physicians' medical judgment. Indeed, Benshoof argues that the *Casey* decision will push doctors further out of the conversation and expand the shortage of providers because of the increased costs and continued harassment of providers (2256). This othering, coupled with regulations such as extra reporting requirements, will make it even more difficult for providers to be seen as equals and to convince future physicians to become providers, which will, in turn, cause even more access issues, ultimately putting women's health further at risk. Furthermore, in the same way that the public is able to accept lack of access as an alternative to abortion by distancing themselves from the horrors of illegal abortions pre-*Roe*, so too are the physicians. As Kolata reports, the vice president for medical affairs at Planned Parenthood Federation of America observes that older doctors who remember the health complications and even death from illegal abortions before *Roe* were willing to perform abortions to prevent the damage, but younger doctors who had not seen the problems, were not so moved (B8).[112]

Finally, like the public, the medical community appears to understand *Casey*'s upholding of *Roe* as evidence that the system is working, and thus backs down from its active engagement in the debate. Despite the extensive interest in abortion regulations' impact on patient health at the AMA's annual meetings in 1991 and 1992, including the detailed mortality report

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[112] Notably, Benshoof suggests that one way the medical community can help increase the number of providers is for older physicians to tell the stories of the dangerous time before *Roe* to help newer doctors understand the importance of providing abortions (2257), essentially invoking empathetic identification.

specifically commissioned to inform the public and government, the interim meeting in December 1992 has only a single brief mention of abortion as it relates to genetic disorders (Dec. 1992: 198), and the annual meeting in 1993 does not mention abortion at all. This could be in part because overturning *Roe* was no longer perceived an immediate threat, or a sign that the AMA saw its efforts as futile given the Court's dismissal of its findings, or a consequence of the othering of abortion within the community. Regardless of motive, this disengagement further distances the abortion debate from the health risks involved, contributes to the idea that abortion is not a legitimate medical procedure or even topic of discussion within the medical community, and costs potential abortion seekers the knowledge and support of the official head of the medical community. Ultimately, uninviting the medical community from the conversation would have a direct impact on abortion rights, both immediate and ongoing.[113] Benshoof argues in her discussion of the *Casey* decision in JAMA, "It is critical that abortion be seen as an important public health issue and a necessary part of a comprehensive reproductive health care policy" (2256). Yet, the Court's narrative, while giving the appearance of offering progress for women, moves abortion discourse, within legal, medical, and public communities, away from this view.

Calling a Spade a Spade: Why Revisiting *Casey* Matters

In *Planned Parenthood v. Casey*, the conservative-majority US Supreme Court was faced with the nearly impossible task of overturning two decades of precedent for an individual right that retained general public support while honoring the legal system's values of tradition and certainty in order to save its own legacy. It accomplishes this feat by separating its legal and rhetorical goals. In short, the Court aligns with the states, and thus conservatives, on the

[113] Chapter 4 further explores the impact of the medical community's absence from the discussion.

tightening of individual rights, while using its words, including the language of *Roe* itself and nods towards women's equality, to persuade the public the decision was right and just and that the status quo remained. Somehow, the *Casey* decision was simultaneously surprising and inevitable in its upholding of *Roe*. Moreover, the opinion cuts the medical community from the conversation, which allows the narrative to claim a recentering of women and provides an object for conflict, allowing the joint opinion to reject only the medically-framed trimester scheme rather than *Roe*. Despite the alleged increased support for women and their liberty, the material reality of the *Casey* decision does not support such a claim. Critically, the framing of the right, including state interest in fetal life that spans the entire pregnancy, positions women as both against and outside of the state, as the state functions only to temper the women's deviant behavior. Yet individuals who seek abortions deserve to have their values considered not only as autonomous decision-makers over their own bodies, but also as members of the community that is responsible for agreeing on its value system. In addition, the joint opinion's creation of the undue burden standard allows for the possibility of a subjective approach, but its application of the standard reflects its focus on objectivity, which is valued as a central tenet of fairness, and offers no genuine consideration of the individual material consequences, demonstrating a failure of empathetic identification with individuals who would be unduly burdened by the new restrictions. Moreover, the stories the Court tells alters the discourse around abortion rights and conceals the material realities of the changes made in ways that have had lasting impacts. For example, the Court's story offered a worthy victim narrative that assessed who was entitled to exercise their individual right to obtain a safe and legal abortion and separated abortion-seekers by their level of resources. Significantly, the opinion's narrative shifted the debate from one

centered in health care to one over legal rights, which obscures the health risks at issue and separates physicians who provide abortions from others within the medical community.

To illustrate how the *Casey* decision creates the illusion of progress, consider one woman's public abortion story. In September 1991, Kate Michelman, executive director of the National Abortion Rights Action League, testified before the Senate Judiciary Committee on the Supreme Court nomination of then-Judge Clarence Thomas about her own pre-*Roe* abortion. She begins by pointedly noting the real lives at stake: "When we get past constitutional theory, precedent, and court rulings, this confirmation process will determine whether millions of women will be forced, terrified and alone, to face one of the most devastating crises of their lives" (223). In her story, she details the shame and trauma of seeking permission from an all-male hospital panel and the personal struggle she faced in making the decision despite her financial inability to make a different choice. Notably, though, her account, and the identification it invokes, is not inconsistent with the outcome in *Casey*. First, she is arguing directly for saving *Roe* and avoiding a return to the "back-alley" days, a request which was ostensibly fulfilled. Second, finding herself in dire need of an abortion because she was a single mother of three who had been abandoned by her husband paints the picture of a "worthy victim," allowing the distinguished members of the Court—and community—to identify with her plight while not accommodating those who made other, more stigmatized choices. And finally, her most compelling point is related to having to seek her husband's permission, despite him having abandoned her and their family,[114] an issue addressed by the Court in its rejection of the spousal

[114] "I would not be able to have an abortion without written permission from the man who had just deserted me and my children. I literally had to leave the hospital and find the man who had rejected me. It was a degrading, dehumanizing experience - an assault to my integrity, my dignity, and my very sense of self" (224).

notification provision. Despite the fact that *Casey* appears to remedy these forceful concerns, shared in a public forum, many, many individuals still do not have the resources to exercise their right and were left in a worse position.

Perhaps most significantly, framing its story as a heroic quest to protect precedent and save liberty left the impression that the rights recognized in *Roe* remained intact. Yet, for many people, particularly those who lack adequate resources, the "essential holding of *Roe*" did not stand at all, if it ever had. What value was an individual right that could not be exercised in any meaningful way? However, legal rights are not a one-way street, and thus the public's perception of those rights is a critical component of how they operate. As such, the public's belief that *Roe* was saved and the status quo remained would have a material impact on their reaction to the decision, including how they publicly express their views, which in turn impacts how laws reflect those views in the future. Moreover, because of the Court's filtered stories, which were not supplemented or corrected by the press, much of the public would adopt the Court's own failure to identify with those individuals most burdened by the regulations. With the news cycle being dominated by the celebrations of the *Casey* Court "honorably" adhering to precedent and protecting the right to choose, there was little opportunity for the public to hear the stories of those for whom they might otherwise advocate.

While the public may not have immediately understood the impact of the *Casey* decision, political operators began to take advantage of the new opportunities to restrict abortion access that the *Casey* decision enabled, and perhaps even invited. Within a couple years, Clarke Forsythe, a public interest pro-life attorney, wrote an article in the *Wall Street Journal* noting the increase in state legislation restricting abortion rights, specifically tying this increase to the *Casey* decision and the 1994 elections that followed (A9). Arguably, the public's understanding

of the status of abortion rights would play a role in elections that involved the issue, and, under the impression that state lawmakers could no longer threaten abortion rights, pro-choice voters may not have understood the potential implications of their voting choices. Forsythe further observed that state legislatures were discovering that the medical community viewed abortion providers negatively and thus used the growing dearth of providers to their advantage (A9). As Benshoof and McCarthy had recognized immediately following the decision, the growing discontent within the medical community regarding providing abortions would continue to be a key component of denying individuals access to abortions. Already, the potential damage caused by the Court ending its efforts to persuade the medical community to participate in the full realization of individuals' right to abortion can be seen. As explored in the next chapter, perhaps even more problematic and long-lasting though, is that by silencing the would-be medical co-rhetors, the Court opens the door for legal rhetors to tell medical stories with increasing false confidence and to critically negative effect. More significantly, with additional conservative Justices and an increasingly public—and political—presence, the Court extends *Casey*'s rhetorical move of merely appearing to follow precedent in order to directly contradict an earlier decision without acknowledgment. Reading the majority opinion together with the dissent, which provides a traditional legal analysis, reveals how far the Court could expand its judicial power through its rhetorical narrative.

Although some legal scholars have belatedly analyzed the impact of *Casey*, there is virtually no critical rhetorical scholarship on the case, largely because the full impact remains discounted. Indeed, one rhetorical scholar, Katie Gibson has criticized the doctor-centered language used by the Court in *Roe* and the influence of medical language over the Court and its abortion decisions as demonstrated in *Gonzales v. Carhart*, a later case which is the focus of the

next chapter ("The Rhetoric"). Yet, her connection between *Roe* and *Carhart* skips completely over *Casey*, even though, from both a legal rights and rhetoric perspective, the *Casey* decision is fundamental to abortion discourse. This omission is significant for two reasons: First, it does not account for the impact to the medical community as rhetor that occurred when the medical language was displaced in *Casey*. That shift is important because the medical language that returns in *Carhart* is not the same rhetorically as the medical language in *Roe*. Second, this discounting of *Casey* further illustrates the underwhelming response to the decision and its rhetorical choices within the scholarship. Unfortunately, by the time the significance of the new legal standard became clear fifteen years later in *Carhart*, the damage to the legal right to abortion had been accomplished.

In his introduction to his edited case book on *Casey*, Leon Friedman asserts that "[t]he *Casey* case is important both for the specific holding of the case and for the process by which the decision was reached," noting the way "the Court made us reexamine and rethink the basic system by which our society operates," including what rights count as fundamental and "how our Supreme Court operates to protect those rights" (18). He is right that *Casey* should make us reexamine and rethink, but history tells us that most have barely considered it at all, believing that the ceremonial saving of *Roe* meant the system was working just fine. Moreover, Friedman's use of the word "protect" illustrates the success of the Court's effort to position itself as the hero, even at the exclusion of others. Yet, it is not too late to pause on *Casey* and consider how our legal system operates, including how stories move into the legal system and back out again, filtered through the Court and the press. These lessons remain significant despite the fall of *Casey*'s holding, including its devotion to precedent and liberty. Indeed, they become more urgent as the governed community grapples with the stability of precedent and the Court itself.

Critically, our societal values are both impacted by and reflected in our system of laws, and the full picture of those impacts and reflections is captured in our collective stories.

CHAPTER IV: *GONZALES V. CARHART* (2007): EXPANDING THE BOUNDARIES OF PRECEDENT'S RHETORICAL CONSTRAINT

On April 18, 2007, Justice Ruth Bader Ginsburg began a new pattern of voicing her concerns as the High Court turned away from its own traditions when she read aloud from the bench an opinion on behalf of Justices Stevens, Souter, Breyer, and herself in *Gonzales v. Carhart*, the decision in which a five-Justice majority of the Court voted to uphold the federal ban on so-called "partial-birth" abortions. Describing the Court's previous ruling on a nearly identical law as "[f]aithful to precedent unbroken from 1973 until today" and "unambiguous" and labeling the current decision "alarming," she declares that the four Justices "strongly dissent from today's decision" (*My Own* 314). Illustrating the danger, she quotes the Court's holding in *Planned Parenthood v. Casey* that overturning *Roe v. Wade* "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law," drawing a sharp contrast with the current Court's actions and proclaiming, "In candor…[a] decision of the character the Court makes today should not have staying power" (316). Although much commentary regarding Justice Ginsburg's bench dissent has redirected the bulk of her ire toward the chipping away of reproductive rights specifically,[115] it was the "mutual concern" of all four dissenters over the "majority's claim of adherence to precedent" (313) that was at the core of the dissenting opinion, and which proved to be the

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[115] Ironically, Justice Ginsburg's revisions for her public audience may have contributed to the misdirection. The written version of the dissent reads "a decision so at odds with our jurisprudence" (191) rather than "of the character the Court makes today," a change likely made to avoid the specialized word *jurisprudence* when publicly reading the opinion. The result, however, created a more ambiguous description and, thus, a greater space for varying interpretations.

gravest threat. A rhetorical analysis of the *Carhart* opinion,[116] including the compound rhetorical situation that surrounds it, reveals how the conservative Justices of the Court—Justice Kennedy, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito—use their available means of persuasion to increase their power by decreasing the limitations created by the expectations of adhering to precedent, a move with implications reaching well beyond reproductive rights.

Across this chapter, I argue that the Court's choices regarding the narrative construction of the *Carhart* decision, including co-rhetors, allows them, first, to sidestep the constraint of precedent by going against previous Court decisions without acknowledging doing so and, second, to reshape public opinion on abortion rights by using the Court's ethos to override medical opinion and women's reproductive health stories. In addition, by burdening an individual's constitutional rights to privacy and equality based on a mere government interest in moral debate, the majority decision smooths the way for a future Court to use the Tenth Amendment's reservation of powers for the states to deny constitutional protection for reproductive rights entirely. By contrast, the dissenting opinion cautions against the Court's

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[116] Even the naming conventions for the "partial-birth abortion" ban cases highlight the increased rhetorical efforts surrounding the issue. The Court struck down a Nebraska ban in 2000 in *Stenberg v. Carhart*, and that case took on the short form *Stenberg*, following the common convention of defaulting to the first party's name. After the Court's 2007 decision on the federal ban in *Gonzales v. Carhart*, pro-choice activists renamed the earlier case *Carhart I* and used *Carhart II* for the later case; the Carhart in both cases is Dr. LeRoy Carhart, a physician who performs later-term abortions and sometimes used the now-banned procedure. Because such a naming convention is generally reserved for instances where the same case returns to the Supreme Court, the most likely explanation for this move is an effort to link the two cases rhetorically in order to highlight the surprising and unusual move by the Court to reach a different decision on a virtually identical law only seven years later. Although this naming convention does not appear to be particularly widespread, it has likely contributed to an uncharacteristically inconsistent use of both *Gonzales* and *Carhart* as the short form for the 2007 case, with the latter being used more frequently. For consistency and clarity, I use *Stenberg* and *Carhart* respectively.

rhetorical moves and pushes back by demonstrating the precedential failures and highlighting the health and equality issues. As had happened following *Casey*, the most significant danger is minimized and overlooked. Thus, in the short-term the Court's opinion normalizes its overtly political acts, but in the long-term it risks the authority concerns that were at issue in *Casey*.

Perhaps more than any other, this chapter is about how storytelling becomes *dissoi logoi*—the art of telling two contradictory and competing stories from the same basic facts. The majority and dissenting opinions in *Gonzales v. Carhart* use the sophisticated rhetorical skills expected of members of the High Court to tell two exceptionally compelling stories that seem too incredibly different to have begun at the same point. Indeed, the *Carhart* decision clears away much of the background noise, dispensing with the partial concurrences and multiple dissents that make it nearly impossible not only to determine what the law grants individuals with respect to reproductive rights, but also to follow the story that reflects the societal values that underpin it. In order to understand these two stories, I consider how exigence was unique to each one and distinct from that of a typical Court opinion. This analysis examines how language and evidence choices reveal the true goals of each storyteller. Moreover, I interrogate how because the authors were primarily telling stories of others, their choices regarding co-rhetors were critically important and had a substantial impact on the material effect of the stories they echoed. The reproductive rights that are available to numerous individuals in the United States continue to be altered based on the stories told in this Supreme Court opinion. More significantly, however, contrasting the methods of the two storytellers reveals foreshadowing of the clash between politics and science that continues to haunt our society and has long-lasting and far-reaching implications as seen through the recent opinion in *Dobbs v. Jackson Women's Health Organization*, which I return to in the concluding chapter.

Entering the Legal Conversation Intent on Changing Public Opinion

According to the Court, the primary legal issue in *Gonzales v. Carhart* is simply whether "a federal statute regulating abortion procedures" is valid, meaning that it does not infringe upon individual rights in an unconstitutional manner (132). More specifically, the issues are whether the federal ban is specific enough, is grounded in an adequate governmental interest, and, most significantly, can survive without an exception to preserve the health of the pregnant person. Although the legal issues appear relatively straightforward, several factors complicate the matter. First, more than three decades of abortion jurisprudence serves as backdrop and provides a complex and often inconsistent precedential history and charged political overtones. More directly, though, the case sits in the shadow of a previous Supreme Court case, only seven years earlier, that decided these same issues with respect to a Nebraska state law and found the law to be unconstitutional. Finally, the procedure at issue, "partial-birth abortion," is a rhetorical creation by antiabortion activists based on moral concerns rather than specific health risks. Taken together, these factors create a situation that is significantly outside a typical judicial context. Answering the questions at issue, the Court observes that the federal law "refers" to the earlier opinion, *Stenberg v. Carhart*, and it finds that compared to the Nebraska law, the federal law "is more specific concerning the instances to which it applies and in this respect is more precise in its coverage" (132-133). Based on that single rationale, the Court then proclaims, "We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it" (133). Notably, while the Court is not required to provide its entire rationale in the opening paragraph, here the Court describes the issue in a misleadingly narrow way, giving the appearance of a typical scenario in where a law is found unconstitutional and lawmakers address the issue. In reality, the federal law had minor language differences in describing the banned

procedure, which may have addressed the first issue; the other issues were addressed by evasion rather than correction and would not have been covered by the "more precise" description in any event. This tactic of misdirection and avoidance permeates the majority's narrative throughout the opinion, resulting in a decision that performs as expected rhetorically but not legally.

Critically, the *Carhart* opinion adds to decades of abortion jurisprudence in ways that turn against the individual right to obtain a safe and legal abortion established in *Roe* and reaffirmed, though diminished, in *Casey*. Specifically, whereas *Casey* altered *Roe* such that it left no temporal space where a state interest in maternal health was not in competition with an interest in fetal welfare and implied a preference for the latter interest, *Carhart* openly subordinates maternal interests to fetal on a federal level. In addition, it backs away from *Casey*'s language of women's equality as well as *Roe*'s language of privacy, explicitly thrusting women and their reproductive decisions into the public square.

Partial-Birth Abortion as Rhetorical Invention

Central to analysis of the *Carhart* opinion is an understanding of "partial-birth abortion," including its origin and purpose. In an article for *Harper's Magazine* a year after the federal ban was passed, Cynthia Gorney unhyperbolically proclaims, "This story is … about how one abortion doctor and one right-to-life cartoonist helped set off the most sustained and rhetorically high-pitched battle in the forty-year history of this country's abortion wars" (33). Indeed, although it sounds like a medical procedure, Gorney notes that the "term 'partial-birth abortion' was invented for the purposes of writing legislation," observing "There is no textbook reference to any operative procedure or medical state called 'partial birth'" (33). According to feminist legal theorists Nancy Levit and Robert Verchick, "A good example of a legal restriction that originated as a political stratagem involves the controversy over 'partial birth abortions'" (140).

In other words, rather than the laws that ban "partial-birth abortion" being drafted to address an existing medical procedure, the procedure was created for the purpose of then banning it.

There are medical procedures that generally correspond to descriptions provided in the many bans. As the *Carhart* Court reports, the most common method for second-trimester abortions is "dilation and evacuation" or "D&E" (135). In this procedure, the physician dilates the cervix and removes the fetus with forceps; the friction causes parts of the fetus to separate, and it may take ten to fifteen passes to complete removal (135-136). In a variation of this procedure, a physician "extracts the fetus in a way conducive to pulling out its entire body" intact or largely intact (137). Although the Court asserts that the "medical community has not reached unanimity on the appropriate name for this D&E variation," it acknowledges the existing medical terminology: "It has been referred to as 'intact D&E,' 'dilation and extraction' (D&X), and 'intact D&X'" (136).[117] While there is not a medical consensus regarding use of the intact D&E, there are safety advantages recognized by reputable members of the medical community.

Though the bans are generally understood to apply to the intact procedures, because the law requires precision in language to ensure proper enforcement, the insistence of lawmakers that they use the non-medical term to restrict medical procedures is relevant to the analysis. The term's history illuminates the issue. In short, in 1992 an abortion provider presented a paper at a medical conference on a method of intact removal, which was published in a volume of conference proceedings and then "in right-to-life hands within a matter of weeks" (Gorney 37). From there, an abortion opponent who had received the conference book created a cartoon illustration that was published in *Life Advocate*, a Portland-based magazine, subsequently picked

[117] For consistency, I use "intact D&E" to refer to the banned procedure and "traditional D&E" for the original, more commonly used procedure.

up by larger organizations, such as the National Right to Life Committee (NRLC), and created an extraordinary, if unexpected, impact (Gorney 37). Based on the emotional effect of the illustration, a group of lobbyists and lawmakers drafted the first proposed federal ban of the intact procedure in 1995, creating the label "partial-birth abortion" for the bill (Gorney 38). The goal of the term and the related bills was to sway public opinion against abortion generally, a goal about which antiabortion activists have been clear. In a 2006 NPR article purporting to "separate[e] fact from spin" in the wake of the passage of the federal ban and subsequent court cases, Julie Rovner answers the question "Where does the term 'partial-birth abortion' come from?" by reporting that in a magazine interview in 1996, "the NRLC's Douglas Johnson explained that the term was thought up in hopes that 'as the public learns what a "partial-birth abortion" is, they might also learn something about other abortion methods, and that this would foster a growing opposition to abortion.'" Legal scholar Rigel Oliveri argues that the term, which she notes was "coined by the congressional proponents of the Ban" and "is neither an accepted medical nor legal term," was "purposefully created to be both inflammatory and misleading" (403). According to Keri Folmar, drafter of the original federal ban, "We called it the most descriptive thing we could think of," insisting that they "didn't want it to be inflammatory" but "wanted a name that rang true" (qtd. in Gorney 38). Regardless of intention, the term evokes emotion and its use results in laws with potentially ambiguous meaning. That legislatures continue to use the term exclusively even while attempting to address unconstitutional vagueness suggests bans with a rhetorical value considered higher than the legal value.

The Court's 2000 Stenberg Decision and the 2003 Congressional Act Begin Carhart's Narrative

The Partial-Birth Abortion Ban Act of 2003 ("the Act") was signed into law by President George W. Bush on November 5, 2003, after twice being passed by Congress but vetoed by

President Bill Clinton, in 1995 and 1997, and after having been introduced in at least one of the two chambers virtually every year in between (Kushnir 1118, 1148). Importantly, in 2000, after the second veto and before passing the eventually signed bill, the US Supreme Court decided *Stenberg v. Carhart*, which invalidated a Nebraska partial-birth abortion ban as imposing an unconstitutional undue burden. Yet, Congress reached its own decision on *Stenberg* within the text of the Act, thus setting off the unusual judicial context of the *Carhart* decision.

In *Stenberg*, the Court struck down Nebraska's virtually identical law as an undue burden because it was too vague and overbroad to be read as not also applying to the traditional D&E; since the traditional D&E is the most common procedure used in later-term abortions, banning it would constitute an undue burden on the individual right (938). In addition, the Court concluded the lack of an exception to protect the health of the mother was a separate defect, acknowledging the medical debate over the procedure but finding that because there is substantial medical authority asserting that the procedure may sometimes be the safest option, banning it would create an unconstitutional health risk (937-938). The Court also points out the logical fallacy of not including the health exception in the face of medical uncertainty, observing that if those who believe the procedure is sometimes necessary turn out to be right "the absence of a health exception will place women at an unnecessary risk of tragic health consequences," but [i]f they are wrong, the exception will simply turn out to have been unnecessary" (937). This issue was a particular concern for Justice Sandra Day O'Connor, who observed in her concurring opinion that per precedent set in *Casey*, a health exception is required for both pre- and post-viability regulations (947). Following typical judicial practice, she provided guidance regarding under what circumstances she would have upheld the law, pointing out how some states have crafted "more narrowly tailored" laws and asserting "a ban on partial birth abortion that only proscribed

the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view" (951). Particularly in a 5-4 case such as this one, such guidance usually acts as a kind of roadmap for lawmakers to revise the law in ways that conform to constitutional requirements.

Despite clearly identified constitutional deficiencies, Congress responded primarily by challenging the Court's findings in *Stenberg* rather than fixing the law. There are slightly more specific "anatomical landmark" references in the Act that distinguish the description from that in the Nebraska law; however, the Act still uses "partial-birth abortion" exclusively rather than existing medical terminology. To address the health exception issue, it offers a medical opinion by declaring that a "moral, *medical*, and ethical consensus exists that the practice of performing a partial-birth abortion…is a gruesome and inhumane procedure that is *never medically necessary*" (1201; my emphasis). Notably, language like "gruesome and inhumane" seems out of place in both a legal and medical context. In addition, the alleged consensus is significantly overstated.

Further complicating the constitutional analysis, the Act's only function is to prohibit a particular abortion procedure. The Act does not make any changes to the law regarding who can obtain a later-term abortion, the timing of performing such abortions, or the circumstances under which one qualifies for a later-term abortion. In fact, though the prohibited procedure is generally performed later in gestation, the Act does not define the procedure based on a particular gestational point. As such, the Act is essentially dictating the proper way to provide medical care rather than granting any new legal rights. Indeed, Justice Ginsburg submitted a concurring opinion in *Stenberg* specifically to call out this issue with the Nebraska law: "I write separately only to stress that amidst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska's 'partial birth abortion' law. As the Court

observes, this law does not save any fetus from destruction, for it targets only 'a *method* of performing abortion'" (951). She goes on to point out that the law does not "seek to protect the lives or health of pregnant women" (951). This failure to protect either fetus or mother raises questions about the government's motivation and right to intervene. To address this, Congress declares that the ban will "advance the health interests of pregnant women" and that "such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life" (1205). Again, none of this is substantially different from the Nebraska law or meant to address the Court's concerns beyond a superficial level.

Given Congress's transparent attempt to subvert the High Court rather than fix the law's defects, many assumed the law was primarily for show. Writing in November 2004, shortly after the Act was struck down by three separate lower courts, Gorney suggests that whether the federal government defends the ban would likely depend on the winner of the 2004 presidential election but asserts "In either case, the ban will have accomplished half its mission" (33). Similarly, in an analysis of the Act for the *Loyola University Chicago Law Journal*, Tamara Kushnir highlights the media attention that accompanied various versions of the federal bill, implying a motive of notoriety over law (1149). Indeed, both Kushnir's article and another by Melissa Holsinger confidently declare in the immediate aftermath of the Act's passage that a proper legal analysis demonstrates it will be found unconstitutional. Accordingly, the Court's decision to hear the case is unusual. Each of the Courts of Appeal that ruled on the Act found it unconstitutional per *Stenberg*, leaving no divided positions to be settled, a typical reason for the High Court to take up an issue. Maya Manian highlights this issue, prefacing her report of the Court's acceptance of *Carhart* with "Despite the lack of a circuit split" (231). Yet, less than a month after Justice

Samuel Alito is confirmed as Justice O'Connor's successor, [118] the Court agrees to hear the appeal of the Eighth Circuit's decision striking down the Act.[119] In a surprise to many legal analysts, though somewhat less so once the Court inexplicably took the case, a five-member majority of Justices rule the Act is constitutional. Contrary to the characterization by some,[120] the *Carhart* Court does not overturn its earlier decision in *Stenberg*; rather, the opinion goes to great lengths to persuade its audience that it is in line with existing precedent. Instead, the Court finds that the minor language changes are sufficient to address the vagueness issue and otherwise justifies its different conclusion, primarily based on deference to the congressional findings.

Notably, narrative is a critical part of the debate over the Act. In order to garner public support, lawmakers provide graphic depictions of the procedure, including phrases like "completes delivery of the dead infant" (1201). Such descriptions are intended to shock the conscious of the public into turning against abortion by suggesting procedures akin to infanticide. Further, in an article examining the *Carhart* Court's narrative of women's regret, Ronald Turner traces the Act's connection to antiabortion advocates and highlights the work of David Reardon, a prominent leader in the movement, who Turner says "has been called the

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[118] The details of Justice O'Connor's retirement highlight the critical importance of representation on the High Court. Following President Bush's nomination of John Roberts, Justice O'Connor expressed regret that her replacement would not be a woman. Given a second chance after shifting now-Chief Justice Roberts to instead replace Chief Justice Rehnquist after the latter's untimely death, President Bush did nominate a woman, White House Counsel Harriet Miers. However, Miers's nomination was withdrawn following complaints by ultra-conservatives, and Justice Alito, one of the most conservative current Justices and now author of *Dobbs*, was confirmed to replace Justice O'Connor.

[119] Justice Alito was confirmed on January 31, 2006, and the Court granted cert in the first of the two companion cases on February 25, 2006. Levit and Verchick characterize the timing as "the Court announcing its acceptance of certiorari in the case on Justice Samuel Alito's first day in office" (142).

[120] For example, Levit and Verchick report, "In 2007, the Court voted 5-4 the other way to overturn *Stenberg* and uphold the constitutionality of the federal law" (142).

'Moses' of the abortion-hurts-women view" (27n152). He quotes a 2000 book by Reardon in which Reardon asserts that "it is the stories of women and men who chose abortion and have suffered so much from that dreadful mistake that are the key to changing the general public's attitudes about abortion" and claims, "Through their stories, we hear that these women and men did not lose 'products of conception'; they lost their children" (30). Explaining the power of stories, Reardon describes empathetic identification: "When we hear their stories—either directly or as relayed to us by politicians, pro-life advocates, or in the media—we become witnesses to the emotional connection between women and the children they have aborted" (30). Two points stand out in Reardon's claim. First, the seemingly equal weight given to stories told via conduits, thus implying the importance of an entity like the Court in fulfilling a storytelling role. Second, the narrow view of anticipated understanding, namely that of a woman as mother. This view of women is reflected in the *Carhart* majority's narrative following its repetition of testimonials provided in an antiabortion *amicus* brief, the only women's stories so recognized by the Court.

In response to activists' stories of regret and infanticide, opponents of bans tell stories of heartbroken mothers-to-be, who have made the decision to have an abortion for medical reasons, either for the pregnant person or fetus, rather than due to a simple unwanted pregnancy. For example, Kushnir's article opens with a paragraph about three women making tragic decisions. She then directly challenges the Act's claim of medical consensus as part of her storytelling effort: "All three of these women were advised by their physicians that an intact dilation and evacuation procedure was the best option to terminate their pregnancies safely without compromising their future attempts to bear children" (1117). Similar stories can be found in media reports, particularly in the wake of related legislative or judicial action. Importantly though, such stories do not represent all instances of later-term abortion, and some second-

trimester pre-viability abortions are elective. Notably, the timing in such instances is often exacerbated by regulations designed by conservatives to inhibit abortion access. In the context of the *Carhart* decision, an *amicus* brief provided these varied stories as well. Though ignored by the majority, the dissent endeavors to provide a more complex picture of women, including more current views on societal roles and more varied scenarios of reproductive choice. Given the intentionally public dialogue invoked by the Act and the case that upheld it, the Justices' representations of abortion narratives are exceptionally important.

Competing Conflicts in Crafting the Rhetorical Narratives

The conflict in *Carhart* is a combination of the conflicts seen in *Roe* and *Casey*, although the results turn out considerably different. Like *Roe*, on its face the primary conflict in *Carhart* is between abortion providers and the government that seeks to control them. Here, though, instead of government control being at the state level, leaving the federal government to act as mediator, control is being instituted by the federal government. This shift in the conflict raises several complex issues. One, because state law is subordinate to federal law on this issue, and many states that had expressed an opinion sided squarely with fetal interests, physicians—and patients—are left essentially without government support of their interests or rights, despite being members of the community that the government purports to represent. Further, to the extent the federal government is still the guardian of individual rights, it is forced into conflict with itself, and in this case, the judicial and legislative branches appear to be collaborating on behalf of the fetus. Finally, there is a similar conflict to that in *Roe* over how much authority physicians should be granted and how much weight should be given to the medical community's self-regulation. Here though, rather than using the physicians as a tool to increase women's

health options, physicians are being used explicitly as a foil to women's efforts to make their own medical choices, regardless of the impact on their health.

In addition to the internal conflict within the federal government, there is an internal conflict within the Court. Because of existing case law created in post-*Roe* abortion jurisprudence, *Carhart* shares the internal conflict present in *Casey* over how the Court should account for the constraint of precedent and how much room the Court has to change its mind based on new membership. Indeed, this conflict is even sharper in *Carhart* because the Court is not merely contending with previous cases on similar issues, but rather with its own decision only a few years prior on a nearly identical law. Moreover, included in the precedent applicable to the *Carhart* decision is the *Casey* Court's vehement recognition of its duty to precedent, even where its members would not have made the same original decision. In other words, to borrow from a more recent Justice during confirmation proceedings, precedent on precedent. Thus, as this meta-analysis demonstrates, the *Carhart* Court is contending with precedent about precedent as well as precedent about the very law it is now considering. Despite having backed itself into such a corner, the High Court again writes its way out. This time, however, dissenting Justices reveal the rhetorical maneuvering of their esteemed brethren in an effort to alert the public about the potentially unstable nature of individual rights.

Because the goals in the *Carhart* opinions are about building narratives, the alignments of both the Court and dissent reflect identification and values as well efforts to meet narrative goals. Despite the expectation of the legal community that the *Carhart* Court would confirm the holding of the *Stenberg* Court and strike down the Act thus aligning with physicians, in a surprise move, the Court does the opposite, instead aligning with Congress. To do this, the Court moves even further away from both the medical community and women. Further, where the

decision about federal law causes a conflict between the judicial and legislative branches of the federal government, the Court aligns with the latter. As it had done in *Roe*, the *Carhart* Court demonstrates its alignment, and thus identification, through its selection of co-rhetors, in this instance relying on the congressional record rather than the medical community even for determinations such as medical necessity. Moreover, although the actions of Congress, an elected governing body, could be considered to represent the community's values, albeit perhaps with an overemphasis on conservative values, the *Carhart* Court goes further in its employment of co-rhetors, demonstrating its identification directly with the antiabortion movement, a move which both indicates and contributes to increasing overt politicization. The dissent, conversely, remains true to the Court's prior rulings and existing abortion jurisprudence, including honoring alignments with the medical community and individuals. Like the majority, the dissent demonstrates alignment through its selection of co-rhetors, focusing on similar issues but telling a different story based on those choices. In contrast to the majority, the dissent opts for echoing previous Courts to establish the act of following precedent as well as the prevailing constitutional interpretation and aligns with the judicial branch by respecting the lower court record over the congressional one. The dissent also offers space for more diverse, complex medical opinions and women's perspectives, demonstrating particularly strong alignment with those the Constitution protects and reflecting concern regarding impacts to both equal rights and health.[121]

[121] There are, and always have been, significant gaps in the protections offered by the Constitution, and here I am referring to a sense of duty to protect citizens rather than an actual effect of protection.

The Majority's Political Alignments and Persuasive Narrative Goals

The *Carhart* majority opinion deviates from traditional norms of judicial opinions in both rationale and form. Careful rhetorical analysis of the Court's narrative reveals how its rhetorical goals and alignment choices work together to create an opinion not merely for a conservative interpretation of the Constitution but also to push the narrative of the antiabortion movement imbuing it with the ethos of the High Court. The efficacy of the *Carhart* Court's narrative requires it to manipulate the words of previous Courts more than the *Casey* Court had, carefully selecting passages and misrepresenting their context. In addition, as part of the Court's efforts to reclaim power from the medical community, it eliminates the long-standing requirement of a women's health exception, thus eradicating what little protection remained for individuals.

Although the full depth of the issue over partial-birth abortions would not be realized until after the opinion in *Gonzales v. Carhart* was issued, going into the case it is clear that the goal of those supporting the Act is not merely a legal one, but also a narrative one, the latter perhaps more crucial to the cause. While the *Carhart* opinion, like all Supreme Court opinions, aims to inform the parties of the Court's decision and persuade the public that its ruling is just, the context in which the Court agrees to hear the case, including the fact that it agreed to do so at all a mere six years after striking down a nearly identical state law, suggests the Court's focus is the conversation about the Act and the possibilities for more pointed public persuasion about abortion generally. Indeed, by the Court's own admission, a primary goal is to inform the public, not only of its constitutional rights, as expected, but of what the Court considers to be a concerning medical procedure. Specifically, the Court observes, "The State's interest in respect for life is advanced by *the dialogue that better informs* the political and legal systems, the medical profession, expectant mothers, and *society as a whole* of the consequences that follow

from a decision to elect a late-term abortion" (160; my emphasis). By upholding the Act on the basis of this interest and adopting Congress's position, the Court is both accepting and contributing to such dialogue.

Two contextual details of particular relevance in examining the rhetorical goals of the *Carhart* opinion are the effect of the Act and the connection between public opinion and the constraint of precedent. First, because the Act bans only a particular method of abortion and does nothing to change the conditions of or protections for the fetus, any efforts to prevent abortions for the benefit of the unborn are implied and accomplished through persuasion only. Here, such persuasion is largely achieved through shaming both abortion seekers and providers, and thus, an essential goal of the opinion is to create a narrative that fosters such shame. Though not calling it shame, the Court acknowledges this objective, asserting, "It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions" (160).[122] Furthermore, government interference requires a government interest, and the interests that have thus far been established for abortion regulations are fetal welfare and, though generally subordinate, maternal health. Because the Act does not offer protection to a fetus by "saving" it, the Court's narrative must persuade its audience that preventing a woman from receiving a procedure deemed appropriate by her physician is based on different government interests. Here, the *Carhart* Court connects the Act to the government's interest in "express[ing] respect for the dignity of human life" based on Congress's assertion that not prohibiting the procedure would "further coarsen society to the humanity of not only newborns, but all

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[122] Whether such an inference is reasonable or that the effect of the Act will be more healthy full-term babies is a separate issue.

vulnerable and innocent human life" (157). In other words, according to Congress, if this particular procedure is not prohibited, the community will be on a slippery slope to denying the humanity of its most vulnerable. In addition, the Court justifies upholding Congress's concern regarding "the effects on the medical community and on its reputation caused by the practice of partial-birth abortion" based on the "significant role" the state plays in "regulating the medical profession" (157). Because these interests are based in community views and medical reputations rather than health risks, public perception becomes a crucial factor in the basis for upholding the law. Indeed, quoting the Congressional record, the Court specifically finds, "It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world'" (160). Thus, by accepting and repeating this assertion, the Court is not only identifying but also contributing to public perception regarding the procedure.

Second, analyzing the rhetorical goals of the *Carhart* Court requires consideration of the link between the public and precedent, including larger goals with respect to reproductive rights law. Because of the US legal system's reliance on tradition and certainty, precedent operates as a constraint on rhetorical choices in all court opinions, limiting in both positive and negative ways the words and rationale available for a given decision. Moreover, as discussed throughout this project, because the High Court makes laws that reflect society's values and relies on the community's willingness to comply, it must consider, at least to some degree, the public's views on and likely reaction to controversial decisions. Notably, its concerns over the potential damage to the Court's authority if it overturned *Roe v. Wade* based solely on a change in the Court's political leanings—particularly when public opinion polls showed approximately two-thirds of

the public was against such a move—led the *Casey* Court to center its decision on its duty to uphold precedent and find more legally creative ways to return control to the states.

As the *Casey* opinion demonstrates, precedent is not a mere formality. The functioning of the US legal system, including the Court's own legitimacy, is potentially at stake if too many members of society come to believe that Court opinions cannot be relied upon. Indeed, the *Casey* Court held that if the Court exceeded the amount of error that the public could plausibly accept, "[t]he legitimacy of the Court would fade with the frequency of its vacillation" (866). In addition, the *Casey* Court asserted that because of the weight of a case such as *Roe*, "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance" (867). In describing the Court's justification for overruling itself in another landmark case, *Brown vs. Board of Education*, the *Casey* Court noted that because society had come to understand that legally sanctioned segregation itself created situations that were inferior rather than separate but equal, "[s]ociety's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896" (863). In *Casey*, the Court went on to observe that "neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed," and thus there was not a sufficient justification for overruling it. Although the Court was making a strong argument for continued recognition of the individual right established in *Roe*, implied in its argument was that the case could be overturned if either facts or societal understandings changed enough to justify so doing. Thus, following the decision of a conservative-majority Court to uphold *Roe* in *Casey*, conservative forces seeking to overturn *Roe* understand that they need to sway at least some

public opinion against abortion first in order to create the justification and support needed to do so without risking the integrity of the Court.

These goals of public persuasion, to both foster shame culture and prepare to overturn *Roe*, are the primary exigence for the Act, more significant than restricting physician behavior. In short, rather than being a law created to address "undesirable" behavior, the Act, including "partial-birth abortion" itself, was created as part of an effort to turn society against abortion. In her essay analyzing constitutional challenges to *Roe*, Reva Siegel examines the genesis of the Act, noting that "[a]ntiabortion advocates were prominently involved in developing and drafting the legislation" and that their objective was "to focus legislation and litigation on visceral details of one infrequently employed second-trimester procedure, with the aim of stimulating opposition to abortion generally" ("Dignity" 1707). Moreover, she cites a report from one antiabortion legislative liaison that specifically acknowledges the goal of getting the Act before the US Supreme Court (1707-1708), thus demonstrating that the Court was an intended participant rather than a bystander in the conversation. The High Court's understanding of its role was foreshadowed in *Stenberg*, where Justice Anthony Kennedy, the eventual author of the *Carhart* opinion, and Justice Clarence Thomas both complained in dissenting opinions about the majority's failure to use the graphic language supplied in the Nebraska law. Specifically, Justice Kennedy claims that the medical terms "may be accurate… but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient" (957). With such arguments, Justices who are later in the *Carhart* majority are not only placing themselves well within the discussion but also acknowledging the argument being made directly to the public, an argument that extends beyond legal analysis. As such, both the Act and the

Court opinion upholding it seek to persuade the public against abortion generally by providing graphic details of a particularly shocking procedure.

To this end, the *Carhart* Court uses inflammatory language and gruesome descriptions, much of which was taken directly from Congress. Despite Nebraska's law falling in part due to ambiguity over exactly which medical procedures were covered by the ban, and the fact that the various possible later-term abortion methods did have distinctive names that were recognized by the medical community, Congress insisted on also labeling the banned procedure the inflammatory but medically meaningless name "partial-birth abortion." In explanation of this naming choice, both by Congress and the Court, much weight is given to the claim that the public understands the term *partial-birth abortion*. However, the Act is intended to regulate only the behavior of physicians who perform the procedure, not the public.[123] Analyzing the original proposed bans from 1995 and 1997, Oliveri asserts that the "most obvious and influential definitional move that the pro-Ban forces used was the equation of the [intact D&E] procedure with birth," which both tapped into the strong emotions associated with birth and blurred the line between pre-viable and post-viable fetuses (406-407). As Oliveri points out, proponents of the ban take advantage of this by using pre-viability data with post-viability rhetoric, falsely implying thousands of elective abortions performed each year on post-viable babies (417), and

[123] Of course, one could argue that the rationale of public understanding is relevant because a stated purpose of the Act is public discourse. However, rather than providing a sound justification, the ensuing confusion and resulting health risks, which continue to escalate to this day, illustrate the danger of resting a law, not even on morals but on public debate about morals, within a legal system designed only to regulate undesirable behavior. Indeed, some physicians expressed concern that the Act would inhibit all later-term abortions precisely because physicians were concerned that they would inadvertently violate the law. Given the constant threats to access, inhibiting abortions not technically covered by the Act was certainly a feature rather than a flaw.

by creating the impression that the intact D&E was being performed on healthy, full-term babies (407). Although the *Carhart* opinion generally refers to the procedure as an intact D&E, it upholds the Act's use of the less precise, non-medical term and takes advantage of parroting congressional usage. Moreover, the Court makes no attempt to clarify the misleading data or narrative caused by the viability conflation, instead repeating it. And though the *Carhart* opinion does not use the word viable, it states, "The Act proscribes a method of abortion in which a fetus is killed just inches before *completion of the birth process*" (156-157; my emphasis). Here, "completion" implies a process that would have resulted in a healthy baby but for the abortion, in other words, a viable fetus. Accordingly, the Court is using its official position to further a false narrative about aborting viable babies.[124] Given the public perception justification for the Act, misleading information and false narratives speak to the foundation of the law, and they have led to continued misinformation regarding the timing of abortions that continues to the current day.

Furthermore, having expressed outrage at the lack of description in the *Stenberg* opinion, the Justices now in the majority provide detailed information about later-term abortion procedures. Based on a general assertion that such descriptions are necessary because "[t]he Act proscribes a particular manner of ending fetal life" (134), the Court spends nearly six pages providing graphic, gruesome details of the various later-term abortion procedures. Analyzing the *Carhart* opinion, Paula Abrams observes that it "goes to great length to describe late-term abortion procedures in graphic detail" without acknowledging that many "are performed for medical reasons," thus characterizing the procedure as "a gruesome 'abortion on demand'"

[124] Justice Kennedy's *Stenberg* dissent also contributes to the misinformation. There, without offering evidence, he asserts, "It is also important to recognize that the D&X is effective only when the fetus is close to viable *or, in fact, viable*; thus the State is regulating the process at the point where its interest in life is nearing its peak" (968; my emphasis).

(332). Notably, though the Court repeatedly sides with Congress over the lower courts, it explicitly relies on "the District Courts' exhaustive opinions" for these gruesome details (134), thus performing tradition where it serves the majority's purpose and insulating itself from complaints about the language. Again though, the Act regulates physician behavior, and physicians would not require such descriptions. Accordingly, the Court is speaking directly to its public audience to persuade them against abortion by changing their understanding of all abortion procedures.

Examining the kairotic moment of the *Carhart* decision—answering why now—further illuminates the larger plans for abortion regulation beyond the opinion itself or even the Act it upheld, including the inextricable highly politicized context. First, because earlier versions were vetoed by President Clinton primarily over the missing health exception and the 2003 version also did not include a health exception, the significant factor in the timing of the Act's final passage into law was the newly elected Republican President Bush. While the text of the Act speaks directly to the Court's ruling in *Stenberg*, it makes no effort otherwise to address the health exception concerns that resulted in the Nebraska version being struck down as unconstitutional. Therefore, there is little reason to believe that Congress was expecting the same Court to reach a different result when it passed the Act in 2003, even if the President was willing to sign it into law. However, understanding that a primary goal of the Act was to plant graphic seeds that would turn the public against abortion procedures explains why Congress would pass a bill that it already knew was unconstitutional. In some ways, given the goal of creating public debate, the continued battle over passing the bill was as effective as seeing the ban come to fruition. Thus, even if the Court did ultimately strike down the bill, as was expected based on

traditional rules of precedent, the public would become aware of the grisly details as planned and the continued fight could be used to galvanize supporters.

Ultimately, by the time the Act reached the Court, two new members had been seated, which gave the Court the votes necessary to reach a different conclusion from that in *Stenberg*, even if such a move did require a creative justification. Notably, because the Court has complete discretion over whether to take nearly all of its cases, including this one, there would be no reason for the Court to agree to do so just to reiterate what it had previously said, especially where the Courts of Appeal had already done that work on its behalf. As Manian observes, after the Court decided to hear the case notwithstanding the lack of a split among the Courts of Appeal, "given the changed composition of the Court, commentators speculated that the new conservative majority would overrule *Stenberg* outright" (231). Similarly, in her analysis of the changing abortion discourse of the Court, Linda Greenhouse notes the Republican majority gained in Congress and its dissatisfaction with the Court's ruling in *Stenberg* and suggests that Congress passed the Act "as a vehicle for bringing the issue back to the Supreme Court" ("How" 54). However, she observes, the federal law was so similar to the Nebraska law that the strategy only worked because of the new members on the Court (54). In other words, the most plausible conclusion for why now, however unsettling it may be to the foundation of our legal system, is that the newly added conservatives, particularly the man who replaced the first woman to serve on the High Court, is prepared to merely rule the other way.

Although the *Carhart* Court does not frame its opinion as directly overturning either *Roe* or *Stenberg*, instead opting for a more subtle attack, its goals for reshaping precedent include both swaying public opinion away from favoring abortion as well shifting the public's perception about how precedent does, and does not, constrain its options. Uncritical media speculation about

a newly configured Court's plan to change its mind, a move directly contrary to traditional legal principles, aids in that effort. More immediately, while waiting for its long-term persuasive efforts to pay off, the Court seeks to continue to chip away at reproductive rights, working to carve out even more space for government intervention against abortion even without overturning *Roe*. Though little remained of the rights created by the landmark decision, the *Carhart* Court takes yet another piece by eliminating the requirement of the women's health exception. Again, these goals are reflected in the history of the Act. By making slight changes to the description of the banned procedure but still refusing to include the health exception, particularly where the lack of such provision was not only an issue for the Nebraska law but also a long-standing requirement of abortion regulations, conservatives were able to set up the Court to both push on the edges of precedent and expand states' regulating capacity.

While gradually shifting public opinion on the issue of abortion to build the foundation for changing the law within the system, practically, the Court remains constrained by existing precedent. Similarly constrained, the *Casey* Court focused its ruling on its duty of precedent, making clear the essential aspect of the public's reliance on decisions, both generally as a legal tenet and specifically for abortion law. To reach the desired outcome notwithstanding the unfavorable earlier decisions, *Casey* selectively quoted *Roe*, asserted the medically focused trimester scheme was unnecessary for securing the right, and positioned decisions after *Roe* as misunderstanding *Roe*, thus setting up its own decision as firmly upholding *Roe* and correcting previous errors in service of its holding. The *Casey* Court's choices of dealing with the constraint of precedent caused and obscured weaknesses in the individual right to an abortion while giving the appearance of following expected legal norms.

In *Carhart*, the Court faces even greater constraints, which the majority addresses largely by following *Casey*'s moves, leading to further gutting of the individual right to obtain a safe and legal abortion. Specifically, in addition to *Roe* as precedent, the Court must fit its ruling within the bounds set by previous decisions in *Casey*, which both reaffirmed precedent and created the undue burden standard, and *Stenberg*, which struck down a nearly identical state law. While the *Carhart* majority does not turn its back on the idea of precedent—or *Roe*—it makes choices that reflect its goals of upholding the Act and supporting new narratives while demonstrating its identification with those with whom it aligns.[125] However, for the same reasons it had done so in *Casey* while working to shift public opinion away from abortion far enough to justify overturning *Roe*, the Court's narrative has to account for the potential damage to the Court's legitimacy if it ruled in ways beyond what the public could accept. Thus, a considerable issue for the *Carhart* Court is ruling the opposite way from the *Stenberg* Court but appearing otherwise.

There are three main constitutional issues addressed by the *Stenberg* ruling that the *Carhart* Court must decide differently while creating the appearance of following traditional norms of legal analysis: 1) whether the Act is an undue burden because it could be interpreted to apply to the most common second-trimester procedure, the traditional D&E; 2) whether the government demonstrated a proper state interest where the Act did not "save" any fetuses; and 3) whether the Act is unconstitutional because it fails to include an exception for the health of the

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[125] The majority opinion deals rhetorically with the position of some of its joiners regarding a continued belief in overturning *Roe* by including qualifiers to the existing framework, such as, "We assume the following principles for the purposes of this opinion" (146). As with many aspects of the opinion, this may appear to a public audience to adequately address the issue, but legally it is unusual for Justices to agree to apply constitutional rights that they do not believe exist.

pregnant person. Rhetorical analysis of the *Carhart* Court's response to these issues reveals its varied approaches and the substantial impacts, which are, like those in *Casey*, largely occluded.

Like the *Casey* Court's focus on precedent to save its own integrity, the Court's narrative in the *Carhart* opinion reflects its efforts to work within the system, pushing at the edges of boundaries, rather than tearing the system down or acknowledging its failures. As such, the Court frames its discussion as inevitable and in line with previous cases, thus following generic conventions of judicial opinion. For example, addressing the missing health exception, the Court asserts, "The Court's *precedents instruct* that the Act can survive this facial attack" (163; my emphasis). This use of precedent as subject implies that precedent does not merely allow but compels the decision to uphold the Act. Discussing the applicable state interest, the Court cites unrelated cases on the issue of physician regulation and holds, "*Under our precedents* it is clear the State has a significant role to play in regulating the medical profession" (157; my emphasis), thus creating a similar narrative that precedent compels its findings, despite using this state interest in a novel way.[126] However, where *Casey* framed its decision as compelled by precedent to justify the actions of conservative Justices who did not overturn *Roe*, the *Carhart* Court is persuading a public audience that its decision follows precedent by merely saying the words.

Another way the majority addresses the constraint of precedent is by careful selection of earlier opinions as co-rhetor to create the appearance of following prior decisions. Similar to the *Casey* opinion taking *Roe* quotations out of context, the *Carhart* opinion relies on selected quotations and misrepresentations regarding applicability, most notably from the *Casey* opinion

[126] The cited cases involve physician-assisted suicide laws, which the Court neither required nor prevented, and an issue of medical license suspension following a criminal conviction.

itself. This creates a double layer of misuse and alters the rights at issue even further. Explaining the other state interest, the Court again uses precedent as agent, coupling it with selective quotation. Quoting *Casey*, the *Carhart* Court asserts, "A central premise of the [*Casey*] opinion was that *the Court's precedents* after *Roe* had 'undervalue[d] the State's interest in potential life'" (157; my emphasis). However, the sentence in *Casey* that is quoted here did not refer to precedents or even to the Court: "*The trimester framework* suffers from these basic flaws: … in practice *it* undervalues the State's interest in potential life, as recognized in *Roe*" (873; my emphasis). Accordingly, the *Casey* joint opinion identifies the trimester framework as the flaw, an intentional choice to blame medicine rather than law; however, the *Carhart* Court repurposes the words to blame previous Courts.[127] This move both changes the nature of the holding and gives the reader the impression that *Casey*'s criticism of earlier Courts weakens the value of precedents, which is the opposite of the earlier Court's goal.[128] The result of this contributes to a narrative of precedents being less certain, particularly for a public audience.

Significantly, the *Carhart* Court's use of *Casey* to justify a state interest reveals how selective quotations in cases can turn into a game of telephone, substantially changing a right while giving the appearance of following prior Courts and constitutional law. The *Carhart* Court relies heavily on *Casey*'s holding regarding the state interest in expressing "profound respect"

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[127] The *Casey* Court does suggest Court opinions between *Roe* and the current case did not give adequate weight to the state interest in fetal welfare, positioning itself as the Court more in line with *Roe*, but blaming the trimester framework for this failing was an essential part of its narrative. Moreover, any reference to prior decisions referred to them only as *cases* rather than *precedents*. Finally, even with respect to *Casey*'s holdings, it would be a misrepresentation to refer to any portion that did not receive at least five votes, including the part discussed here, simply as *precedent*.

[128] As an author of the *Casey* joint opinion, Justice Kennedy is fully aware of the original context and authorial intent.

for fetal life. Yet, in identifying this interest, the *Casey* Court repeatedly highlighted only half of *Roe*'s holding—the fetal interest—and failed to provide any practical inclusion of the state interest in women's health beyond reiterating the inclusion of a health exception.[129] In a similar move, the *Carhart* Court briefly acknowledges that *Casey* identified three parts to *Roe*'s essential holding—1) a woman's right to choose abortion without undue state interference, 2) the state's power to restrict abortion after viability if it includes exceptions for the woman's life and health, and 3) the state's interest in protecting women's health and fetal life from the outset of pregnancy—but it focuses only on the latter half of the third part, without accounting for the other parts.[130] Indeed, despite women's health being explicitly incorporated into both the second and third parts, the Act not only ignores but also runs contrary to an interest in women's health. Additionally, the *Carhart* Court's rhetorical selection removes context to the state interest that acknowledges women's choice even while it failed to consider the practical realities. In the *Casey* opinion, the state interest in fetal life was considered in the context of informed consent, and thus discussions were framed as the state's ability to persuade women about her choice. However, the *Carhart* Court relies on *Casey*'s identification of a state's pre-viability fetal interest and claims that interest justifies the Act because it is "advanced by the dialogue that

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[129] Specifically, the section in *Roe* that *Casey* relies on declares, "We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, … and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct" (*Roe* 162). *Casey* focuses only on the latter interest, quoting that language several times as if it stands alone.

[130] The privileging of only the third part is apparent in the Court's explanation for the majority opinion including Justices who dissented in *Casey* despite it being central to the holding here: "Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals" (145).

better informs" society (160). Thus, the Court is not contemplating state interference with the constitutional right to choose, instead firmly positioning that right only as an object of public debate. Accordingly, the *Carhart* Court selects part of a previous opinion, that itself had misrepresented the entirety of the individual constitutional right, and it uses the opinion to further hollow the original right. Indeed, as Martha Plante describes the outcome, "The *Carhart* Court … erased the state's interest in preserving women's health and safety established in *Roe* and reaffirmed in *Casey*" (400). Here, the state interest in women's health is not even sharing rhetorical space with an interest in fetal life, instead discarded in the name of public discourse.

In its use of precedent as actor and previous Courts as co-rhetor, the *Carhart* Court is using precedent as a positive constraint, building its narrative from the boundaries previously set. Where precedent would otherwise constrain the Court in a negative way, the majority allows the voice of Congress to speak louder than the Court's own, using Congress's words to craft its story in a seemingly logical way. Tracing the language from the Court to Congress back to the Court—i.e., from *Stenberg* to the Act to *Carhart*—reveals a conversation between congressional and judicial conservatives. Indeed, the Act is crafted in direct response to *Stenberg*, although not in the customary way of adjusting the law to fit the constitutional requirements, and the *Carhart* opinion takes up that response, again eschewing judicial norms. In her analysis of Justice O'Connor's *Stenberg* concurrence, Kushnir notes how Justice O'Connor mentioned other states that had passed intact D&E bans that were constitutional and described what differences would allow her to uphold the ban (1147). "In effect," Kushnir asserts, "Justice O'Connor gave legislators a blueprint for a constitutional ban on [intact D&E]" (1147). Accordingly, the expected next step would be for the Nebraska legislature, or any legislature seeking to make a similar law including the US Congress, to change the law in the suggested ways so that it would

be upheld. Although this sounds like a vote-driven exercise, because the vote is over constitutionality, such directions are not simply to aid lawmakers in crafting a law that will get the requisite number of votes, but rather to ensure that the law is constitutional and respects the rights of individuals.

However, Justice Kennedy, the eventual author of the *Carhart* opinion, used his dissenting opinion in *Stenberg* to speak directly to Congress with a different message. In his discussion of why he disagreed with the majority that the Nebraska ban required a health exception, he gave explicit deference to Nebraska's legislative findings that banning the procedure did not create a health risk because it was never the only procedure available to a person seeking a later-term abortion—in other words, never medically necessary—specifically asserting that the "legislatures of the several States have superior factfinding capabilities in this regard" (968). Relying extensively on a 1905 case upholding law requiring smallpox vaccination despite some medical disagreement, he concluded by asserting that the Court was not even permitted to review such a determination: "In light of divided medical opinion on the propriety of the partial birth abortion technique … and the vital interests asserted by Nebraska in its law, one is left to ask …'Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature?'. The answer is none" (972).[131] The factual determination that the procedure is never medically necessary is essential because it is a required part of establishing that the ban does not create a health risk and thus, by the logic of some, does not need to have a health exception. Accordingly, Justice

[131] As the *Carhart* majority would also do, Justice Kennedy is creating the appearance of authority by citing a previous case. Notably, he seems to be comparing the "vital" state interests of public moral debate and physician reputation with the public health crisis of the highly contagious smallpox virus.

Kennedy's argument that a legislature can make a determination of medical necessity that is unreviewable by the courts seems to be making an explicit suggestion on how to sidestep rather than survive judicial review, particularly to a Congress that had twice before passed such a ban and was now waiting on a more receptive president.

In an unusual move, Congress speaks directly to the High Court within the text of the Act, responding explicitly to its opinion in *Stenberg*, not by conforming the law to the Constitution, but by contesting the Court's constitutional interpretation, thus following the directions of Justice Kennedy rather than those of Justice O'Connor. Specifically, the text of the Act refutes the *Stenberg* Court's finding that there is "significant medical authority" to support the claim that intact D&E is sometimes the safest procedure and, thus, medically necessary (1201). In order to appear less accusatory toward the High Court—likely a consequence of needing the Court to uphold its own law—the Act notes the *Stenberg* Court was "required to accept the very questionable findings issued by the district court judge," offers case law on the Court's position of "highly deferential review of congressional factual findings," and asserts that "much" of the congressional record was "complied after the district court hearing in *Stenberg*" (1202), thus providing legal and factual reasons why the future Court—the eventual *Carhart* Court—can reach a different conclusion.

In response, the *Carhart* opinion accepts the argument offered by Congress in the Act, prioritizing Congress's responses over all others, even previous Supreme Court opinions and the lower courts in the case before it. The *Carhart* Court states specifically that "[t]he Act responded to *Stenberg* in two ways," and lists the first way as "Congress made factual findings" (141). The opinion goes on to quote the Act's determination regarding the requirement that the *Stenberg* Court accept the district court's "very questionable findings" and Congress's finding that it was

not bound to accept those same facts (141). By repeating the Act's assertion that the findings of the lower court in *Stenberg* were "very questionable," the *Carhart* Court demonstrates its agreement, and thus alignment, with Congress on the characterization, in direct contradiction with a previous version of itself. The opinion continues with its wholesale recitation of findings in the Act: "Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited" (141). Notably, this quotation is offered with no commentary despite the Court's seemingly begrudging admission twenty-four pages later that "evidence presented in the District Courts contradicts that conclusion," as well as the congressional finding that no medical school taught the procedure, and that, therefore, "[u]ncritical deference to Congress' factual findings in these cases is inappropriate" (165-166).[132] This admission may be offered to give the appearance of performing an analysis. In any event, the Court decides to defer to Congress's assessment even with the lack of medical consensus. Here, the *Carhart* Court cements its alliance with Congress by following through on upholding the law that followed Justice Kennedy's dissenting instructions.

The Court identifies language differences as the second way the Act responds to *Stenberg*, by clarifying the law's application thus addressing the undue burden issue that challenged the Nebraska law. Specifically, the Court asserts that whereas the Nebraska law used "substantial portion" of the fetus to describe the prohibited procedure, which could be interpreted in different ways, the Act provides specific landmarks (149). On the surface, this analysis most

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[132] As part of that admission the Court states, "Whether or not accurate at the time, some of the important findings have been superseded" (165), thus, providing Congress with the same benefit of the doubt regarding later acquired evidence that Congress had granted to the Court.

closely follows expected judicial norms of finding a subsequent law constitutional because it addresses the previous concern. Rhetorically, this supports the narrative of this opinion following precedent by performing its application in a visible way. In fact, the *Stenberg* Court had noted that the Nebraska Attorney General suggested the inclusion of the words "the child up to the head" based on legislative debate and acknowledged that such inclusion "might avoid the constitutional problem" (944). Significantly though, the *Stenberg* Court went on to hold that such a change "would not be determinative" because of the lack of a health exception (945). In other words, although the *Stenberg* Court was unequivocal that the mere inclusion of anatomical landmarks was not enough to meet constitutional requirements without the inclusion of a health exception, the *Carhart* Court separates the issues and suggests Congress has responded appropriately. Indeed, contrasting the "two ways" Congress responded to *Stenberg*, the Court introduces the language differences as "Second, and more relevant here" (141). This framing suggests to the reader that the vagueness issue was the most significant defect, despite *Stenberg*'s expression of the opposite. This assertion is likely not based on a genuine belief regarding priority but rather as a move to misdirect the audience to the issue more readily resolved. Thus, relying on Congress, the *Carhart* Court highlights minor differences between the Nebraska law and the Act, which account for only a fraction of the fault identified by the *Stenberg* Court, and claims that such changes fix the entire problem, thereby appearing to follow precedent.

Yet, whereas the Court's response to the vague language issue is framed in a traditional way, its response to the state interest issue takes full advantage of the conversation between the Court and Congress. Although Congress was able address potential vagueness by changing the language, there was nothing it could do to change the fact that a law that bans only a method of performing an abortion cannot be justified by a state interest in fetal welfare. Instead, the state

interests asserted by Congress and accepted by the Court are regulating the medical profession and protecting the dignity of human life. The rhetorical echoing that occurs between the Court and Congress is an essential element of the Court's ability to create these new state interests and demonstrates the circular logic that underpins the *Carhart* decision. In her analysis of Justice Kennedy's invocation of dignity, Siegel highlights *Carhart*'s acceptance of the state interest in expressing "respect for the dignity of human life" notwithstanding the Act's failure to save particular fetuses ("Dignity" 1737) and notes that this language "echoes Kennedy's dissent in *Stenberg*" (1738). Importantly though, between *Stenberg* and *Carhart*, this language passed through Congress. A comparison of the language reveals how Justice Kennedy uses Congress's position as eventual co-rhetor to create the justification he needs for upholding the Act.

In his *Stenberg* dissent, Justice Kennedy asserts, "The State's brief describes its interests as including concern for the *life of the unborn* and 'for the partially-born,' in *preserving the integrity of the medical profession*, and in 'erecting a *barrier to infanticide*'" (961; my emphasis). He goes on to claim, "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, *might cause the medical profession* or *society as a whole* to become *insensitive, even disdainful, to life*" (961; my emphasis). For this point, which becomes central to *Carhart*'s holding, he provides no reference to Nebraska's brief, instead relying on his own broad interpretation of *Casey*'s recognition of the consequences of abortion. Further, he maintains, "A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the *dignity and value of human life*" (962; my emphasis). Congress then repeats these justifications in the Act, finding and declaring that "such a prohibition will draw a bright line that clearly *distinguishes abortion and infanticide*, that *preserves the integrity of the medical*

profession, and promotes *respect for human life*" (1205; my emphasis). Specifically, the Act states, "Partial-birth abortion … *confuses the medical, legal, and ethical duties of physicians* to preserve and promote life" and asserts, "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will *further coarsen society to the humanity* of not only newborns, but all vulnerable and innocent human life" (1205-1206; my emphasis). The *Carhart* Court extensively quotes each of these findings as it explains and justifies the state interests on which the Act is based. This repetition is significant because the Court relies on Congress's stated interest in affirming the justification. In other words, because the government's interest is central to the debate, its articulation of that interest is directly relevant. Indeed, the *Stenberg* Court had found the interest in the Nebraska law too tangential to support its ban. However, that the state interest asserted by Congress and affirmed by the *Carhart* Court originated in Kennedy's *Stenberg* dissent illuminates the political and rhetorical maneuvering that occurs as the line between making and enforcing laws is blurred.

The most substantial issue the *Carhart* Court faces in terms of its complete turn from precedent and the impact to individual rights is the Act's lack of an exception to protect the woman's health. Prior to *Carhart*, the women's health exception had been considered an essential part of any abortion regulation, as reaffirmed in *Stenberg*. Congress attempted to provide the facts the Court needs to rule differently by declaring the banned procedure is never medically necessary; however, this position was too easily disputed by medical science for the Court to accept it in such absolute terms. Instead, the *Carhart* Court uses the congressional finding to declare medical uncertainty and changes how such cases are handled, reallocating the power to Congress. Even then, though, the Court does not acknowledge that it is changing this process, instead implying its decision simply fits within existing law. The Court claims that

others had misinterpreted the previous holding, asserting that "*Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty" and holding, "A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription" (166). Here, the Court uses passive voice to obscure the actors and conflates, without explanation, the actual holding—which requires substantial medical authority—with a zero-tolerance policy. Thus, to a public audience, the Court sounds reasonable suggesting such a policy would be too restrictive while claiming its own policy is supported by previous cases.

Furthermore, to justify its divergence from *Stenberg* without acknowledging its failure to follow precedent, the *Carhart* Court changes the nature of the health exception as an individual right, substantially weakening the right's protection. Relying on Congress's factual findings, the Court concludes that the "medical uncertainty over whether the Act's prohibition creates significant health risks" does not impose an undue burden, applying *Casey*'s standard (164). Explaining its reasoning, the Court borrows another of *Casey*'s moves, rhetorically adjusting the significance of the impact in order to reach the desired result. To explain how only the spousal notification constituted an undue burden, the *Casey* Court shrunk the pool of women that it was measuring the burden against, from all women—or even all married women—seeking abortions to married women seeking abortions who did not want to tell their husbands. The Court reasoned that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant" (894) and found that the regulation would create a "substantial obstacle" in "a large fraction" of the relevant cases (895). Quoting this section of the *Casey* opinion, the *Carhart* Court mirrors its analysis in reverse, holding that leaving out the health exception would not be unconstitutional "in a large fraction of relevant cases" because

"the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications" (168).[133] Notably though, in *Stenberg* the Court struck down the Nebraska law "for at least two *independent* reasons," explicitly distinguishing between the lack of a health exception and the imposition of an undue burden on an individual's right to obtain an abortion (930; my emphasis). Indeed, pointing to this distinction drawn by the *Stenberg* Court, Caitlin Borgmann asserts, "The majority's approach thus rejected *Casey*'s suggestion that the health exception requirement might be subject to the undue burden standard" ("Winter" 706). Thus, the application of the undue burden standard is in direct opposition to the precedent set in *Stenberg*, and the ability to apply the fraction test, particularly given how easy it is to manipulate, substantially weakens the protection provided by the health exception. However, the *Carhart* Court applies undue burden and invokes the fraction test without acknowledging or explaining this divergence.

Legally, there is little question that the majority opinion in *Carhart* fails to honor the precedent of previous Court opinions in any meaningful way. However, because the *Carhart* Court's goals are primarily rhetorical, the legal aspects of the case, especially precedent, are addressed through rhetorical choice, expanding the boundaries of how much precedent constrains its action. Addressing the approach of the "new conservative majority," Manian asserts that "the *Carhart* Court took the approach of surreptiously [sic] overruling precedent" (231). Specifically, she argues, "The majority opinion claimed to uphold *Stenberg* by distinguishing the terms of the

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[133] Remarkably, even if the undue burden standard were the proper analysis, this assertion fails logically unless one assumes all physicians would simply ignore the law. Assuming providers are law-abiding, using the Court's own analysis, all instances in which a doctor proposes to use the prohibited procedure would be those instances in which the physician determines there is a health risk to the pregnant person otherwise, and, thus, the lack of a health exception would impact all of them.

statutes at issue in the two cases, but instead gutted *Stenberg*'s main principles as well as reversed longstanding precedent requiring a health exception in abortion regulations" (231). Most directly, the Court rules in a way that is unreconcilable with its earlier decision in *Stenberg*. Explaining the opinion in *The New England Journal of Medicine*, George Annas observes that in *Carhart* Justice Kennedy "substantially adopts his dissenting opinion in *Stenberg* as the Court's new majority opinion" and "concludes that his decision is consistent with *Stenberg*," despite the fact that "all three U.S. District courts and all three Courts of Appeal that had examined this federal law found it unconstitutional under the principles in *Casey* and *Stenberg*" (2204). Notably, Annas describes the majority as Justices Kennedy, Scalia, and Thomas, "and the two new justices" (2204), thus making clear what he views as the actual changed circumstance that allowed for the different outcome.

Significantly, the majority's choices for addressing *Stenberg* reflect its efforts to persuade a public audience. As evidenced by Manian's assessment, legal scholarship she relies upon, and unequivocal predictions by scholars such as Holsinger and Kushnir that the Act would be found unconstitutional under *Stenberg*, it appears unlikely that the legal community would be persuaded by the Court's decision to use rhetoric to mask bad law. However, a public audience would be less likely to make nuanced legal distinctions, particularly when such an audience is predisposed to want to find agreement with the majority based on the graphic and inflammatory language used in describing the procedure. Accordingly, the Court only has to explain its actions in a cursory way that sounds like following precedent, rather than ensuring its analysis is legally sound. Moreover, although the *Carhart* Court makes a few gestures toward previous Court decisions to give the appearance of honoring precedent, Congress provided the Court with the words and rationale to rule differently through the Act. Thus, the Court's ability to rely on

Congress as co-rhetor to address *Stenberg*'s precedent becomes a crucial part of *Carhart*'s narrative. Critically, though, given the Supreme Court's role of adjudicating the constitutionality of laws for the benefit of individuals, this collaboration between Congress and the High Court, including an extreme deference to congressional findings even in the face of contradictory evidence, is a potentially dangerous abdication, well beyond reproductive rights.

Furthermore, the *Carhart* Court makes rhetorical choices that change individual protections established by *Roe* and *Casey* without acknowledging its turn against precedent. These changes include allowing state interference on an individual fundamental right based solely on the desire for a public morality debate and altering the protection provided by the health exception by changing the standard used for constitutional analysis. Yet, the Court not only makes these changes, but it makes them in a way that gives the appearance of following precedent, particularly to its public audience. Although Courts have always been able to justify desired outcomes even when not as inevitable as implied by the opinion, judicial norms, including adherence to precedent, create limits on such power. The changes to individual rights made rhetorically in *Carhart* expands the boundaries of precedent and creates nearly limitless possibilities.[134] Moreover, by assessing public response to the decision, the Court can consider how tightly the bounds of precedent constrain its choices at all.

The Dissent's Warnings and Storytelling Goals

In response to the Court's turn against precedent, the Justices in the *Carhart* minority aim to match the majority's persuasive goals, also pleading their case directly to the public. Like that of the majority, the *Carhart* dissent's narrative reflects its goals and alignments, seeking to

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[134] Chapter 5 considers how the health issues created in a post-*Roe* era are significantly more dangerous than the time before *Roe* and are largely due to damage done in *Carhart*.

criticize the rhetorical maneuvering of the majority in its barely veiled effort to rule differently with no legal justification. With the majority decision to uphold the Act notwithstanding the Court's adverse ruling in *Stenberg*, a reality evident from the decision to hear the case, the dissent's primary goal is to highlight the Court's failure to follow its own rules regarding adherence to precedent. The dissent, authored by Justice Ginsburg, challenges the majority by demonstrating its own analysis is in genuine alignment with existing case law and seeks to warn the public by pointing out the majority's problematic rhetorical choices. To demonstrate its conclusions as following precedent, the opinion yields significant space to previous opinions, primarily *Casey* and *Stenberg*, allowing the words of earlier Courts to speak to the current issue. Significantly, while the majority uses a similar strategy of asserting its reliance on precedent, it also relies on its deference to Congress. Conversely, because the dissent's point is that these issues have already been decided, it ensures that all points are supported without using such tactics, instead relying solely on existing case law and the lower courts' unanimous application of that law. Further, the dissenting opinion describes the holding of previous cases as clear and claims to find the majority's analysis confusing, a subtle way of implying the Court should not have been able to reach the decision it did. In addition, the dissent must address the practical matters of protecting individuals' access to reproductive health care and guarding against health risks, particularly given the stakes involved by dispensing with the health exception requirement.

In analyzing the goals of the *Carhart* dissent, Justice Ginsburg's own words offer a framework and guidance. In July 2013, she delivered remarks titled "The Role of Dissenting Opinions" to the Tulane University Law School Summer Program, which was one of "numerous versions" to "various audiences" throughout the years (*My Own* 278). Of note within these remarks is the significance of bench dissents, the importance of a unified voice, and two types of

dissents based on external impact. First, Justice Ginsburg describes the significance of reading a dissenting opinion, or summary thereof, from the bench, an act she employed in the *Carhart* dissent: "Ordinarily, when Court decisions are announced from the bench, only the majority opinion is summarized. Separate opinions, concurring or dissenting are noted, but not described. A dissent announced orally, therefore, garners immediate attention" (279). Continuing in her remarks, Justice Ginsburg notes that a bench dissent "signals that, in the dissenters' view, the Court's opinion is not just wrong, but, to borrow Justice Stevens' words, 'profoundly misguided'" (279). Thus, her decision to read the *Carhart* dissent from the bench reveals her goal of reaching a public audience as well as the importance and urgency with which she views the issues raised. The significance of a bench dissent is understood outside the Court as well. Quoting a *New York Times* article by Greenhouse, which itself echoes the Court, Katie Gibson observes, "[t]o read a dissent aloud… is an act of theater that justices use to convey their view that the majority is not only mistaken, but profoundly wrong. It happens just a handful of times a year" ("In Defense" 124).[135] Notably, describing it as "an act of theater" also highlights the public performance aspect of bench dissents.

The next noteworthy point is the unified voice of *Carhart*'s four dissenting Justices in a single opinion, particularly given the multiple opinions that were often issued in abortion cases.[136] Briefly, a majority opinion, designated as the "Opinion of the Court," is generally

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[135] As further illustration of the significance of the act of reading from the bench, Gibson highlights it five times throughout her analysis of the *Carhart* dissent, including in the quotation that opens her article (123, 124, 127, 131).

[136] Discussion of the dissent, both public and academic, largely refers to the words of the *Carhart* dissent as if they belong exclusively to Justice Ginsburg. While there are reasons to acknowledge her as the primary author, particularly her decision to read from the bench, I suggest that overreliance on her authorship occludes the significance of the unified voice and the collaboration, however invisible, that allows for such a result. As such, with appreciation of

written by one assigned Justice and "joined" by at least four others for a minimum of five votes. Those Justices who join may, but do not always, write "concurring" opinions, which may emphasize certain parts and/or offer a different rationale for reaching the same result. Sometimes concurring opinions explicitly state they are concurring only with the result and/or only with certain parts.[137] Legally, such complex concurrences can make it difficult to discern what the controlling law is, causing significant debate in future cases and sometimes weakening intended protections.[138] Opinions that get the most votes but lack five, either in whole or in part, are referred to as a plurality rather than majority and carry less precedential value. The opinion in *Casey* further complicates this usual circumstance because the majority opinion is written jointly by three Justices with no official designation of authorship for specific parts. *Casey* also has two concurring opinions, each of which declines to join certain sections of the joint opinion, thus depriving those sections of a majority of votes and leading to references to the "joint opinion" or "plurality" when discussing those sections. In addition, *Casey* has two dissenting opinions, each of which is joined by the other three dissenters. *Stenberg* has three concurring opinions—though each is relatively short and is emphasizing rather than departing from the majority opinion—and a dissenting opinion from each of the four dissenters, one nearly as long as the majority and one

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Justice Ginsburg's contribution, I refer to the dissent as such throughout absent a specific reason to note her authorship. I have left other scholars' framing unchanged.

[137] For example, in *Dobbs*, Justice Thomas and Justice Kavanaugh each filed a concurring opinion offering certain "clarifications" that do not change controlling law. Chief Justice Roberts filed an opinion concurring in the judgment that agreed with the decision to uphold the Mississippi law at issue but not the rationale of overturning *Roe*. This is why the law was upheld 6-3 but *Roe* was overturned 5-4.

[138] In one extreme example, *Furman v. Georgia*, the 1972 case that initially found the death penalty unconstitutional, had nine separate opinions, none in total alignment, thus making it impossible to identify the specific constitutional protections. This, in turn, led to states passing laws that made few practical changes but were upheld only four years later.

significantly longer. In *Carhart*, by contrast, even Justice David Souter—one of the authors of the joint opinion in *Casey*, the meaning and application of which is a focal point in both the majority and dissenting opinions—allows his voice to stand as one with the other dissenting Justices. Remarkably, unity is one of the many distinctions between the majority and dissenting opinions. Though only a single paragraph and claiming to unconditionally join the majority opinion "because it accurately applies current jurisprudence," the concurrence by Justice Thomas, joined by Justice Scalia, "reiterate[s] [his] view that the Court's jurisprudence, including *Casey* and *Roe*, has no basis in the Constitution" (168-169). Despite his characterization otherwise, because the majority grounds its opinion explicitly in those rights, his affirmative repudiation of their existence does compromise his, and Justice Scalia's, agreement with the majority, an agreement necessary to achieve more votes than the unified dissent.

In her Tulane remarks, Justice Ginsburg confirms the Court's belief in the strength of unity, asking her audience to "[c]onsider the extra weight by the Court's unanimous decision in *Brown v. Board of Education*. All nine Justices signed one opinion making it clear that the Constitution does not tolerate legally enforced segregation in our nation's public schools" (280).[139] Moreover, she asserts, "[e]ven for dissenters, I believe, one opinion speaks more impressively than four," comparing the "four separate, rather long, dissenting opinions" issued in *Bush v. Gore* due to time constraints with "the single opinion Justice Stevens composed expressing the views of all four in the minority" in *Citizens United v. Federal Election*

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[139] This kind of unity seems particularly important in a case like *Brown* that essentially overruled an earlier Court's precedent and stands in sharp contrast to the mere five votes in *Carhart*, or, more significantly, the votes in *Dobbs*.

Commission" (280).[140] Notably, she specifically identifies "the press and the public" as the audience for these opinions in explaining the significance of one, unified voice (280). In his book expressing concern regarding the potential politicization of the Court, Justice Stephen Breyer, one of the other dissenters in *Carhart*, similarly argues that the High Court can help maintain its confidence and respect by compromising where possible, including forgoing or not publishing opinions separate from the majority. In such instances, he suggests, "the decision not to dissent gives a public impression of greater unanimity than actually exists" (79). Furthermore, the focus on unity within Justice Ginsburg's remarks makes clear that the decision to dissent at all is well-considered. Specifically, she asserts, "To sum up, although I appreciate the value of unanimous opinions, I will continue to speak out in dissent when important matters are at stake" (286). Here she notes her emphasis on *important* because she tries to follow Justice Brandeis's advice that "it is more important that [the applicable] rule of law *be settled* than it be settled right" (286; my emphasis, brackets in source). This point supports her belief not only in unity, but also in settled, stable laws, which is a primary basis for adherence to precedent.

Finally, Justice Ginsburg explains two types of dissents based on their intended external impact and describes the goals that drive them. Specifically, one type looks to a longer-term future and seeks to eventually influence a later Court, while the other aims for much sooner action by other political actors, including voters. Invoking a famous 1936 quotation from Chief Justice Hughes, Justice Ginsburg argues for the future value of dissenting opinions, observing, "A dissent in a court of last resort is an appeal to the intelligence of a future day, when a later

[140] *Bush v. Gore* is the case that stopped the Florida recount in the 2000 presidential election. *Citizens United* is the 2010 case that reshaped US election law by allowing unlimited campaign spending by corporate entities.

decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed" (282-283). Quoting another Justice, her famous friend and adversary Justice Scalia, she suggests that "[d]issents of this order… 'augment rather than diminish the prestige of the Court'" (283). In explanation, she again offers Justice Scalia's words: "When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting…to look back and realize that at least some of the [J]ustices saw the danger clearly and gave voice, often eloquent voice, to their concern" (283; ellipses and brackets in source). Accordingly, though a decision to criticize a majority opinion and seek its future overturn seems somewhat counter to the goal of stability supported by both unity and precedent, in cases involving profound misguidance, as the dissent believes *Carhart* to be, providing a clear dissenting voice adds more stability for the future Court than that which is disrupted by the current act. Distinct from the slight-of-hand overturning done by the *Carhart* majority, the overturning imagined by these dissents is the kind acknowledged in *Casey*, following substantially changed circumstances or understandings, such as *Brown v. Board*. Notably, Justice Ginsburg contrasts this type of distant future dissent to one that "seeks immediate action from the political branches of government" and "aim[s] to engage or energize the public and propel prompt legislative overruling of the Court's decision" (284). Here she offers the example of *Ledbetter v. Goodyear Tire & Rubber Co.*, the bench dissent she authors shortly after *Carhart*, and notes that "Congress responded within days of the Court's decision," amending the law that was at issue in the case (285).[141] Justice Ginsburg's illumination of this type of dissent sheds light on Justice Kennedy's instructions to Congress in his *Stenberg* dissent, including his

[141] *Ledbetter* involved an interpretation of Title VII and the calculation of the required timing of salary discrimination claims.

assertion that Congress could make an unreviewable determination of medical necessity. Critically, though, *Ledbetter* involved Congress making changes to its own existing law to ensure the outcome originally intended, not a legislative bypass of individual constitutional rights. Justice Ginsburg's explication of these two types of dissents is remarkable for two reasons. First, it confirms the goal of both speaking to a public audience and moving it to action, especially for bench dissents like *Carhart*. Moreover, it highlights the particularly multifaceted context of the *Carhart* dissent, which falls somewhere between the two types, perhaps explaining its omission from her list of examples.[142] Specifically, concerns about the immediate threats to an individual's health and access to reproductive choice might be addressed by Congress—on behalf of an energized public—in the short term. However, constitutional issues regarding gender equality and the Court's violation of its own rules regarding precedent can only be remedied by future Courts.

The dissent's goals are evident in its rhetorical choices, particularly its co-rhetors. Whereas the majority in *Carhart* depends significantly on the words and reasoning of Congress, even to the point of reversing its own earlier decision, the dissent relies heavily on the words of previous Courts, especially *Casey* and *Stenberg*. This choice performs the act of following precedent and allows the dissent to demonstrate its alignment not with political actors but with the rule of law. Notably, the dissent uses its co-rhetors to its advantage, carefully choosing passages and placement to show that it remains aligned with its duty to follow precedent and to reveal the majority's deviation from traditional judicial norms. For example, the dissent cedes its

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[142] Although Justice Ginsburg does not reference her *Carhart* dissent in her Tulane remarks, its significance is confirmed by its inclusion as one of three additional dissents provided in the collection of her works, the other two being cases related to the Affordable Care Act (277).

opening line to the words that began the *Casey* opinion, thus immediately establishing its alignment with precedent itself and the earlier Court. Then, the dissent highlights the *Casey* Court's goal of confirming "'the meaning and reach' of the Court's 7-to-2 judgment, rendered nearly two decades earlier in *Roe*" (169). By emphasizing the weight of the vote in *Roe* and the longevity of the opinion, the dissent is establishing its own analysis as the one with more precedential support. The second paragraph begins, "*Taking care to speak plainly*, the *Casey* Court restated and reaffirmed *Roe*'s essential holding (169; my emphasis). Here, the dissent is asserting that there is no room for interpretation of *Casey*'s holding, thus implying that the majority's argument to the contrary is not in good faith. As part of its recounting of *Casey*'s affirming of *Roe*, the dissent again quotes *Casey* directly and adds emphasis to highlight the part of the holding the majority ignores: "Third, the Court confirmed that 'the State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and the life of the fetus that may become a child'" (170). Describing the *Casey* Court's rationale, the dissent concludes, "Of signal importance here, the *Casey* Court stated *with unmistakable clarity* that state regulation of access to abortion procedures, even after viability, must protect "'the health of the woman'" (170; my emphasis), again asserting that there was no ambiguity on which the majority could rely for its contrary holding. Next, the dissent briefly summarizes the Court's holding in *Stenberg*, noting it struck down the Nebraska law "[w]ith fidelity to the *Roe*-*Casey* line of precedent" because of the lack of health exception (170). Because the majority does the opposite, upholding the federal law even without the health exception, the dissent is contending that the *Carhart* Court is not acting with such fidelity to precedent.

After summarizing previous holdings, the dissent uses strong language to stress the urgency of the situation and identify the primary concern: "Today's decision is alarming. It

refuses to take *Casey* and *Stenberg* seriously" (170). Continuing to draw a connection with existing case law and highlighting the majority's stark divergence, the dissent further describes the problems with the majority opinion as blurring the viability line "firmly drawn in *Casey*,"[143] and, "for the first time since *Roe*," upholding a law with no health exception (170-171). It concludes the opening section by accusing the majority of "[r]etreating from prior rulings" (171). Accordingly, from the outset, the dissent emphasizes the majority's departure from established precedent and connects this action to increased risks to women's health. This framework is the primary basis for the dissent's critiques and concerns throughout the opinion.

In addition to underscoring the majority's deviation from precedent, the dissent highlights how the Court is materially impacting reproductive rights. This elucidation is especially important for a public audience, particularly given the substantial changes made to the individual right in *Casey* that largely went unnoticed. For example, the dissent points out the tenuous state interest on which the Act is justified, one of the unexplained reversals from the *Stenberg* opinion. Specifically, it highlights the Court's admission that the state interest in the Act, which does not save a single fetus, is based on "moral concerns," asserting that "the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life" (182). The opinion continues, "By allowing such concerns to carry the day and case, overriding fundamental rights, the Court *dishonors our precedent*" (182; my emphasis), directly invoking the narrative of duty and honor set forth by the *Casey* Court. In its response, the dissent again choses its co-rhetor carefully, asserting, "Our obligation is to define the liberty of all, not to

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[143] Remarkably, rather than understanding this statement as criticizing the Court for failing to adhere to precedent, Chief Justice Roberts relies on it to establish the *Carhart* Court already moved away from the viability marker as justification for doing so explicitly in his *Dobbs* concurrence (slip op. 4).

mandate our own moral code" (182), words from the *Casey* joint opinion generally attributed to Justice Kennedy (Greenhouse, "Adjudging"). This choice could be in part an attempt to persuade Justice Kennedy to give more weight to his own previous words; in her Tulane remarks on dissents, Justice Ginsburg highlights "their in-house impact" and notes, "My experience confirms that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial argument" (*My Own* 280-281). However, given the public audience both sides are addressing, it also illustrates for the public how the Court is allowing a general state interest in moral concerns to override an established fundamental right, thus demonstrating how outside the normal boundaries the *Carhart* opinion is and how inconsistent the opinion is with the words the current majority author. Finally, the dissent is attempting to contain the impact to fundamental rights to the limited circumstance at issue. Analyzing the dissent's use of opinions Justice Kennedy joined or wrote, Siegel asserts, "Not only was Justice Ginsburg's opinion an effort to persuade Justice Kennedy to strike down the Partial-Birth Abortion Ban Act, it was an urgent reminder that the principles articulated in Justice Kennedy's opinions govern the constitutionality of abortion restrictions in the vast majority of cases not implicating the infrequently used procedure at issue in *Carhart*" ("Dignity" 1735). Accordingly, while unable to prevent the expansion of state interest and encroachment on individual rights, the dissent reminds the Court and the public not only what law should have applied but also what does apply in the remaining circumstances, thus limiting future damage.

In response to the Court's new interpretation of the health exception, the dissent both highlights the majority's failure to adhere to precedent and points out the majority's collusion with Congress. First, the dissent challenges the majority's health exception finding by pointing to previous cases and suggesting there is no basis on which to find differently. It cites numerous

decisions that "consistently required" regulations to protect a women's health (172). Specifically highlighting the inconsistency with *Stenberg*, the opinion states, "Indeed, we have applied the rule that abortion regulation must safeguard a woman's health to the particular procedure at issue here" (173). The use of "we" positions the dissenting Justices as part of the Court and highlights the intended continuity. In other words, appointing new Justices does not, or at least should not, result in a Court that is different and free to ignore itself. Relying on the previous Court as co-rhetor, the dissent quotes *Stenberg*'s finding that "division in medical opinion 'at most means uncertainty, a factor that signals the presence of risk, not its absence'" (174), again highlighting that the current Court's alignment with Congress on the issue is directly contrary to its own previous position. This point is also intended to refute the idea that any change in circumstances accounts for the different decision in *Carhart*. More significantly, though, the dissent also supplies a direct quotation from Justice O'Connor's concurrence: "Th[e] lack of a health exception necessarily renders the statute unconstitutional" (174). This adds another voice to the four who are dissenting, one that is both female and conservative, thus implicitly pushing back on partisan complaints and reinforcing the Court's intended apolitical position. It also serves to preclude any claim that the existence of a concurring opinion creates any ambiguity regarding the requirement for a health exception. Indeed, in her analysis of the Act prior to Carhart, which asserts the Act is unconstitutional, legal scholar Holsinger describes Justice O'Connor's concurrence as an "even more pointed lesson to legislatures" than the *Stenberg* majority (607), leaving no room for doubt regarding how such a law would need to be altered in order to meet the requirements of constitutional protection.

The dissent similarly criticizes the Court's assertion that claims for health exceptions should be brought on an as-applied basis, pointing to earlier holdings to the contrary and

employing language professing confusion to highlight the unusualness of the majority's conclusion: "This holding is *perplexing* given that, in materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face" (187; my emphasis).[144] By claiming to be confused, the dissent suggests the majority is not only wrong, but that its result is nonsensical by traditional judicial standards. In further analysis, the dissent notes that the majority makes its argument "[w]ithout attempting to distinguish *Stenberg* and earlier decisions" (188), which would be the usual method of reaching a different result. This deviation from judicial norms is significant because it gives the majority substantially increased power, which could extend well beyond reproductive rights, a danger the dissent is seeking to illuminate. Moreover, the dissent demonstrates how the Court is calculating the health exception test in a novel way, a novelty which the majority does not acknowledge, asserting it is doing so incorrectly. Specifically, the dissent declares that the Court has "never before invoked the 'large fraction' test" for safeguarding women's health, highlighting the precedential weakness, and points out that there is no fraction because the women the health exception applies to are the women who need it, noting the logical weakness (188n10). This also serves to keep potential health consequences as part of the conversation.

In addition to directly noting the Court's deviation, the dissent also makes particularly effective use of its co-rhetors when responding to the Court's application on the undue burden standard. When refuting how the Court selects the controlling class of women when applying the undue burden standard, the dissent again quotes *Casey* directly: "[A] provision restricting access to abortion 'must be judged by reference to those [women] for whom it is an actual rather than an

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[144] A facial challenge argues a law is necessarily unconstitutional as written; an as-applied challenge claims a law is unconstitutional only in a particular instance.

irrelevant restriction'" (188). Here, selecting the *Casey* Court as co-rhetor demonstrates the dissent's alignment in several ways. First, the dissent points out that the majority cites *Casey* in its argument, using the *Casey* Court's words from the same page, which shows that the dissent's reasoning rather than the majority's is actually aligned with the previous Court. In addition, because Justice Kennedy was one of the authors of the *Casey* joint opinion, this selection highlights that he has previously reached a different conclusion when applying the standard; in other words, he is not acting in good faith. Finally, this quotation comes from a section generally attributed to Justice O'Connor, again adding Justice O'Connor's voice to the dissent. Furthermore, the dissent goes on to quote the *Stenberg* Court regarding the application of the undue burden standard to this specific issue, even when "accepting the 'relative rarity' of medically indicated intact D&Es as true" (188). Again, this interpretation of the undue burden standard was previously agreed upon by five members of the Court, including Justice O'Connor. Providing Justice O'Connor's voice is particularly significant because the two remaining authors of the joint opinion that established undue burden as a judicial standard—Justice Souter and Justice Kennedy—are divided, so here the dissent makes clear that the third author would align with its interpretation. Accordingly, while precedent plays an essential role in supporting a stable legal system, in *Carhart*, where the majority opinion seems to be turning away from the rulings of previous Courts in favor of a branch the courts are tasked with balancing, the dissent relies on earlier Courts as co-rhetor to show its continued alignment with its own rules and tradition.

Critically, the dissent's concern about the extended boundaries created by the majority's refusal to engage fairly with legal norms is punctuated by the barely veiled political motives of the majority. While the majority is trying to cloak its political position in legalese, the dissent directly calls out the majority's political positioning and reveals the danger inherent in allowing

such blatant disregard for precedent to stand. For example, after detailing the holding in *Stenberg* that struck down the Nebraska law for lack of a health exception, the dissent observes, “In 2003, a few years after our ruling in *Stenberg,* Congress passed the Partial-Birth Abortion Ban Act—without an exception for women’s health” (174). This calls out the political nature of the congressional decision, highlighting the Act’s direct opposition to the Court’s holding. To ensure the implication does not go unnoticed, the opinion includes a footnote that quotes the congressional record and asserts, “The Act’s sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*” (174n4). Again, making clear there is no justification for the new position, the dissent continues “The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede” (174-175). In other words, Congress manufactured the evidence the Court needed to uphold the Act, and any suggestion by the Court that it reached a different conclusion than the *Stenberg* Court based on new congressional evidence is thus similarly manufactured.

The dissent ends where it started, focusing on *Casey*’s holding regarding precedent: “As the Court wrote in *Casey*, ‘overruling *Roe*’s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law’” (190). Here, the dissent makes clear that the issue is bigger than reproductive rights, instead threatening the legitimacy of the Court itself. Yet, the dissent observes, although the *Carhart* Court does not explicitly reject *Roe* or *Casey*, it is “hardly faithful to our earlier invocations of “the rule of law’ and the principles of *stare decisis*’” (191). Significantly, it describes the Court as “differently composed than it was when we last considered a restrictive abortion regulation” (191), making clear that this decision is based in politics rather than law.

Although the critique is a fair one, it seems possible that such a statement would further suggest to a public audience that a decision on this basis is, while perhaps distasteful, permitted.

Conflicting Use of Medical Co-Rhetors for Medical Evidence

As an undeniable instance of reversing course, the internal debate over the inclusion of the health exception reveals how each side deftly constructs its argument through careful selection of evidence, including co-rhetors, and language to reach opposite conclusions. Although it is fair to acknowledge the medical disagreement over the intact D&E procedure, plenty of evidence existed on the available record from reputable members of the medical community, particularly those who were making the medical decisions at issue in *Carhart*, including the American College of Obstetricians and Gynecologists (ACOG). This evidence detailed numerous scenarios that might indicate the use of the procedure, including specific risks to patients. Similar evidence had led the *Stenberg* Court to conclude that a law banning the procedure was required to contain a health exception to allow physicians to provide appropriate medical care in a given situation. In order to uphold the Act without the health exception, the *Carhart* Court has to address both the legal aspect of precedent as well as the medical evidence that led the previous Court to its conclusion. It does the latter by relying on Congress to supply the medical evidence, filtering out the information contrary to its position. In addition, the majority diminishes the evidence from those opposing the Act by othering abortion providers and summarizing the detailed health risks to obscure potential material consequences. In so doing, the Court avoids precedent, shifts additional power away from medicine to law, and further damages the reputation of the medical community for its public audience. By contrast, the dissent responds to this tactic by highlighting the deficiencies in the majority's argument and using its own, more credible medical co-rhetors to provide the missing medical evidence, which

follows the Court's traditional practice, forces the majority to confront the discarded evidence, and ensures that patients, and their health, remain part of the debate.

As part of the *Carhart* Court's collaboration with Congress to reach a different result than the *Stenberg* Court had, the Act provides medical evidence that the Court relies on, thus bypassing the medical evidence gathered by the lower courts. One example is the Court's use of the Act's finding that the intact D&E is never medically necessary. In the Act, Congress declares, "There is no credible medical evidence that partial-birth abortions are safe or safer than other abortion procedures," citing an apparent lack of controlled studies or peer-reviewed papers (1204). In the *Carhart* opinion, after listing three separate examples of why an intact D&E may be safer, which were offered by medical professionals opposing the Act, the Court responds, "These contentions were contradicted by other doctors who testified in the District Courts *and before Congress*. They concluded that the alleged health advantages were based on speculation without scientific studies to support them" (162; my emphasis). The Court acknowledges that each of the District Courts recognized the differing opinions but still found substantial evidence that the procedure may be safer, and it offers no explanation regarding its determination with respect to the specifically identified advantages of the procedure. Instead, it allows Congress's determination regarding medical safety to substitute for its own.

The majority offers some evidence from the medical community; however, this comes largely filtered through the congressional hearings, thus resulting in weaker medical co-rhetors and malleable medical evidence. In her analysis of how *Carhart* creates a threat to women's health, legal scholar Plante observes, "the Act's authors relied on testimony from medical professionals who had never performed abortions but clearly opposed the practice, concluding, against direct medical authority, that late term abortion procedures are never necessary to

safeguard a woman's health" (402). Indeed, the detailed, specific health risk concerns of the very people who are tasked with making the medical decisions at issue in *Carhart*, physicians who perform later-term abortions, are summarily dismissed by the Court as "based on speculation" (162), purely "unfettered choice" (163), and "mere convenience" (166).[145] In fact, in her analysis of the Court's attack of physicians, Greenhouse observes that the respondents' brief informed the Court that ACOG had "concluded that there were 'at least 25-30 different circumstances' in which the intact dilation and extraction procedure 'would be the safest option'" ("How" 54). Despite this evidence, she argues, the Court "simply rejected it—perhaps because it got in the way of the opinion's premise that doctors were not to be trusted" (55). By deferring to Congress, both its findings and its medical testimony, the Court can retain the appearance of medical co-rhetors while selecting the evidence that supports its narrative. Moreover, because the testimony comes through Congress, the Court can make its selections without having to justify its reliance beyond congressional deference.

Remarkably, the Court uses these relatively weak medical co-rhetors, despite the availability of stronger options, including from the AMA, the primary governing body of the medical community. This exclusion is remarkable as it is new to the *Carhart* opinion. Despite the similarities between Justice Kennedy's dissent in *Stenberg* and the *Carhart* majority opinion, one stark difference is the medical co-rhetors. In *Stenberg*, both sides, including Justice Kennedy's dissent, relied on the expertise of the AMA to support their arguments. For example, Justice Kennedy quoted the AMA as describing the intact D&E as "ethically wrong" (963) and as reporting that the "AMA's expert panel, which included an ACOG representative, could not

[145] Such dismissal ignores not only the testimony of the physicians, but also the material health risk to the individual.

find ‘any’ identified circumstance where it was ‘the only appropriate alternative’” (966). Notwithstanding his extensive reliance on the AMA to justify upholding the Nebraska law, the *Carhart* Court relies on none of these AMA quotations or any others. Notably, while his select quotations from the AMA could support individual parts of the argument, the organization’s position as a whole was less helpful. The *Stenberg* majority pointed out Nebraska’s selective choice of quotations, noting its acceptance of a quoted point “even though the State does omit the remainder of that statement: ‘The AMA recommends that the procedure not be used *unless alternative procedures pose materially greater risk to the woman*’” (935). Moreover, the next sentence in the quoted policy, adopted by the AMA at its 1997 Annual Meeting, states, “The physician must, however, retain the discretion to make that judgment, acting within standards of good medical practice and in the best interest of the patient” (149). By acknowledging that “ethical concerns have been raised” regarding the procedure and invoking the requirement that the physician act “within standards of good medical practice and in the best interest of the patient,” the medical community is following the previously agreed-upon terms of mutual profession respect by making clear its willingness to self-regulate in response to the concerns and its continued focus on patient care. However, by relying on Congress for its medical evidence and avoiding the AMA, the *Carhart* Court demonstrates its alliance with Congress over physicians and law over medicine, both with its co-rhetor selection and by refusing to engage with the issues of potential health risk, physician discretion, or a physician’s duty to their patient.

Whether a cause or effect, the result of this shifted alliance is a medical narrative that privileges law over medicine, even with respect to health risks, and paints physicians as self-serving and dishonest. The primary villain in the majority’s story is abortion providers, and with this narrative the *Carhart* Court continues *Casey*’s trend of separating abortion providers from

the rest of the medical community. However, in *Carhart* the Court goes further, refusing to allow for a physician's medical judgment and directly impugning physicians' credibility in making such decisions. Physicians sit at the heart of this narrative because the law is directed at their behavior and because they are the key to further expanding legislative control. Specifically, upholding the ban at all requires a finding that physicians will act improperly if the law does not intervene, and upholding it without a health exception requires a complete turn against physician discretion. This position is in stark contrast to the professional cooperation and respect for medical judgment and self-regulation found in *Roe* and underpinning the individual right in the first place. However, for the reasons that began in *Casey*, the Court shifts the narrative away from medical alignment in order to make room for increasing regulations. The result of this more extreme approach is moving beyond unalignment to malignment.

Furthermore, to expand legislative control, the Court must dismiss the medical community's history of self-regulation. Here, it relies on a narrative of protection and implied mistrust, which accomplishes its goal while further othering abortion providers. By upholding a ban of a procedure, particularly over the objections of the AMA, which had already asserted its intention to self-regulate the performance of it, the Court demonstrates its lack of trust in the medical profession. In addition, the Court repeats and confirms Congress's justification of protecting the medical community from itself. Quoting the Act's finding that the intact D&E procedure "confuses the medical, legal, and ethical duties of physicians to preserve and promote life," the Court asserts, "Congress was concerned, furthermore, with the effects on the medical community and on *its reputation* caused by the practice of partial-birth abortion" (157; my emphasis). The Court's concern with the medical community's reputation, particularly at the risk of women's health, is especially paternalistic. Moreover, as Rebecca Ivey notes, "[t]he reasoning

behind regulating ethics of a profession is to ensure no harm comes to *patients*" (1468). Here though, she argues, "the Court sanctions the idea that ethical regulation of the profession protects physicians from *their own* vulnerability to ethical decay, rather than protecting patients from harm" (1468-1469). Accordingly, this narrative indicates the medical community cannot be trusted to manage its own ethical concerns and places the legal community in a protective role.

Moreover, the protection narrative by Congress and the Court, which identifies the danger as the intact D&E procedure and those who perform it, positions abortion providers as an internal threat, implying they are operating outside the medical standard of care. The *Carhart* opinion further contributes to this critical picture of abortion providers through its language choices. For example, in multiple instances, the Court refers to "abortion doctor" (138, 144, 154, 155, 161, 163). As Nan Hunter points out, this trend has been ongoing. Arguing that conservative Justices pushed back on *Roe* using "a counter-rhetoric of the unreliability of medical judgment" (192), she asserts that "[e]ven the vocabulary grew sharper" as "Justices hostile to *Roe* began to include 'abortionist' in their opinions and to deemphasize the more respectful terms 'physician' and 'doctor'" (194). She identifies the use of "abortionist" as early as a dissenting opinion in 1979 as well as noting its extensive use in two of the *Stenberg* dissents, including that of Justice Kennedy (194). Significantly, though tempered slightly to "abortion doctor," in *Carhart* the practice leaves the dissenting pages and enters an official Court opinion. Another example is the Court's repeated description of abortion as "killing" the fetus.[146] By describing the procedure as *killing*, the Court's narrative paints it as criminal act rather than medical care, which marks the physician as criminal and frames the behavior as something law already regulates and forbids.

[146] The majority opinion uses the word *killing* seventeen times.

In addition to the Court's language choices, its selection of co-rhetors further questions the reliability of abortion providers, within the medical community and society. Specifically, when the Court relies on Congress's second-hand medical advice as evidence of abortion providers' wrongdoing, it adjudges one group more credible. Generally, relevant expertise matters when assessing evidence. Indeed, when pointing out that one of the antiabortion movement's leading experts had a degree from an uncredited institution, Turner remarks that while he is "not confusing or equating credentials with knowledge or expertise," he finds it "noteworthy that credentials were important to Justice Kennedy in his dissenting opinion in *Stenberg* …, wherein he unfavorably compared Dr. Leroy [sic] Carhart …with 'board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists'" (28n152). Despite this previous focus, the *Carhart* majority incorporates the weaker medical testimony from Congress into its own opinion, thus layering on the Court's ethos and adding significant weight to dubious medical claims, particularly to a lay public audience. This choice also reaffirms Congress as more capable decision makers than the medical community, even with respect to appropriate medical care and potential health risks. Because this decision is justified based on moral and ethical concerns, it calls into question both the competency and ethics of physicians who provide abortions, even beyond those who might have otherwise performed the banned procedure. Since Congress stopped the abuse of discretion, the public will never have to know which physicians would have made the unethical choice. Consequently, they are all suspect. Critically, this narrative opens the door for lawmakers with less expertise and more political motives than physicians to increasingly usurp medical authority.

In the same way it adheres to existing alliances by using more traditional legal co-rhetors, the dissent includes medical co-rhetors, which serves not only to show identification with the

medical community, but also to show alignment with proper legal procedure, particularly in contrast to the majority's deviation. Importantly, the dissent highlights the goal of using medical co-rhetors to address medical decisions. For example, the dissent quotes one of the District Court opinions as finding, "[N]one of the six physicians who testified before Congress had ever performed an intact D&E. Several did not provide abortion services at all; and one was not even an obgyn" and another that held, "Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures" (175). Accordingly, the dissent demonstrates its medical alignment by detailing the contrast between the medical evidence relied on by Congress, and thus the majority, and stronger, more extensive medical evidence available in the record.

At the same time, the dissent also provides its audience with much of the missing evidence that the majority ignores in its one-sided analysis. Making a point to use the same source as the majority, the dissent continues, "But the congressional record includes letters from numerous individual physicians…as well as statements from nine professional associations, including ACOG" attesting to health risks caused by the Act or safety advantages of the banned procedure, while "[n]o comparable medical groups supported the ban" (176). Accordingly, the dissent tries to disrupt the majority's false medical ethos and highlight the bad faith actions by both Congress and the Court by ignoring the available contrary opinions. Its reliance on the congressional record for that addresses the congressional deference claim and makes clear that the information was available. Moreover, the relatively weak congressional record is directly contrasted against the District Court findings, which, quoting the record, the dissent points out "had the benefit of 'much more extensive medical and scientific evidence'" (177). Here, the

dissent quotes the District Courts' descriptions of the medical evidence, describing those who testified that the procedure is sometimes safer as "'numerous' 'extraordinarily accomplished' and 'very experienced' medical experts" and "'all of the doctors who actually perform intact D&Es'" (177). The dissent continues to point out the majority's deficiencies, again expressing confusion to highlight the lack of explanation. After describing the significant medical evidence relied on by the lower courts, the dissent argues that the majority claims the Act survives even with medical uncertainty "in undisguised conflict with *Stenberg*," labeling the majority's assertion "bewildering" because "it def[ies] the Court's longstanding precedent" (179). Having demonstrated the evidence disparity, the dissent highlights the majority's choice and its impact on the decision: "In this insistence, the Court *brushes under the rug* the District Courts' well-supported findings that the physicians who testified that intact D&E is never necessary to preserve the health of a woman had slim authority for their opinions" (180; my emphasis). As Gibson observes in her analysis of the dissent, this language "raises suspicion about the motives" of the majority and specifically "casts the majority as deceptive" ("In Defense" 127). Indeed, such overtly accusatory language is particularly significant from a Justice who had been trying to maintain judicial decorum, thus revealing the dissent's ire at the perceived breech of judicial protocol and fundamental rules of weighing evidence.

Furthermore, the dissent's alignment with the medical community is not limited to its ability to provide medical evidence. Responding to the majority's assertion that physicians could challenge the law if a specific situation arose where the intact D&E is safer, the dissent asserts that the Court "places doctors in an untenable position" because, given the slow pace of the legal system, at the time of treatment "physicians would risk criminal prosecution, conviction, and imprisonment if they *exercise their best judgment* as to the safest medical procedure *for their*

patients" (190; my emphasis). Accordingly, the dissent considers not only the physicians' medical advice, but also the practical circumstances that the new law will create and the difficult position physicians will find themselves in while doing their jobs.[147] In this way, the dissent is identifying with physicians as professionals and individuals who are entitled to constitutional protection from government overreach. Further, the dissent is echoing the professional judgment and patient care language that the AMA uses in its policy statement and that has been a hallmark of the alliance between the legal and medical communities. Critically, this framing of the narrative has the additional effect of considering the patients as part to the debate.

Although a discussion of a law that bans a particular medical procedure is destined to be framed in terms of physicians' actions, and the dissent sees the importance of highlighting health risks to emphasize the consequences, the opinion also takes care to ensure the patients are included. After establishing the credibility of the dismissed medical evidence, the opinion returns those voices to the conversation and highlights the health risks for women by detailing the multiple safety reasons provided for performing the intact procedure. However, in contrast to the majority, the dissent includes the impacts to the patient in relaying the safety assessment. For example, the majority reports that those against the Act "presented evidence that intact D&E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete" (161), thus collapsing significant health risks into a single brief sentence. The dissent not only enumerates the risks separately but also includes that the first is "a condition that can cause infection, hemorrhage, and infertility" and the second "may reduce bleeding, the risk of infection, and complications relating to anesthesia" (178). This

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[147] The post-*Dobbs* aftermath illustrates the danger to patients when physicians are concerned about criminal prosecution.

acknowledgement of the results of the health risks is important for keeping women at the center of the discussion rather than focusing only on the physicians' perspective, a weakness the *Carhart* dissent acknowledges about *Roe* (171n2). As an argumentation tactic, it highlights the irrationality of the majority's mere dismissal of such concerns and underscores the disingenuity of the Court to argue the Act protects women as mothers and future babies when it creates health risks that include infertility. Further, the dissent highlights rhetorical choices by the majority that impact the medical narrative, which in turn affects the health exception. Specifically, the dissent criticizes the Court for referring to physicians "by the pejorative label 'abortion doctor'" rather than their medical specialties, for calling pre-viability second-trimester abortions "late-term," and for dismissing medical judgments "as 'preferences' motivated by 'mere convenience'" (187). Here, as Gibson asserts, the dissent "exposes the politically charged rhetoric" of the majority in part to "highlight the bias of the Court" ("In Defense" 128). I suggest that this highlighting of the Court's rhetorical choices to justify its decision to ignore certain medical testimony both further critiques the Court's motives and demonstrates the majority's disregard for health consequences, which necessarily runs counter to an assertion of protecting women's health.

Even accepting a reasonable difference of medical opinion regarding the potential necessity of the intact D&E in certain circumstances, the divergence of alignment of the majority and dissent is clear from who each side believes is in the best position to adjudicate a given medical situation—the dissent sides with physicians, and the majority sides with the legal system. Justifying its decision to uphold the Act notwithstanding the medical uncertainty, the majority quotes *Casey* as condemning *Roe*'s trimester framework in part because it "left this Court to serve as the country's *ex officio* medical board" (164). This, coupled with the Court's

stated deference for Congress's findings in the Act, even over the lower courts in the case before it, demonstrates the majority's position that the legislature should make determinations of proper medical procedures. Moreover, the Court offers as-applied challenges as the solution to address any potential health risks, suggesting, "In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack" (167). An *as-applied challenge* means that a lawsuit would be filed for any individual set of circumstances where an intact D&E may be the safer procedure. In other words, the *Carhart* Court is not foreclosing the possibility that the procedure may be safer, only that it has not been established as safer in enough circumstances to warrant constitutional protection even absent the health exception. This determination lies at the heart of the legal issue and is the primary reason the Court needs carefully chosen medical evidence, largely filtered through Congress. Indeed, in response the dissent observes that "the record already includes hundreds and hundreds of pages of testimony identifying 'discrete and well-defined instances' in which recourse to an intact D&E would better protect the health of women with particular conditions" (190), thus providing another example of the Court ignoring the testimony, and potential co-rhetors, before it. The dissent, by contrast, argues that because of the health risks and the lengthy timeline of individual lawsuits, the Court is "gravely mistaken" in its conclusion, instead asserting that the health exception provision, and thus physicians' professional judgment, is the more appropriate way to deal with individual circumstances than individual future lawsuits (190). Notably, the Court's method is not only too slow to address immediate health concerns, it also leads to more court intervention rather than less. Critically, all of the Court's balancing tests—legislatures versus courts, lower courts versus higher courts—imply that the oversight has to be legal, completely discounting any self-regulation or professional ethics within the medical community. Accordingly, although

Stenberg reiterated the Court's continued, if tenuous, alignment with the medical community, particularly regarding its support of the health exception, *Carhart* withdraws any appearance of alignment between law and medicine.

Contrary Filtering of Stories of Women's Lived Experience

Despite professing concern for women in its justification for upholding the Act, the women's narrative in the *Carhart* opinion reflects a concern that is primarily rhetorical. The *Carhart* Court's efforts to turn public opinion against abortion while appearing to operate within traditional legal norms and demonstrating alignment with the antiabortion movement leads to a narrative that suggests a concern for women's health but that actively turns against it. Indeed, notwithstanding the Court's assigned duty to consider the scope of constitutional protection for individual rights, the Court affirmatively positions women as objects of appropriate public debate rather than considering them as individuals to which the Constitution applies. Moreover, the debate over women leads to a woman-protective narrative. In creating this narrative, the Court employs careful rhetorical selection of women's stories, deciding whose stories are considered and repeated, thus creating a singular view of women and weaponizing the stories of a few against all those who may seek a safe and legal abortion. Thus, rather than offering a consideration of women's constitutional rights or even a genuine reflection of their experiences, the Court's narrative is hostile to abortion and protective of women, both reflecting and creating a singular view of women that avoids any of the complexities that might otherwise challenge its curated story. And further rhetorical analysis reveals that even where women's stories are employed, the women to whom those stories belong are not the true co-rhetors of the opinion; instead, the Court echoes the antiabortion movement.

The *Carhart* Court's rhetorical selection includes which parts of the analysis contain women's stories, leaving them noticeably absent in many respects. These gaps are connected to assumptions the Court makes and creates about later-term abortions. First, the Court's discussion of state interest, which it asserts is "advanced by the dialogue that better informs…society…of the consequences that follow from a decision to *elect* a late-term abortion" (160; my emphasis), frames women as objects of public debate. In addition, despite its proclaimed focus on such debates, the Court does not consider any reason why a woman might seek a later-term abortion, focusing throughout the opinion only on the gruesome medical details of how various procedures are performed and ethical concerns it claims are raised. Yet, an *amicus* brief filed by the Institute for Reproductive Health Access (IRHA brief), which included testimonials from over 150 women who had second-trimester abortions, provided three primary reasons: "(1) they are carrying wanted pregnancies in which the fetus is diagnosed with grave anomalies; (2) their own health becomes endangered by their pregnancy; or (3) they have been unable to access care because of financial, geographic, or other delays" (2). Instead of responding to, or even acknowledging, these varied reasons, the Court's use of the word "elect" implies that all later-term abortions are simply elective, painting women as callous while erasing the stories of many.

Next, the Court's discussion of the intact D&E procedure is similarly devoid of any genuine acknowledgment of women's interests or even agency. Because the Court assumes the procedure would be an unreasonable or uninformed choice, it offers no consideration of why a women might choose to have the intact procedure, such as concerns over the health risks the Court acknowledges, albeit barely, thus denying women any agency over their decisions. Analyzing the Court's justification for upholding such government intervention, Siegel argues that though the Court points to a state's interest in "ensuring so grave a choice is well informed,"

the opinion does not consider “how decisions about the banned procedure are actually made” (“Dignity” 1698). In addition, the discussion excludes the possibility that a woman’s choice to have the intact procedure might be *in line* with the Court’s championed values rather than contrary to them. In one particularly poignant example, which Gorney recounts in her article for *Harper’s Magazine*, the wife and nurse of a doctor who performed the intact D&E procedure in the 1990s recalls how her husband would bring the intact fetus to women who asked to see them: “Having it intact was a goal, so they could do that, and have this closure. … I knew what it meant to these women, to be able to hold them, and be able to coo over them and say goodbye. It was profound” (37). This reasoning is supported in the IRHA brief. Gina, who received an intact procedure due to several fetal abnormalities, “recounts that she requested [an intact D&E] procedure so that she could hold her daughters intact after the procedure” (24n32). The brief notes that before the availability of the intact D&E, “women who wanted to obtain an intact fetus to hold or for genetic testing purposes would terminate by induction,” which is similar to a labor delivery and can take a long time and increase health risks (24n32). This indicates not only that women have well-considered reasons for requesting the intact procedure but also that those reasons predate the banned procedure, which supports the claim that women are not merely falling victim to misleading claims by bad physicians.

The Court’s choices in discussing—or avoiding—women’s health contribute to a narrative that is an incomplete picture of women’s experiences and refuses to ever prioritize women, even with respect to health risks. This is an especially problematic narrative for a public audience, who will, in turn, incorporate these ideas into its value system. Importantly though, this narrative is an essential part of changing the law without acknowledging having done so. In other words, this narrative contributes to the Court’s ability to explain its decision to allow the

lack of health exception and to find an adequate state interest in a law that does not save any fetuses, both holdings directly contra to *Stenberg*. By treating women as object bodies rather than subject humans and assuming the choice to have the procedure is unreasonable or uninformed, the Court is able to sound reasonable in its assertion that the health exception is not needed and its accommodation of a state interest that precludes choice rather than informing it.

Standing in stark contrast to all the stories the *Carhart* Court does not tell is the single story the Court selects for sharing, the story of women who regret their abortions. The Court's use of this narrative is troubling in multiple ways, including its origins and purpose. In addition to protecting women from physicians who mislead them, the Court introduces the idea that it is saving women from themselves by preventing the psychological consequences of regretting their abortions, thus relying on a maternal health justification for the law by first creating the psychological health risk for which it is providing protection. Notably, this narrative of women's regret originates with the antiabortion movement, and adopting it requires substantial curation through rhetorical selection, including willfully ignoring certain evidence and simply declaring some parts to be self-evident.

Critically, the *Carhart* Court affirmatively chooses to introduce the women's regret narrative. While both the Act and the petitioner's brief contain some general claims regarding the potential physical health risks of the banned procedure, neither argues for or offers evidence in support of the claim that the Act is necessary to protect women from the regret they will come to feel after the procedure or that physicians are purposefully misleading women about the procedure in order to convince them to agree to it. Opening her analysis of the Court's invocation of dignity in *Casey* and *Carhart*, Siegel observes, that "the Court also discussed an additional woman-protective justification for the ban that congressional findings never mention,"

citing her extensive review of the congressional record ("Dignity" 1697). Instead of Congress or the lower courts, she points out, "*Carhart* cites an amicus brief with affidavits suggesting that women need protection from making uninformed abortion decisions they might regret…" (1697-1698). This irregularity prompts Siegel to ask questions: "What are we to make of the Court's raising woman-protective considerations that Congress did not consider in enacting the Partial-Birth Abortion Ban Act? Why did the Court discuss deliberative errors in women's decision making about whether to carry a pregnancy to term in a case concerning restrictions on the procedures doctors use to perform abortion?" (1698-1699). "Paradoxically," she concludes "*Carhart*'s abortion-regret discussion seems so out of place that it invites attention" (1699). Legally, that neither the Act nor the parties' briefing mentions the issue of women's regret is significant because it means the Court had no reason to mention it in the opinion at all, particularly since the Court could establish its justification for upholding the Act without that point. That the Court does include this discussion suggests its motivation is something other than a legal one. In her law review note analyzing the new discourses in *Carhart*, Ivey cites Siegel's recognition that the "woman-protective" justification first appears in the opinion but asserts that the significance is not just legal, but also rhetorical: "While this Note cribs the adjective 'woman-protective' from Professor Siegel's articles, the intention here is to describe a *discourse* rather than a *justification* or *argument*. The discourse does provide a justification, but is capable of (and does) much more work" (1453n9). Because of the significance of the women's regret narrative, not only for shaping rights but also how we talk about them, it is worth considering how the *Carhart* Court came to echo it and from whom.

Although *Carhart* marks the introduction of the women's regret narrative into the legal discourse, antiabortion activists had been working on developing it for some time. Following the

conservative Court's surprising decision to uphold *Roe* in *Casey*, antiabortion activists refocused their efforts. Specifically, activists wanted to shift the position of women in the narrative from one of conflict to protection and support. As one scholar suggests, this shift was a reaction to a perceived need to appeal to rather than alienate those concerned with women's rights. Specifically, Siegel explains, following *Casey*, "the leadership of the antiabortion movement began to look for new ways of speaking to the American public" ("Dignity" 1714). This rhetorical strategy was specifically adopted to reach those resistant to the antiabortion movement because they were concerned that abortion restrictions would harm women (1715). As such, it aims to provide such an audience with a story about women that satisfies their concerns and moves them to act affirmatively toward protecting women through regulation.

One potential issue with this strategy, as many scholars note, is that the assertion that abortion causes harm to women, either physical or psychological, had already been discredited by the medical community. Detailing many of the specific claims that have been disputed, including the link between abortion and breast cancer, Melody Rose observes, "The antiabortion pro-life, pro-woman rhetoric has met predictable resistance from the scientific community and from pro-choice groups" (14). The psychological claims, including regret, have also been repeatedly refuted. At its 1992 Annual Meeting, the AMA specifically addressed the issue, acknowledging the earlier assumption by many "that serious emotional problems following induced abortion were common" but reporting on several studies, including one by Dr. C. Everett Koop, Surgeon General during the Reagan Administration, that all found no evidence of widespread regret (323). Discussing Koop's findings, Greenhouse observes, "This incident, which occurred in 1989, was widely publicized at the time" ("How" 56). Accordingly, relevant

audiences, including the public, were potentially aware that claims of women's regret had been refuted before they were used in this way by antiabortion activists.

This disconnect between the scientific evidence and the regret claims is reflective of the antiabortion movement's aims and audiences. Discussing the movement's shift in press releases from fetal to pro-woman framing, Rose points out that "the language advances the claim that abortion is harmful to women, often *citing its own research as evidence*" (13; my emphasis). As such, Rose asserts, "Clearly the pro-woman frame is not designed to attract the regular scientific community to the movement" (15). Therefore, those in charge of the antiabortion movement's rhetorical strategies seem to have determined they only needed to persuade their target audience, a lay public concerned about women's rights, and could thus use circular evidence to give the appearance of authority even where none existed. Notably, the *Carhart* Court will echo not only the content of the women's regret narrative but also the circular evidence strategy. Moreover, it is no accident that this narrative strikes a chord with the Court. Included among the audiences Rose identifies as possible targets of the pro-woman frame is elites, observing that although the press releases do not "explicitly mention the utility of the new frame for policy makers, social movements are necessarily attentive to them" and citing the *Carhart* opinion as evidence that "the pro-woman frame resonates with the Court's majority" (16). Furthermore, Siegel makes a more direct connection between the antiabortion movement and the Court, detailing several examples of the movement's use of its own research to persuade state legislatures and the Court, including in the *Carhart* case ("New" 1026-1028). In one example she observes that an antiabortion website posted documents, which are attributed to prominent antiabortion activists, with suggested changes to legislation "designed to appeal to Justice Kennedy" (1028).

Critically, the antiabortion movement's arguments were not limited to the public sphere. The Justice Foundation, an openly antiabortion organization, filed an amicus brief on behalf of Sandra Cano, the woman identified as "Mary Doe" in *Roe*'s companion case, *Doe v. Bolton* (the Cano brief), which argues for omitting the health exception and banning the procedure based on the health consequences for women. In its statement of interest, the Cano brief claims, "Congress in its findings only discussed the physical health consequences of abortion. However, other health consequences not stated in Congress' findings would be helpful to the Supreme Court in making its decision. The women attest to the fact that there are adverse emotional and psychological health effects that have affected their lives" (1). Thus, the Cano brief asserts its position of moving beyond the congressional findings and indicates that its primary source of evidence is excerpted testimonials from a small group of women. Because these arguments and evidence were presented only in the Cano brief, the Court's use firmly establishes the Justice Foundation, an organization focused on ending *Roe*'s protections, as a co-rhetor. Siegel reports that the affidavits in the Cano brief were collected by Operation Outcry, an outreach program of the Justice Foundation, for lawsuits filed seeking to overturn *Roe* and *Doe* by reopening the cases based on alleged new evidence ("Dignity" 1727n95). Analyzing the Court's use of the Cano brief, she contends, "There is no doubt that the Court's discussion of post-abortion regret and its reference to the Operation Outcry affidavits in *Carhart* signal receptivity to antiabortion advocacy and the abortion-hurts-women claim" (1769). Critically, because this issue is not part of the official legal record and not necessary for resolving the legal questions before the Court, the *Carhart* majority's reasons for including is not legal, but rhetorical. Here, the goal is not to demonstrate the Court's legal analysis, but to include the Justice Foundation/Operation Outcry as co-rhetor, thus demonstrating the Court's alignment with and support of the organization's

antiabortion mission. Moreover, although the Court purports to be aligning with women's interests, their stories have been heavily filtered through the antiabortion organization.

The women's regret narrative is relatively short, taking up just over a page of the opinion, but its impact is substantial. After asserting the government's existing interest in showing its "profound respect for the life within the woman," the Court moves to the regret narrative, offering a weak connection to the existing state interest and a sweeping stereotype about the role of women: "Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well" (159). This assertion by the Court highlights one of most problematic aspects of the women's regret narrative, its portrayal of acceptable women's roles, namely mother. Examining the Court's use of the woman-protective discourse, Manian observes, "The *Carhart* Court gave no explanation for why the mother-child bond is the ultimate bond, as opposed to father-child or parental bonds, especially for a woman with an unwanted pregnancy" (255-256). Instead, she argues, "the Court simply declared that the Act recognizes the supposedly 'self-evident' reality of women's nature and role as mothers" (256). Thus, relying on outdated stereotypes, the Court creates a singular view of women that tells society, including women, what acceptable women look like. By saying a mother's love is the ultimate expression, the Court is saying women *should* feel that love and criticizing not just those who do not feel it but also those who fail to display it in acceptably overt terms.

Furthermore, citing only the Cano brief, the Court maintains, "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow" (159). By describing the choice as one "to abort the infant life they once created and sustained," the Court leaves no doubt about its view of the decision and how it

expects women to view their own choices.[148] To establish regret, the Court ignores the previous studies on the issue, simply announcing a lack of data and proclaiming its own conclusion, which is based on a mere handful of testimonials, to be "unexceptional," thus avoiding unhelpful evidence from both regret studies and opposing testimonials. In practice, this selection allows the experience of a few to dictate the scope of the rights for all. [149] In his analysis of the Court's words, Turner emphasizes that though the Court uses the language that "some women" regret their abortions, "when this rationale is proffered as a justification for the total ban of the at-issue procedure, the operative meaning of 'some women' is, in effect, 'all women'" (41). This use of the experience of some to represent all is particularly troubling given that it requires the active denial of opposing expressions. Moreover, saying women feel regret both purports to act as evidence of such regret and suggests that women *should* feel regret.

Having introduced the idea of regret, the Court asserts that "some doctors may prefer not to disclose precise details" beyond the "required statement of risks," citing lower court evidence that some experts acknowledge that they do not go into significant detail, although not suggesting the information provided was less than that required at the time (159). Again,

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[148] Notably, this framing implies that women are singularly responsible for creating life.

[149] According to the brief, the excerpts provided are the "Relevant Portion of 178 Affidavits of Post Abortive Women of the approximately 2,000 of file with The Justice Foundation" (App. 11). Moreover, the brief asserts that these are "only the tip of the abortion iceberg," claiming that "pregnancy resource centers attest that their organizations had over 100,000 women in post-abortion recovery programs in 2004 alone" (25). The brief also reports, "It is estimated that there are more than one million abortions each year" and claims that federal and state legislatures should intervene "to protect women's health" if "even 1 in 10 women suffer from negative psychological consequences of abortion" (25). This is worth highlighting for two reasons. One, the regret narrative represents only around ten percent by their own estimations, but it is being repeated by the Court as the representative of women's experience. And two, protecting even ten percent of women is offered as a reason to restrict the reproductive rights of all women but is apparently not reason enough to include a health exception.

allowing some to stand for all and offering a weak connection to state interest, the Court insists that it is "precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State," supporting its claim by quoting language from *Casey* about permissible frameworks for informed consent. Here, the Court is relying on existing case law to support its arguments; however, this reliance is misleading because the law at issue bears no resemblance to the regulations considered by the earlier Court. As such, the *Carhart* Court must stretch to make its own points fit. The resulting narrative further impugns physicians' integrity without evidence and purports to protect women from their own medical providers.

Critically, the *Carhart* Court's disingenuous use of even those stories it deems worthy of inclusion results in women who are used as pawns rather than contributing co-rhetors. First, the stories on which the Court elects to rely and echo are ones to which the Act overwhelming did not apply. Of the 178 personal accounts of regretting abortion, only three potentially involved a later-term abortion (Cano et al. App. 34, App. 98, App. 105-106).[150] In fact, Sandra Cano, the primary women whose story is invoked, did not have an abortion at all, instead offering an affidavit that laments her role in establishing abortion rights as Mary Doe and provides second-

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[150] K.N. reports that she was "at least three or four months into the pregnancy"; however, her account does not discuss the procedure or doctor, instead noting she was "told by the media on TV and my friends that it was just a seed" and "just a blob of blood" and blaming her mother for her additional guilt (App. 98). Loretta Bingham, who does not directly say how far into the pregnancy she was but describes circumstances that point to a later-term abortion, does mention the procedure in a negative way, reporting that she "was called back into the clinic because they thought they hadn't gotten all the baby out of" her, which led her to have visions of "an infant with its arms and legs pulled off" (App. 34). Ironically, though, this description suggests she may have benefited from the now banned procedure. Several others mentioned being impacted by later fertility issues, another health risk intended to be addressed by the intact D&E. The final account, by Kathy G. Rutledge, is one of the longest and most detailed testimonials, and though she is vague on the precise timing, she says that "[o]bservation of the dead baby that was birthed caused devastating emotional and psychological complications" (App. 105).

hand generalized accounts of regret (App. 6-8). In other words, in the same way that the Court accepts and amplifies the medical opinions of physicians who did not perform later-term abortions over those who did, the testimonials it relies on are largely from women who had not received later-term abortions. Similarly, while the women's accounts do reflect painful regret, they do not reflect misrepresentations by physicians or the resulting increased regret that the Court attributes to them by reasonable inference.[151] Accordingly, even if one accepts allowing a few women to speak for all, the stories on which the Court purports to rely are not relevant to the debate, leaving the stories of none as representative. Moreover, the Court is ignoring women's own expertise about their experiences. First, it ignores the women who have experienced later-term abortions in declaring its reasonable conclusions. Thus, though the decision is made in the name of women's experiences, it is based solely on the assumptions Court. In addition, because the women in the Cano brief who did express significant negative impacts largely did not have later-term abortions, using their stories to uphold a law that does not address their concerns is a further failure to honor women's expertise. For example, several of the testimonials in the Cano brief reference the shame the women felt, which contributed significantly to their negative psychological health. In one particularly emotional account, Karen Bodle recounts, "I felt shame and struggled with depression. I felt dirty on the inside. I believed that people would reject me if they knew I had an abortion" (App. 104-105). While her pain is palpable, those who are using

[151] The overwhelming majority do not mention physicians at all. The examples offered within the brief report only that they did not know or were misinformed without identifying by whom (8n15). In addition to K.N., who blames the media and friends, Dana Nicole Landers similarly blames society noting that in order to heal, "I had to be able to grief [sic] the loss of my unborn child in a society that had convinced me that he/she was just a piece of tissue" (App. 17).

her story indicate no awareness of their contribution to it by arguing for a law designed to increase the shame culture at the center of it.

Despite its questionable relevance to the issues before the Court, the women's regret narrative is significant for the story it tells as the sole representation of women's experience within the *Carhart* opinion. Critically though, not only does the Court's narrative misrepresent and minimize women's experiences, it is also used by the Court to weaponize women's experiences against women's interests. The Court paints an irreconcilably conflicting picture of women—as both thoughtfully making painful decisions regarding children to whom they are bonded and callously disregarding humanity to have self-serving elective procedures. This disconnect allows the Court to control who is deserving and under what circumstances. Here, regret is the price of admission. This narrative flattens the complexities of women's experiences so much that no individual woman can fit into either version, which in turn extends the Court's control by giving it more room to make the determination. This narrative flattening is exacerbated by the Court's selection of only the stories in the Cano brief as worthy of reliance, at best privileging and endorsing those experiences, and in practice erasing the others entirely. Furthermore, despite offering only a thinly veiled justification for the Act, the women's regret narrative also contributes to shame culture by shaming those who do not feel or at least profess regret and those who choose to obtain a later-term abortion, regardless of the reason. Indeed, by the Court's own admission, the state's interest is advanced by public dialogue, and the number of abortions is only reduced if the knowledge the Act conveys encourages some women to carry their pregnancies to term. While the Court offers no details regarding how specifically this encouragement would work, instead offering the connection as one of its many reasonable

assumptions, these two points taken together act as shame culture. And with such little room for understanding, the narrative feeds the larger goal of turning the public against abortion.

In response, the dissent criticizes the majority for its use of woman-protective discourse, demonstrating how it incorporates gender stereotypes and fails to follow established constitutional protections. Moreover, the opinion aligns with the women most impacted by the Act, making space for their voices in contrast to the narrow representation offered by the majority and again providing the evidence dismissed by the majority. Drawing on precedent, the dissent challenges the majority's reliance on stereotypical gender roles: "As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny'" (171). Consistent with the framework employed throughout the dissent, such assertions are taken directly from previous case language and repeatedly and explicitly acknowledged as such. However, the issue reaches beyond concerns about reinforcing stereotypes. As part of this discussion, the dissent emphasizes that based on these determinations in *Casey*, the basis for the individual right has expanded to include equality: "Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature" (172). Pointing to this language, Siegel asserts, "Justices Ginsburg, Breyer, Souter, and Stevens understand the right *Roe* and *Casey* protect as a right grounded in constitutional values of autonomy and equality" ("Dignity" 1780).

In its discussion of the regret narrative, the dissent again points out the majority's reliance on "ancient notions about women's place in the family and under the Constitution," asserting that such ideas "have long since been discredited" and comparing cases from 1908 and 1873 with decisions from 1996 and 1977 (185). Providing this history further demonstrates the

progress that was made that has now been erased. Analyzing the rhetoric, Gibson argues that this "narrative of progress" allows the dissent "to paint the majority decision as outmoded and out of step with a more progressive and more just vision of women" ("In Defense" 127). Significantly, though, the dissent makes clear that the majority is ignoring progress not only in a justice sense but also contrary to the evolution of the Court's precedent. Notably, the progress narrative is also significant for demonstrating that despite its shortcomings and slow reaction, the legal system is capable of evolving its views to more accurately reflect the value changes in the community. However, as the language of alarm explains, accommodating progress within the system will be meaningless if later Justices can simply ignore it.

The dissent also supplies missing data to push back on the majority's legitimizing of the women's regret narrative, providing the evidence from numerous published studies, quoting one as showing "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have" (183n7). Moreover, the dissent calls out the logical disconnect between invoking the rationale of informed consent for a law that does not offer informed consent as a solution: "The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks… Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety" (184). Pointing to this language in the opinion, Ivey argues that the dissent is countering the majority's paternalistic narrative by "remind[ing] the reader of women's capacity for rational choice" (1501). Notably, the dissent simultaneously reframes women as decision-makers while also keeping the potential dangers to their health at the forefront.

Furthermore, the dissent directly calls out the majority's use of co-rhetor: "Revealing in this regard, the Court invokes an *antiabortion shibboleth* for which it concededly has no reliable evidence" (183). As Gibson argues, this move underscores the Court's bias and calls into question the inevitability that is meant to guide judicial opinions ("In Defense" 128). Thus, the dissent reveals the majority's faulty logic as well as its disregarding of women's autonomy and health. Taken together, the dissent's attack demonstrates that despite the Court's claims of protecting women, it is aligned with the antiabortion movement to the detriment of women's interests. In addition, though, the use of the word shibboleth rather than a direct accusation regarding the specific origin, such as identifying Operation Outcry, maintains some level of judicial decorum. This further supports the argument that the dissent's warnings are meant not as justification for destroying the legal system but in the hope that if the boundaries are restored quickly enough, trust in the system can also be restored. Again, in the context of persuading a public audience regarding the potential danger lurking, it is essential that the dissent make clear not only that upholding the Act is the wrong legal conclusion, but also how the majority opinion rhetorically manipulates the outcome.

In addition to challenging the Court's argument, the dissent makes clear that women are more than the regret-filled picture painted by the majority, thus demonstrating and encouraging identification with more complex scenarios. Here, the dissent reintroduces the disregarded evidence into the discourse, both providing a more complete factual picture and demonstrating the majority's extreme bias. Accordingly, the dissent provides the ignored stories of women's experiences, making space for more voices and offering a more sophisticated version of the individuals whose rights the Constitution should protect. This includes acknowledging the reasons for the later-term abortions and the economic issues that contribute. Specifically, the

dissent observes, "Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy," noting that minors may take longer to realize they are pregnant and that lack of financial resources can inhibit "timely receipt of services" (173n3). Moreover, the opinion reports, "Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester" (173n3). The dissent's explanation of delays and fetal abnormality rationale offers a counter-narrative to the majority's singular focus on elective abortions. The dissent also suggests a more complete view of women. For example, the opinion reminds the reader, "Notwithstanding the 'bond of love' women often have with their children not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity" (184n8), a move that Abrams calls "[d]ebunking the 'good mother' construct" (317). Thus, the dissent offers additional stories to complicate women's narrative contribution to the opinion. Further, to support equality and highlight health concerns, the dissent examines the material impacts of regulations, which further solidifies its alignment with women's interests. Noting the dissent's attention to intersectionality and varying contexts, Gibson contends, "Rhetorically, Justice Ginsburg's dissent opens up a space for taking the material experiences of women seriously" ("In Defense" 132). This attention to material effects, both socioeconomic impacts and serious health consequences, is essential to aligning with women as subjects with agency rather than mere objects of the abortion debate.

Accordingly, by using its judicial voice to account for the diverse experiences of women and seeking to protect their equal liberties and health, the dissent is demonstrating its alignment with women as a complex group—rather than a monolith—as well as the High Court's duty to

safeguard their constitutional rights. While the majority sides with Congress's efforts to control physicians rather than rely on their professional judgment and with the antiabortion movement's plan to turn public opinion through a compelling narrative of protecting women, the four Justices of the dissent, align with the constitutional obligation to protect individual rights and honor precedent, leading, as a practical matter, to alignment with physicians, women, and the judiciary.

Abandoning Liberty for Power

In the end, all the duty and sacrifice that permeated the Court's story in *Casey* is discarded in *Carhart* in favor of distain, judgement, and paternalistic protection, not of liberty, but of innocent lives, both unborn babies and the women who kill them. Moreover, whatever gains had been achieved in *Casey*'s more equality-friendly language is lost. Here, women are not even written into the story as patients; they are remorseful innocents who lack all the necessary information to understand their decision. Any focus on equality as a justification for protection of reproductive rights is barely a memory. Indeed, there is no protection of individual rights at all in this story, only protection of the government's right to encourage—read "compel"—women to carry pregnancies to term regardless of the risks and its right to dictate best medical practices in furtherance of that goal. Although extreme, this result is a natural extension of the changes to the individual right that began in *Casey*.

First, the *Casey* Court's narrative positions the rights of the woman and fetus as equal by focusing on the state's interest in both maternal health and fetal welfare from the beginning of pregnancy. Critically, although this sounds like the balancing of the interests of women and fetuses that is often at the center of abortion debates, these are both state interests. The maternal interest here is one that allows states to regulate medical care, such as physician licensing, not a woman's constitutional right to decide whether to continue a pregnancy. This constitutional right

is not merely a third interest, though, it is—or at least should be—superior to state interests that are not compelling. As Justice Blackmun observes in his concurring opinion in *Casey*, the Court's recognition that "a State has 'legitimate interests from the outset of the pregnancy…'" should not have disrupted the individual right because mere "legitimate interests are not enough" (932). Despite this, the individual right was brought into seemingly equal standing with the state interests following the *Casey* opinion. From there, the *Carhart* Court subordinates the individual constitutional right not only to fetal welfare, a state interest not based in the Constitution because a fetus has not been recognized as a "person" protected by the Fourteenth Amendment but that arguably involves a potential life, but also to ethical and moral concerns, which, the dissent notes, "are untethered to any ground genuinely serving the Government's interest in preserving life" (182). Yet, as part of its narrative of appearing to follow precedent, the Court asserts, "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn" (158). This holding, which the Court supports with unrelated case law, lengthens the list of merely legitimate state interests that can support interference with an individual constitutional right and implies a further retreat from heightened scrutiny through the unexplained reference to rational basis. While the *Carhart* Court may not affirmatively change the level of judicial scrutiny, a future Court could quote such language and imply its precedential value, significantly altering a right not through legal analysis and deliberation but by selecting a particular word. Having displaced the individual right to obtain an abortion—based in the constitutional protections of privacy and equality—with a mere interest in moral debate, a future

Court's move to void the right entirely in favor of the Tenth Amendment's catchall language in support of state power would be easy rhetorical work.[152]

Moreover, once lawmakers began dictating the scripts for informed consent, leaving no discretion for medical judgment, it is a rather small step to intrude further into medical decisions while callously ignoring the health risks involved. Ultimately, the *Carhart* Court uses Congress as co-rhetor both to side-step the constraint of precedent established in *Stenberg*—as well as other earlier abortion cases—and to supply manufactured evidence in building its argument. Indeed, though the Court acknowledges later in the opinion that certain facts stated by Congress in the Act had been disproven, it provides them without caveat or comment early on. The Court also introduces a narrative known to originate with the antiabortion movement into the official legal discourse, one that was neither necessary nor supported by evidence.

Voiced by Justice Ginsburg, the dissent makes every effort to counter the majority, sounding the alarm over the turn away from precedent and ensuring a public delivery of the

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[152] Though the *Dobbs* opinion does not discuss *Carhart*, instead focusing only on the complete overturning of *Roe* and *Casey*, Chief Justice Robert's concurrence demonstrates how it could have been used in yet another incremental diminishment of the individual right. Arguing that getting rid of the viability marker does not require overturning *Roe*, he asserts, "The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of 'potential life'" (slip op. 4). He further observes, "That changed with [*Carhart*]. There, we recognized a broader array of interests, such as drawing 'a bright line that clearly distinguishes abortion and infanticide,' maintaining societal ethics, and preserving the integrity of the medical profession" (slip op. 4). Moreover, he cites *Carhart*'s permissible state interests when describing as an example of Mississippi's stated reasoning that its legislature found "that the 'dilation and evacuation' procedure" is barbaric, dangerous, and demeaning and cites *Carhart*'s graphic description of the procedure (slip op. 4-5). Notably, neither the *Carhart* Court nor federal lawmakers disputed that if the Act had applied to the traditional D&E, the procedure mentioned here, it would constitute and undue burden because it was the most commonly used later-term procedure. Yet, in Chief Justice Robert's analysis, he fails to acknowledge that his use of *Carhart* to justify a law that would essentially ban the procedure is directly contrary to that Court's holding, instead implying that its common later-term use contributes to the argument justifying the state's right to prevent it.

critiques. The three Justices who join the dissent—Justices Stevens, Breyer, and Souter, the latter also an author of the *Casey* joint opinion—did so without further comment, thus providing a strong united front, a position that the majority does not enjoy thanks to Justices Thomas and Scalia. Indeed, given the majority's attempt to demonstrate reliance on *Casey*, the single concurring paragraph—which maintains an objection to that foundational case—foreshadows the danger to come by relying on such tenuous votes.

Notably, emphasizing the key feature of the storytelling in the *Carhart* opinion not as the debate over abortion rights specifically but as the *dissoi logoi* that emerges as a united dissent skillfully demonstrates how following judicial norms results in a different outcome, one that has already been decided by previous Courts without the current Justices having to decide any new law or apply law to new facts, is essential for recognizing the breadth of the issue. The *Carhart* dissent is not the first to suggest that one side is rhetorically obscuring a lack of necessary votes. For example, responding to the *Casey* joint opinion's dismissal of *Roe*'s trimester framework and resulting retreat from strict scrutiny in favor of undue burden, Justice Blackmun asserts in his concurring opinion, "In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe*…. No majority of this Court has ever agreed upon an alternative approach" (930). Nearly two decades later, Justice Stevens pens a concurring opinion in *Stenberg*, joined by Justice Ginsburg, in which he calls out the Nebraska law and judicial discourse required in response as only explainable as a distraction: "The rhetoric is almost, but not quite, loud enough to obscure the quiet fact that during the past 27 years, the central holding of *Roe* has been endorsed by all but 4 of the 17 Justices who have addressed the issue" (946). In *Carhart*, the dissent begins with *Casey*'s finding of "an 'imperative' need to dispel doubt as to 'the meaning and reach' of the Court's 7-to-2 judgment,

rendered…in *Roe*" (169) and ends by asserting, "the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational" (191). Creating a sense of honesty over judicial decorum, the dissent thus concludes, "In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives" (191). Thus, the dissent is not merely asserting but demonstrating its correct and just position through its parallel but contrasting narrative and conclusion based on the same available means, legal and rhetorical. This revelation regarding some Justices' willingness to use rhetoric to avoid the Court's own precedent extends beyond abortion rights.

However, within the US legal system, dissenting opinions are not granted equal weight legally, offering only rhetorical value to the future Courts, and here the public, both of which they hope to reach. Thus, the majority's role as primary legal storyteller cannot be overstated. The *Carhart* opinion illustrates the power that storyteller holds, not only in their language and evidence, but also in their selection of co-rhetors, those voices chosen for inclusion as well as those left out. Unlike the *Casey* Court, who prioritized the legacy and integrity of the Court above all else, the *Carhart* Court and the dissent it evoked are willing to reveal the system's weaknesses in order to stake a political claim. Critically, the High Court was granted its power on the basis of neutrality and fidelity to the Constitution, even if ideas of reaching those goals differed. Using such power for a political motive creates a volatile scenario where protecting individual rights is all but forgotten. Moreover, because of the Court's power to reflect and shape society's values, the potential damage is virtually unlimited.

Despite the dissent's warning, the significance of the *Carhart* opinion is often minimized. For example, arguing that the "compromise" reached in *Casey* settled political debates over

abortion, Neal Devins describes *Carhart* as "emphasiz[ing] the government's power both to recognize 'the life within the woman' and to protect women from the 'regret' they will feel to abort 'the infant life they once created and sustained'" without critique of the impact or acknowledgment of the novelty of either rationale (1320). Moreover, the long-term danger of the opinion is largely overlooked, many choosing instead to focus on the limited number of abortions directly affected. Analyzing the Court's impact on the narrative of "the irrational woman," Manian observes that "[s]ome scholars have argued that *Carhart* has had little practical effect on abortion rights" (289). "To the contrary," she argues, "not only does the decision detrimentally impact women's health in clinical practice, *Carhart*'s woman-protective reasoning has had and will continue to have significant impact both legally and politically, and both within abortion law and beyond abortion law" (289). Because of its position governing the community, the Court has a substantial ability to shape its values. Underscoring the High Court's influence on society, Siegel points to the Court's assertion that the government could base the ban on its duty to ensure medical professionals are viewed as healers who recognize the value of human life and contends, "Regulation of this kind creates social meaning: it generates value that affects social interactions that reach beyond the regulated act" ("Dignity" 1738). This effect on the narrative of the larger society potentially extends from all aspects of the Court's opinion. Analyzing the woman-protective rationale, Plante argues that by erasing the state interest in women's health entirely from the narrative, the Court "diminishes women's worth in the eyes of the law solely to that of their procreative ability" (405). By extension, I argue, the Court similarly diminishes women's worth in the eyes of the governed society.

The Carhart majority's divergence from established abortion jurisprudence, particularly *Roe* and *Casey*, leaves reproductive rights in a substantially worse position. In her analysis of the

Supreme Court's contribution to abortion stigma, Abrams provides a succinct assessment of the interaction between language and law across these foundational abortion cases. She argues that *Roe* and *Casey* are mirror images of each other, where "*Roe* paired a narrative of the passive woman with robust constitutional protection for her assertion of reproductive autonomy"—in other words, bad language but good law—and *Casey* "coupl[ed] an eloquent narrative of the equality and liberty interests of women with a legal standard that undermines the principles lauded by the Court"—good language but bad law (328). Significantly, she asserts that *Casey* "sets the stage" for *Carhart* because its "narrative of the autonomous woman," which she describes as "mere dicta," disappears in the latter opinion leaving only "the legal standard that invites government control and the corresponding narratives of women as objects of control"—bad language *and* bad law (328). Put another way, because only the law is binding from one Court to the next, dicta being language that may explain a decision but is not required for resolving the issues, by moving women's protections from law to language, *Casey* made it easy for the future Court to leave women with no protections simply by changing the language.[153] Thus, Abrams contends, *Carhart* "exemplifies the perfect marriage of language and law that both generates and reinforces abortion stigma" (328).

As this chapter demonstrates, based on the *Carhart* Court's own description of how the federal law is intended to operate, abortion stigma is the primary goal of both the law and the opinion. Moreover, by following *Casey*'s rhetorical lead and altering the law by applying only part of it, the *Carhart* opinion leaves the legal protection for women in a worse state than it found it. Additionally, the difference between *Roe*'s narrative of passive but present patients and

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[153] Whether a given point is dicta or a required part of an opinion is often the subject of debate in future cases.

Carhart's women as objects of control in need of protection from themselves results in language that is substantially worse as well. Furthermore, notwithstanding rhetorical assurances of adhering to traditional expectations of following precedent, the results of the *Carhart* decision are in direct opposition of such traditional principles, which were affirmatively reconfirmed in *Casey*. Accordingly, in sum, despite a general lack of fanfare for a Supreme Court decision that upholds a federal law that banned a rare and publicly unpopular procedure, *Gonzales v. Carhart* leaves women with further diminished constitutional protection, less autonomy, and increased language of shame and judgment. At the same time, it leaves itself with decreased precedential constraints, which results in increased unchecked power, and a blueprint for further gains.

Although a reshaping of public perception regarding precedent may work initially, it risks long-term structural damage to the legal system itself. In an editorial, the *Wall Street Journal* concludes its defense of the ruling by asserting, "The Court has shown a very modest new deference to the will of the voters on abortion, but no more" ("Partial"), thus echoing the sentiment of many reports regarding the connection between the Court and voters. Significantly, though, federal judges have lifetime appointments in an effort to avoid the direct sway of politics. Indeed, it was this politicization of the Court that the joint opinion authors were trying to avoid in *Casey*, concerned that it would weaken the legitimacy and integrity of the Court. Unfortunately for our legal system, such increased politicization will also lead to the jurisprudence of doubt from which the *Casey* Court was trying to protect a distressed liberty.

CHAPTER V: LIBERTY'S LOST REFUGE: MOVING FORWARD WITH A JURISPRUDENCE OF DOUBT

> Liberty finds no refuge in a jurisprudence of doubt. - United States Supreme Court, *Planned Parenthood v. Casey*

On June 24, 2022, nearly thirty years to the day after the High Court offered those opening words as it vehemently safeguarded the sanctity of both reproductive rights and its own prior rulings via an opinion written jointly by three conservative Justices, that same Court, now comprised of eight new members and one long-standing dissenter, turned its back not only on an individual's right to make their own reproductive choices, but also on the stability and integrity of the very bench from which it rules. Meanwhile, responding to an argument unrecognizable within the tradition of our legal system, three voices join, appealing to the intelligence of a future day, to dissent—with sorrow.

In *Dobbs v. Jackson Women's Health Organization*, by a mere 5-vote majority, the United States Supreme Court explicitly overturns its previous decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, declaring that the federal Constitution provides no protection for an individual's right to obtain a safe and legal abortion and returning the issue to the states. In so doing, the Court retreats from fifty years of abortion jurisprudence and a lifetime of creating stability through certainty, holding that the previous two Courts were simply wrong.[154] Moreover, the Court fails to consider the rights, or even health, of the women within its

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[154] As the Court explained in *Casey*, reversing course on previously established constitutional issues should occur only in the most exceptional cases when factual underpinnings or societal understandings changed in ways that called for a different outcome, such as the 1954 reversal in *Brown v. Board of Education*, which overturned *Plessy v. Ferguson*'s 1896 "separate but equal" doctrine, citing a new understanding that separate educational settings are inherently unequal.

community. In short, the Court proclaims that women's rights can fairly be limited to those granted in 1868. A sixth voice offers to merely diminish the existing right further, taking away the last remaining vestige of *Roe*, but leaving some recognition that women should have a minimal amount of control regarding reproductive choice. However, despite the seemingly hopeless state of gender equality and the Court's confounding failure to adhere to even its own rules, this moment calls for leaning into judicial rhetoric rather than retreating. In her recent book *Rhetorical Feminism and This Thing Called Hope*, Cheryl Glenn introduces "rhetorical feminism" as a theoretical stance for active progress towards inclusion and social justice, a theory she avers is "anchored in hope" (4). Specifically, she suggests that "hope presents scenarios for how attitudes toward women might shift and offers methods and methodologies for how such transformation could be made possible, even at the scene of crisis, disappointment, confusion, or curiosity" (123). Critically, she asserts that hope is action-oriented and that "with hope comes a collaborative belief in some kind of future, some alternatives to the current situation" (123). Focused on such alternatives, I suggest that it is through understanding how the High Court uses its available means of persuasion to gain power and move members of the community toward its view, especially views seemingly detached from our current culture, that informs our ability to best move forward even when facing a jurisprudence of doubt.

In this chapter, I return to the lessons learned from the Court's narratives in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Gonzales v. Carhart* and consider how this analysis might illuminate the nuances of the Court's authority in the wake of this unexpected turn. Through this examination of the Court's rhetorical power, I suggest key takeaways from those cases still relevant today with respect to reproductive rights and related constitutional protections that are now more precarious than ever. Given the future uncertainty and the increased political posturing

of the Supreme Court, it is even more essential to interrogate how its words, those included and those intentionally excluded, tell stories that move an audience. As the legal foundation of the Court rests on particularly shaky foundations, its rhetorical prowess takes on a more significant meaning. To conclude this analysis, and usher it forward, I argue that by examining the Court's narratives within their legal context and as part of a compound rhetorical situation, not just on reproductive rights but also on the rule of law, we uncover crucial warnings about our legal system and societal values. Moreover, sharing stories, both within official contexts and to the public that makes up the governed community, is an essential rhetorical tool to increase empathic identification as we continue to seek more formalized protections for those most vulnerable.

The Road from *Carhart* to *Dobbs*

Although a full analysis of the most recent developments in reproductive rights is beyond the scope of this project, it is useful to consider how this rhetorical analysis fits within the drastically different landscape. As such, I begin with a brief summary of the fifteen years after *Gonzales v. Carhart*. Two members of the *Carhart* majority changed in the time between that decision and *Dobbs*, both under controversial circumstances, though for different reasons. In February 2016, Justice Antonin Scalia died unexpectedly, and even though a new president would not take office until January the following year, Senate Majority Leader Mitch McConnell refused to allow any confirmation hearings for President Barack Obama's nominee. The seat was eventually filled by Justice Neil Gorsuch, a staunch conservative, after the newly elected Republican president took office. In the fall of 2018, *Carhart*'s author, Justice Anthony Kennedy, retired and was replaced by Justice Brett Kavanaugh, also conservative. His nomination was controversial not for procedural issues, but because of questions regarding personal integrity that arose during his confirmation hearing, many of which went largely

unaddressed. Of the four *Carhart* dissenters, only Justice Stephen Breyer remained. Justices David Souter and John Paul Stevens were replaced by Justice Sonia Sotomayor and Justice Elena Kagan respectively, both liberal. The only change that involved a different position on abortion was Justice Amy Coney Barrett, a conservative who replaced Justice Ruth Bader Ginsburg following the latter's untimely death shortly before the 2020 presidential election. Accordingly, this new Court was expected to effect a 6-3 vote against abortion rights. That said, the *Casey* Court a similarly conservative composition, leading to surprise when it explicitly upheld *Roe*.

There were few abortion cases that reached the High Court in the fifteen years between *Carhart* and *Dobbs*. In the most notable case, the Court struck down as an undue burden Texas regulations requiring that providers have hospital admitting privileges and that centers meet certain surgical standards. In that case, Justice Kennedy joined the majority against the regulations. The other significant case was notable for what the Court did not do. Briefly, Texas passed a law that essentially banned abortions when a "heartbeat" can be detected, which is around six weeks and well before viability, which is generally accepted as approximately twenty-four weeks.[155] However, to avoid *Roe*, the law created a private right of action rather than relying on state criminal enforcement; the idea is that since the government is not interfering, the law is not subject to the *Roe*-*Casey* standards. Although the case did not reach the Court for a full hearing on the merits before *Dobbs*, the Court did deny a request to stop the enforcement of the law while the litigation was pending. This decision was made with the Court composed as it is for *Dobbs*, with Chief Justice John Roberts joining the liberal Justices in dissent. Though the

[155] Many medical professionals have pointed out that since a fetus at that stage has not yet developed a heart, the sound heard is machine-generated and is not a heartbeat in the typical understanding of the word.

decision expressly did not consider the constitutional issues, many saw it as a clear signal regarding the Court's intention to overturn *Roe*. In addition to the Texas laws, many conservative states passed increasingly restrictive abortion laws after *Carhart*, some well short of the viability line. These efforts increased after a Republican president was elected in 2016. Further, some states began passing so-called "trigger laws," which would automatically outlaw abortion as soon as federal constitutional protections fell. On the opposite side, some liberal states passed laws to make clear their citizens would retain the right to obtain a safe and legal abortion.

All of the political posturing came to a head in May and June 2022, in *Dobbs v. Jackson Women's Health Organization*. At issue in *Dobbs* is a Mississippi law that bans abortion at fifteen weeks, though it includes exceptions for medical emergency and severe fetal abnormality (*Dobbs*, Opinion of the Court slip op. 6). Because this law involved a ban rather than restriction, the viability line drawn in *Roe* and affirmed by *Casey* was the primary issue, as viability—when the fetus could survive outside the womb—remained the earliest point for a full ban, and Mississippi's ban was about two months earlier. Notably, in Mississippi's initial request for review to the Court, it presented the issue as only related to the viability line; however, after the Court agreed to hear the case, the state changed its position, asserting that *Roe* and *Casey* should be overturned entirely (*Dobbs*, Roberts slip op. 5-6). In early May 2022, an extraordinary leak of a draft opinion in *Dobbs* revealed the Court's intention to overturn *Roe*.[156] This decision was confirmed when the final opinion, drafted by Justice Samuel Alito, was handed down the following month, days before the end of the term. Five of the six conservative Justices agreed

[156] Although many theories have circulated regarding the origin of the leak, as of this writing no formal explanations have been made. The Court conducted an internal investigation but reported being unable to identify the source.

that *Roe* and *Casey* should be overturned, holding that *Roe* had been wrongly decided and that *Casey* failed to consider the merits of the original decision as part of its analysis. Though the Court pays little attention to the gravitas of its ruling, instead simply insisting that *stare decisis*—the rule of following precedent—is not an absolute requirement, it relies in no small part on the changes *Casey* had made to the original right in *Roe* and the vagueness around the undue burden standard, which it claims made application unworkable. The core of the Court's argument is that because a right to abortion would not have been recognized when the Fourteenth Amendment, covering the privileges of citizenship, was ratified in 1868, the right cannot be protected by that Amendment; this determination is made primarily through selective historical review with much of the historical context, such as women's participation in government and medical advancements, ignored. The opinion similarly ignores any practical realities of the decision. Chief Justice Roberts concurs only in the judgment, arguing that the Court could have—and thus should have—upheld the Mississippi law on the narrower basis of overturning only the viability line. In an ultimate showing of unity, Justices Breyer, Sotomayor, and Kagan issue a joint dissenting opinion, highlighting the failure of the majority to follow the rule of law, as well as various logical failures, and bringing the significant health risks and economic consequences to light. In an especially poignant moment, they observe, "After today, young women will come of age with fewer rights than their mothers and grandmothers had" (slip op. 55).

In candor, when I began this project, I did not anticipate the fall of *Roe*. Even as *Dobbs* was pending, my legal assessment was that the Court would rule as Chief Justice Roberts suggests, upholding the Mississippi law by changing the viability line, perhaps using the

previously used “quickening” marker.[157] Admittedly, my legal education led me to put too much faith in the High Court’s reverence for precedent. Despite this outcome, however, there are critical lessons to be learned from this rhetorical analysis of the Court’s narratives on reproductive rights, perhaps even more urgently needed. To that end, this concluding chapter considers how the rights granted are directly impacted by the Court’s narratives, including the very system that articulates them. By considering these nuances, possibilities for intervention are revealed as we maintain hope for stronger common bonds.

Judicial Rhetoric as Meaning Making

Articulating the lessons emerging from her rhetorical analysis of *Roe v. Wade*, Katie Gibson suggests that “the disconnect between the symbolism and the rhetoric” of the landmark opinion “reveals that scholars are not paying close enough attention to judicial rhetoric” (“Rhetoric” 327). Thus, she argues, “As rhetorical critics and informed citizens, we need to do much more to understand and to engage judicial opinion as a branch of constitutive rhetoric,” identifying the rhetoric of the Supreme Court as a specific site of additional focus for feminist rhetorical scholars (327-328). Such an analysis is valuable, Gibson asserts, because examining Court opinions “as a significant site of meaning-making” leads to “a more accessible judicial discourse and a more active citizenry,” while considering the rhetoric “encourages an understanding of the law that is embedded in our public rhetorical culture” (328). In other words, understanding how the law—specifically the words the High Court uses to articulate the law—contributes to the shaping of the society governed by such law illuminates both the need and the

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[157] Among the options considered in *Roe* for determining the state interest in fetal life was the view in common law—historical law before modern statutes—that abortions prior to “quickening” were not illegal. Quickening is the first movement of the fetus, usually around sixteen to eighteen weeks gestation (*Roe* 132).

path for public intervention. The public becomes active participants rather than merely governed. This project takes up Gibson's call for a closer examination of US Supreme Court opinions, approaching them with an understanding of their constitutive rhetorical value. Indeed, I consider not only how the law functions as rhetorically constitutive of society, but also how the law itself is constructed through the rhetorical choices made by the Court, including its complex persuasive concerns. Because of the public's active role in setting the terms of its acceptance, the narratives offered by the Court, which justify and ground the law it pronounces, both constitute and reflect the governed society. Significantly though, as my analysis demonstrates, because official legal texts, especially Supreme Court opinions, include specialized legal discourse and perform specific legal acts, a rhetorical analysis yields the best insight when the texts are examined as both rhetorical and legal. That is, rhetorical analysis is most instructive when Court opinions are explicitly examined within the legal context in which they are created.

Moreover, while legal texts serve a legal function, their rhetorical value is at least as significant, as rhetorical choices impact laws in material ways. Because agreed-upon values can be negotiated through empathy, narrative is a particularly useful rhetorical tool for creating and conveying legal rights. Indeed, Paul Gewirtz argues that "narrative and rhetoric pervade all of law and, in a sense, constitute law" (3). The ability to empathize with others is especially important for including the voices of historically marginalized or excluded individuals. Moreover, this understanding of the law highlights the role the public plays in its own governance. As Celeste Condit puts it, "we need to understand the law, not as an isolated and privileged professional field, but as an interface between the state and public" ("In Praise" 97). Examining the law in this framework allows a more critical examination of rhetorical choices made in official legal contexts including how those choices account for the governed community.

This, in turn, illuminates potential sites for intervention by those working both within and outside the legal system.

Furthermore, accounting for the community's role acknowledges implied, yet intended, audiences, including the public. Notably, in recent years, the High Court has increased its interaction with the public in more visible ways, perhaps connected to increased access through technological advancement or to increased politicization or both. Recognizing this shift reveals new considerations for rhetorical choice while also reminding of the substantial history that is publicly quieter but still essential. For example, Justice Ginsburg offered two bench dissents—that is, dissenting opinions read aloud from the bench—in the 2006-2007 term, first in *Carhart* and then a second gender equality case shortly after. Although these were not her first bench dissents, it was the first time she had read two in one term, leading some scholars to respond by suggesting she had found her voice. However, given her already lengthy career as a legal scholar and vocal participant in the judicial process, I would argue that what she found was her audience, specifically, a public one.

Another significant aspect of the rhetorical work of Court opinions is the constraints of the legal context. Although the genre of judicial opinion implies objectivity and inevitability, judges, especially Supreme Court Justices, have significant room to craft a narrative that reaches the desired result. However, those generic expectations give rise to some limitations on how far a decision can go. Because the law is created through the Court's expression of it, these rhetorical constraints act as legal constraints as well. Similarly, precedent acts as both a positive and negative rhetorical constraint as courts work to justify their rulings. Significantly, the connection between rhetoric and law works both ways; that is, as skilled rhetoricians the Court can make

substantial changes to the law, including individual fundamental rights, through a carefully crafted narrative.

Finally, examining Court opinions as both legal and rhetorical makes space for considering the compound rhetorical situation of an opinion, including the collective work of both other opinions—past and future—as well as contributions outside the official legal record. For example, Justice Ginsburg was praised for considering the gender equality aspects of reproductive rights and the material issues that many women faced, such as economic constraints, in the *Carhart* dissent. While those issues are essential for the conversation and Justice Ginsburg did consider their absence a significant flaw in *Roe*, she was not the first to raise them. In the Hyde Amendment cases, *Maher v. Roe* and *Harris v. McRae*, Justice Thurgood Marshall, the first Black Justice on the Court, repeatedly offered detailed, powerful descriptions of the material impacts caused by denying Medicaid coverage for abortions, especially for women of color, in his dissent from the Court's decisions. Similarly, Justice Harry Blackmun, the primary author of the *Roe* opinion, not only supports the Court's inclusion of equality language in *Casey*, but he also explicitly cites the Equal Protection Clause in his concurring opinion (928). Because of the legal system's method of building on itself and valuing tradition, this historical record is essential to understanding rights and doing activist work in support of those rights. Moreover, understanding the law not as an object but as rhetorical interaction between the Court and the public, illuminates the significance of the public's contributions to the compound rhetorical situation as well as how the filter of the press impacts the public's reception and understanding of the decisions and rights they convey. Using the example of the Court's narratives across thirty-four years of reproductive rights discourse illustrates the complexity and value of exploring how law and rhetoric come together to shape our society in material ways.

Court Narratives as Both Rhetorical and Legal

Across this dissertation, each of the example cases demonstrates how the Supreme Court shapes rights and community through the narratives constructed based on its goals and alignments, both stated and implied. The analysis of *Roe v. Wade* responds to feminist criticisms of the opinion and explains how the complexity of establishing a new right, especially in a way it could be exercised, required a careful balancing of interests and persuasion of multiple audiences. A primary complaint about the Court's opinion in *Roe* is that it positions physicians over women. Gibson asserts that despite *Roe* being considered "a turning point in the fight for women's equality," rather than focusing on "new thinking about the rights and autonomy of women," the Court "grounds the right to reproductive choice squarely within a narrative of medical progress" ("Rhetoric" 319). However, when considering what the Court was trying to accomplish and who needed to be persuaded to reach those goals, potential explanations arise. From a legal perspective, the Court's choice to ground the new right in a right to medical privacy and family planning built off existing case law on contraception, thus using precedent as a positive constraint and providing a more stable foundation. This choice also reflects the Court's rhetorical goal of framing its decision in terms with which the public already agrees to support voluntary compliance. Moreover, because the right to *obtain* a safe and legal abortion required willing abortion providers, persuading physicians that performing abortions was acceptable within the community's value system was critical to effectively creating a right for women that they could exercise. Yet the Court had authority only over creating an individual right to access and abortion but no similar authority to compel physicians to perform them. Further, while the American Medical Association, the body that did have some authority over physician behavior, evolved to a position of recognizing abortion as an important part of patient care, it stopped short

of requiring physicians to perform the procedure. Accordingly, physicians, a necessary part of effecting change, could only be influenced to change through persuasion, thus revealing the high stakes involved in deciding among the available rhetorical means.

Focusing on the broader, compound rhetorical situation reveals how efforts to persuade these critical audiences affect the way co-rhetors help shape the narrative to effectively build a case for the new right and impact the right itself. For example, a Gallup poll tells the public's story of its opinion and values, and the AMA similarly offers the physicians' official story. Language from both stories is reflected in the Court's narrative—that is, the official legal story—as part of its persuasive techniques. Furthermore, the compound rhetorical situation stretches out from the opinion as well, as the reporting event created by the opinion creates an opportunity for the press to fill in the personal, individual stories that were displaced in the Court's narrative in favor of stronger legal protection. Thus, while the *Roe* opinion should not avoid all criticisms, as there arguably was room for a stronger recognition to women's autonomy and economic impacts, recognizing the complex goals, legal and rhetorical, creates space to acknowledge positive attributes of the opinion and potential sites for future intervention.

Whereas *Roe*'s narrative might be partially rehabilitated by rhetorical analysis, the Court's decision in *Planned Parenthood v. Casey* is brought back from obscurity, recognized for the damage it caused and for the missed opportunity it offered. Perhaps most significantly, through its careful narrative, the Court diminishes the individual right to obtain an abortion in order to meet conservative aims while protecting its own integrity and obscuring the significance of the changes from public view. A rhetorical analysis of the *Casey* opinion reveals that its reverence for precedent and focus on a language of women's equality and individual burdens creates misdirection regarding the fate of *Roe*, which in turn impacts the public reception,

including its opinions and voting, and the response within the scholarship. The narrative in *Casey*, crafted to meet the Court's conflicting goals of changing the law based on Court membership without acknowledging it, changes not only the individual right to obtain an abortion, but also the discourse around abortion, equality, and women's choices, including their ability to make them. Most critically, all of this occurs with virtually no fanfare or resistance; instead, the joint opinion authors are celebrated on the front page of the *New York Times*. The impact of both the changes and the failure to respond would come back to haunt those who support reproductive rights, as the *Dobbs* Court justifies its decision to overturn both *Roe* and *Casey* by pointedly observing, "Paradoxically, the judgment in *Casey* did a fair amount of overruling" (slip op. 3). With this truth revealed, though, community members can take action, insist upon their values, and tell their stories. Even as *Casey* is no longer law that governs our society, the analysis of the opinion offers insight into the potential power of the Court.

Furthermore, although it diminished the individual right, the *Casey* narrative did provide elements that could have benefited feminist efforts had they been recognized. For example, many feminist scholars argue for a more subjective legal system, and *Casey*'s undue burden standard provided substantial possibilities toward that effort. Indeed, in his concurring opinion, Justice Blackmun observes, "In striking down the Pennsylvania statute's spousal notification requirement, the Court has established a framework for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice" (924-925). Shortly after the decision, legal scholar Patricia Martin expressed excitement at the Court's choice to foreground the experience of women and predicted that *Casey* would lead to a significantly more individualized and subjective analysis in determining women's rights and, ultimately, a more inclusive legal system (310). Despite these possibilities, like the changes to the rights, the more

subjective standard was largely missed. For example, praising the *Carhart* dissent as providing a new framework for reproductive rights discourse, Gibson asserts, “Advocates for reproductive rights—in the courtroom and on the street—have faced an incredible disadvantage while trying to craft a defense of abortion rights within the language of *Roe v. Wade*” (“In Defense” 134). Specifically, she claims, “This language of privacy follows the generic script of the law and endorses a logic of decontextualization—disqualifying the woman question and rendering women’s gendered experiences of pregnancy and motherhood out of bounds” (134). Although her praise of Justice Ginsburg is admirable, the contextual judicial framework had been available since *Casey*, fifteen years earlier, and provided as part of a majority opinion rather than a dissent. Similarly, the *Casey* Court had moved toward considering outdated gender stereotypes and including an equality-based rationale. The failure to recognize this progress meant missed opportunities to take advantage of the subjective standard by moving more judges toward identification with a broader population and to use the equality framework. Critically, it also resulted in a misguided understanding of the impact of the *Carhart* decision, which was viewed as more of the same rather than as the backtrack that it was. Though both the undue burden standard and equality rationale have been completely erased legally by *Dobbs*, the opinion does still provide a framework for activists and demonstrates the Court’s capacity for progress.

Critically, though, with respect to the subjectivity of the undue burden standard, the lesson here is more than a missed opportunity; rather, analysis of the implementation of the undue burden standard offers evidence of the weak spots of a more subjective legal system. As demonstrated by the cases that followed *Casey*, while the Court may find ways to adopt subjective language, the legal system will still attempt to apply it in the most objective manner possible. Even within the *Casey* opinion itself, it was clear how the ability of the Justices to

identify with particular burdens had a substantial impact on the rights protected. The Court went to great lengths to protect women in domestic violence situations; however, even though opponents of the other restrictions demonstrated how the increased costs and delays increased the health risks for women, the Court was unable to identify with poor women enough to intervene. In the wake of the decision, the objective legal system could not apply a subjective standard of review, especially one that provided such little guidance. Many lower courts seemed to not even attempt a subjective analysis, and even those that did try could not accurately perceive of what kind of burdens would prevent access. Reporting on the aftermath of the decision over a decade later, lawyers for Planned Parenthood reviewed the cases and found that "lower courts have too often failed to conduct a contextualized, fact-sensitive analysis of its likely impact on women, resulting in shallow, even dismissive treatment of the realities of women's lives" (Wharton et al. 386). Ultimately, a whole host of new regulations by conservative states were upheld. This failure comes from both a failure of identification and an inability to create and/or apply laws on such an individual basis. Notably, the issue was visible even in the descriptions that celebrated the new standard. While acknowledging it was too soon to know for sure, Martin was hopeful about the undue burden standard, suggesting that "*Casey* may indeed point to a new jurisprudence that allows the abortion debate to be reconciled upon the *common ground of women's experience*" (310; my emphasis). Critically, her use of the phrase "common ground" and the singular "experience" fails to account for the significantly varied experiences of women and the considerable difference in material impacts depending on those experiences, thus illustrating the challenges courts would face implementing the standard in any meaningful way. Accordingly, although the undue burden standard suggests the kind of empathy for which storytelling is well-suited and the subjective attention that is missing in *Roe*,

the continued uneven application by judges and legislatures unwilling or unable to identify with those most burdened left many women worse off after *Casey*. This lesson encourages reevaluation of calls for subjectivity and how such a system may function.

As with *Casey*, the analysis of *Gonzales v. Carhart* uncovers substantial missed warnings and reveals the Court's ability to not only persuade but materially increase its own power through skillful rhetorical selection. In her 1998 analysis of the early legislative efforts to ban "partial-birth abortion," Rigel Oliveri refers to the description of the procedure as "rhetorical manipulation" and notes how proponents defined terms in ways that allowed them to control the narrative and create confusing statistical evidence that suggested numerous elective abortions of healthy viable babies (402-403). By relying on this same terminology, the *Carhart* Court contributes to this rhetorical manipulation. Significantly, though, while the decision did have material negative impacts on reproductive rights and the progress of women's equality, the more valuable lesson, especially in a post-*Dobbs* world is the Court's effective use of rhetorical choice to limit the constraint of precedent, thus granting itself more power, virtually without detection.

Although largely unnoticed, Dorothy Samuels, a member of *The New York Times* editorial board who reported on legal issues, raised the precedent issue in an editorial a week after the *Carhart* decision, criticizing Chief Justice Roberts's empty assurances during his confirmation hearing: "Indeed, a bizarre aspect of the new ruling is the way it casually reverses, misstates or wholly ignores major precedents and doctrines—mostly without acknowledging it. I guess this is what Chief Justice Roberts means by judicial modesty." Samuels also notes the Court's turn against its traditional evidentiary procedures, writing "Another galling feature of the decision is its use of junk science," and claiming that the majority's "dismissive treatment of the overwhelming medical evidence…and the undue credence given to the flimsy assertions on the

other side, disregard the court's own rules for evaluating expert testimony." In addition, the Court's incorporation of a narrative directly from the antiabortion movement endorsed the argument, adding the Court's own ethos, and shifted to a more direct politicization of the Court, in direct contradiction of its constitutional mandate and the reason for the Justices' lifetime appointments. Samuels observed this issue as well, asserting, "The biggest surprise—a shocker, really—was the majority's use of the opinion to enshrine into Supreme Court doctrine the rhetoric and tactical positioning of the anti-abortion movement," which she described as "the patronizing fiction that the court was acting for women's own good to protect their mental and moral health." In sum, the *Carhart* opinion is significant for the Court's use of rhetorical choices to alter both rights and discourse without being accountable for either.

Additionally, analyzing the majority and dissenting opinions together, the dissent's warning regarding the deviation from precedent and demonstration of how traditional legal analysis would reach a different result reveal both the rhetorical manipulation that occurs and the level of manipulation that is possible, the latter point remaining critically relevant in the wake of *Dobbs*. The significance of the dissent's proffered warning—often relegated to the backseat of reproductive rights discourse, both academic and public, in favor of focus on the specific gender equality points—supports the importance of examining legal texts within their legal context.

The Making of *Dobbs* and the Post-*Dobbs* Reality

There are numerous potential areas of concern that emerge from the analysis of these three cases related to reproductive rights and beyond. One obvious question is how this analysis can inform an examination of the *Dobbs* decision, both to respond to the new legal landscape and to prevent the impact from growing. First, *Roe* is the beginning of the individual right and bore the weight of supporting that right, both legally and rhetorically, almost exclusively despite

decades of additional case law that altered both the right and the narrative. Thus, it is vital to more critically examine arguments regarding the reaction to *Roe*. There is little debate that the Republican party used the issue of abortion to attract new voters and gain political power following the decision in *Roe v. Wade*. The common argument by scholars and public commentators is that conservatives were able to do this because the Court was overreaching in its decision, doing too much too soon, and, thus, created a public backlash against the decision. While this is one possible scenario, and polling data is far from infallible, this position discounts, perhaps too heavily, the careful calculations the *Roe* Court likely made about public opinion. Indeed, Linda Greenhouse and Reva Siegel offer a compelling argument that Republican party leaders focused on abortion as a way to *create* rather than respond to a unifying issue that would bring together multiple voting blocks. Specifically, they point to chronological details—such as how long it took for the party to take up the issue after *Roe* was decided, the continued public polling in favor of abortion rights following the decision, and the fact that party leaders changed their position on abortion almost a decade before their voters—as evidence that the Court's adjudication of the issue is not entirely to blame ("Before (and After)" 2081-2082). This understanding is crucial, they say, for a more compete evaluation of the possibilities for the Court to be an outlet for those seeking protection of their rights (2086). Similarly, considering the possible motivations of those involved in spearheading changes to the rights granted in *Roe* provides a richer analysis of the intersection of rhetoric and law.

Regardless of whether it was party leaders or voters who led the charge to reconsider *Roe*, antiabortion activists' plan was to weaken the foundations that supported the individual right before overturning it once the needed number of votes could be obtained. A primary concern was how to account for existing precedent. In *Casey*, the Court provided two examples

of cases where overruling earlier precedent was justified, one where the original case "rested on fundamentally false factual assumptions" (861-862) and another, *Brown v. Board of Education*, where "[s]ociety's understanding of the facts" regarding the impact of segregation on education was "fundamentally different" at the time of the later case (863). Although the *Casey* Court's discussion of adherence to precedent could more fairly be characterized as an explanation for why it needed to uphold *Roe*, a memorandum from antiabortion lawyers to a coalition working on an abortion ban in South Dakota describes it as a test to be met in order to justify overturning *Roe* (Casey and Cassidy 9-10). Specifically, they describe the "test" as requiring "a showing … that there are now new facts or a new appreciation of old facts which show that the *Roe* holding was based upon one or more false assumptions of fact" (9). They continue by discussing the types of evidence different Justices might need to make such a determination. Though this memo is examining next steps after *Carhart*, it acknowledges the value of the federal Partial-Birth Abortion Ban Act for creating "a debate that had the capacity of changing hearts and minds" and "help[ing] shift public sentiment to a degree" (13). Because the antiabortion movement is speaking both to and through the Court, its goals align with the Court's goals and include demonstrating changed facts or understandings sufficient to justify overturning *Roe*.

Justifying its strategy, the antiabortion lawyers explicitly argue against the suggestion that "the main factor…in overturning *Roe* is the make-up of the Court," pointing to two previous instances where conservatives should have had enough votes, including *Casey*, but failed (6). Specifically, they argue that "the legal and factual analysis presented to those courts…was not adequate to hold the coalition on the Court together" and assert, "Any argument about how to best overturn *Roe* that focuses exclusively upon a strategy to merely 'pack the Court' is dangerous and will fail" (6). Despite this prediction, in *Dobbs* the Court did ultimately overturn

Roe because of its changed make-up, justifying its decision as *Roe* having been wrongly decided rather than relying on changed facts or understandings: "*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start" (slip op. 6). The Court's willingness to do this may have been because it perceived a change in public perception, not regarding abortion but regarding the role of the High Court and the options available to it. In short, beginning with the Republicans' nomination of an unconventional presidential candidate in 2016, coupled with Leader McConnell's decision to hold open Justice Scalia's seat for nearly a year while offering a weak justification for thwarting norms, all three branches of government started moving further away from traditional modes of operation, blurring conventional boundaries and expectations. It was this shift that allowed the "court packing" plan to work and *Dobbs* to overturn *Roe*—not because the Court was presented with the changed facts to address precedent or even because the public had changed its views enough on abortion to accommodate the changes, but because the public, or at least enough of it, had shifted its understanding of how much or little precedent acted as a constraint on the Court's decisions.

Although the *Dobbs* decision renders some of the specific analysis of the Court's narratives on reproductive rights somewhat moot, there are still important takeaways. First, reproductive rights is only an example of how the Court can use its rhetorical skill to increase its power, and there are many rights now potentially at issue because of the way cases are intertwined. Any case that relies on *Roe* and/or *Casey* directly is especially vulnerable. The *Dobbs* majority opinion attempts to offer assurances regarding other, similarly situated constitutional rights by simply stating they are not at risk; however, the dissent pointedly notes the lack of logical reasoning, asserting, "Either the mass of the majority's opinion is hypocrisy,

or additional constitutional rights are under threat. It is one or the other" (slip op. 5). In addition, given that the Court has demonstrated its skill at using precedent as a positive constraint, even where it means taking it out of context, future Courts can rely on *Dobbs* for ignoring precedent in other cases, further damaging individual rights and the integrity of the Court. If the Court does ever return to its former focus on tradition, it will be important to understand where the cracks in the system are, even when it is working as intended, perhaps especially then. Finally, key to moving forward is recognizing the warnings that were present in *Casey* and growing in *Carhart* to more readily identify such warnings in the future.

Moreover, this analysis highlights the need to more carefully examine the role of the press in explaining rights to the public, thus influencing the public's understanding and the rights themselves. For example, changes in public perception regarding the functioning of the legal system are exacerbated by the press, including its assertion of inaccurate information. In *Casey*, the reporting both before and after the decision was focused almost exclusively on whether or not *Roe* would be overturned, giving readers the impression that doing so would be a viable opinion and obscuring the significance of the changes made to the individual right. Similarly, while *Carhart* was pending, the press again focused on the likelihood that *Roe* would be overturned. After the decision, although the press does not frame *Carhart* as overturning either *Roe* or *Stenberg*, reflecting the success of the majority's narrative, reporting on *Carhart* does focus on what conservative gains are accomplished based on the changed make-up of the Court. Specifically, the press highlights that *Stenberg* had gone the other way only seven years before and suggests that Justice Alito replacing Justice O'Connor was likely the determining factor in the different decision. Notably, the reporting is largely uncritical of this result, instead leaving the impression that decisions are supposed to change as the Court does. In one particularly

pointed example, the *Wall Street Journal*, after reporting that *Carhart* did not overturn *Stenberg* and that Justice Kennedy dissented in the earlier case, asserts, “The fact that he wasn’t willing to overturn even *Stenberg* suggests that this Court is *not in the mood* for sweeping reversals of precedent” (“Partial”; my emphasis). They continue, “As for Messrs. Roberts and Alito, the Court’s opinion also gives no clue about *how many abortion precedents* they might be *willing to overturn*” (my emphasis). This is a surprisingly nonchalant misrepresentation of *stare decisis*. Notably, by the time of the *Carhart* decision, the question of changing constitutional rights based solely on Court composition has been asked so many times, in the wake of cases and confirmation hearings, the press seems to simply accept this result as part of the process, observing but not critiquing the increasing political nature of the High Court. This practice would continue through the decision in *Dobbs* and almost certainly contributes to the Court’s decision to rule as it does.

In addition to the impacts to constitutional rights, there are significant considerations regarding how the Court’s narratives contribute to negative health outcomes as evidenced by an increasing number of reports of women being denied necessary health care, often with dire consequences, following the decision in *Dobbs*. Although some frame the current situation as reflecting the time before *Roe*, for several reasons women’s health is substantially worse off. First, examining historical context and specific language choices provides further insight into the significance of the health exception and how *Carhart*’s move to allow laws without it has affected health care. At the time the individual right to an abortion was established in *Roe*, although most states outlawed elective abortions, therapeutic abortions—those determined to be medically necessary by physicians—were generally allowed. Significantly, because the Court decides how the Constitution protects individual rights in response to state interference with such

rights, the right articulated in *Roe* was not necessarily designed to address state interference with therapeutic abortions because they were not illegal. The *Roe* Court's holding that post-viability regulations can include a ban "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (165), which is provided with virtually no discussion, seems to be an acknowledgement that therapeutic abortions remain legal and an effort to standardize the scope. This is confirmed and reaffirmed by the Court in *Casey*. Upholding viability as the point at which a state may ban abortions, the Court defines a central holding of *Roe* as establishing "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on *nontherapeutic* abortions" (860; my emphasis).[158] However, over time, once elective abortions were protected, the distinction between therapeutic and nontherapeutic abortions became obscured and/or obsolete, and the *Carhart* Court's decision to discard the health exception makes room for states to essentially outlaw the previously established therapeutic abortion. This, in turn, is contributing to physicians' concerns regarding prosecution and reluctance to provide treatment that could be considered an abortion. Indeed, although the *Dobbs* majority opinion does not account for the health of pregnant people in any sense, the dissent specifically highlights the potential danger here, noting, "The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment" (slip op. 22).[159] Because of the way opinions are circulated among the

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[158] Given the collaborative nature of writing opinions to accommodate the Justices who join, this was likely a contribution by Justice Blackmun, ensuring the connection to *Roe*'s intent.

[159] In its discussion of workability, the dissent offers a helpful illustration of the issue, also unanswered by the majority:

> Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur,

Justices to allow for specific responses, as reflected in such responses, the majority's silence on this issue is, as the dissent suggests, ominous.

Perhaps more noteworthy is the connection between the *Carhart* Court's support for the antiabortion movement's narrative and the health risks for pregnant people. In order to frame the Act as helping women while also introducing the women's regret narrative to the discourse, physicians are cast as villains who mislead women into making choices they will regret, a narrative which requires a direct attack on physicians' medical judgment. Moreover, the narrative of distrust contributes to the othering of abortion providers. Critically, this impact grows in significance with the loss of federal protection of the individual right. Without even the federal requirement of an exception to protect the health of a pregnant person, there is virtually no limit to the health risks states can demand individuals take in the name of protecting potential life. Notably, the distrust between physicians and lawmakers, and by extension law enforcement, goes both ways, and the *Carhart* Court's rationale, which obscures the circular nature of its own arguments, creates further mistrust between the medical and legal communities. For example, responding to the vague language and broad application claims, the Court points to the Act's requirement that a physician specifically intends to perform the prohibited procedure in order to violate the law. Despite relying on the intent requirement in finding the Act constitutional, the Court goes on to declare, "The evidence also supports a legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance" (155). Thus, the Court

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> before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality? (slip op. 35-36)

is preemptively granting priority to legislative decisions about medical care and a physician's own intent, ignoring the weaknesses in such determinations already established and negating the intent requirement it had just relied upon through legislative override. Here the Court is making its alignment with law over medicine clear while painting providers as untrustworthy and providing no assurance to providers that they can safely avoid prosecution. Moreover, the text of the Act provides that a physician prosecuted under the Act "may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother"; however, the trial court is permitted to delay the trial for such a hearing only up to thirty days (1207), thus calling into question the practicality of this provision. More troubling, the medical board's findings are only "admissible" on the issue not determinative (1207), meaning even with the support of the medical board, a physician would still be at the mercy of a court's determination of medical necessity. Coupled with the High Court's clear deference to law over medicine, rather than the cooperative stance that was central to *Roe*, it is unsurprising that following *Dobbs*, physicians are concerned about potential liability even when in their reasonable medical judgment a patient's health is at risk.

Beyond Reproductive Rights

Women's Health and Decision-Making

Significantly, the impacts of these Court narratives and the lessons learned from them extend beyond reproductive rights. One narrative aspect that could be relevant in other contexts is the impact of focusing only on rights to the exclusion of the health issues. Despite the existence of significant health risks related to the denial of access to abortion, couching the debate only in terms of legal rights makes it easier to take a stand against protecting women's health by not acknowledging the material risk. Moreover, although many may believe that

gender equality requires full control over reproductive choices for any reason, in order to evoke empathetic identification with the largest number of community members possible, arguments would be more effective to present women as whole people with bodies and health concerns. Highlighting health concerns would not require a direct centering of physicians, and those with health concerns, particularly those with the most barriers to access, cannot afford to wait for more people to agree with absolute autonomy. In addition, removing the medical community from the conversation entirely has far-reaching effects, as demonstrated by the result when the Court reintroduced the medical aspect of the abortion debate. Whereas the *Casey* Court made room for women by excluding the physician perspective that had dominated *Roe*, a decision applauded by many as progress, the *Carhart* Court again places the medical aspects at the center of the debate. Significantly, though, the medical co-rhetors that had been carefully included in the *Roe* opinion were then ignored in favor of Congress's medical evidence and the Court's own understanding of the medical story. Thus, when the *Casey* Court removed physicians from the conversation, it created space for non-medical professionals to comment on medical procedures without the requisite ethos that is generally expected. By the time the Partial-Birth Abortion Ban Act was passed in 2003, Congress was deciding that certain procedures were never medically necessary, a declaration which the *Carhart* Court then backs by repeating without acknowledging limitation and alternate views. Thus, it is a shocking, but unsurprising, consequence that in 2019, state legislators were introducing laws requiring things like reimplantation of ectopic pregnancies, a medical procedure that does not exist. Furthermore, by allowing Congress and itself to speak on behalf of the medical community, overriding medical opinions to the contrary, and declaring, for the first time, that law rather than medicine will have the final say over medical disputes, the Court is unequivocally placing legal power and its own

narrow view of morality ahead of even the health of the society it claims to protect. Thus, it is likewise unsurprising, that thirteen years later even a global pandemic would be framed as a political debate over legal rights rather than a public health crisis. Of course, viruses are not rhetorical, and the public health crisis exists whether or not it is acknowledged. Similarly, individuals who are denied access to a safe and legal abortion, particularly the most vulnerable within our society, will continue to suffer the physical, mental, and emotional health consequences of that denial whether or not they are recognized as anything more than wombs.

While the example here demonstrates the risk with respect to reproductive rights, the issue could extend much further, including other medical and scientific issues as well as other instances where ethos is ignored or usurped. Indeed, emboldened with virtually unlimited deference, legislators could override any number of medical decisions. As a recent example of the expansion of this philosophy, several states, including Arkansas, Tennessee, Alabama, and Florida, have passed laws restricting or banning gender affirming care for minors, overruling the guidelines of the American Association of Pediatrics and the Endocrine Society, which say that denying such care creates significant mental health risks (Fawcett A14). In an interview with Jon Stewart, Arkansas Attorney General Leslie Rutledge repeatedly answers his questions about ignoring the guidelines of major medical organizations as well as parents' wishes by asserting the state has medical experts on its side, though she is unable to name any medical organizations, and insisting the law was passed to "protect the children" (@TheProblem). This explanation closely echoes the weak medical evidence and woman-protective rationale the Court uses in *Carhart*. Ultimately, this positioning of medical and scientific fact as suitable for political debate sets our society on the path of politicized disinformation that we see today, sometimes with deadly consequences.

In addition to ignoring individual health risks, the co-opting of informed consent laws that began in *Casey* and woman-protective narrative in *Carhart* create an increasingly problematic view of women as incapable decision makers. In her discussion of the Court's "misuse" of informed consent, which she notes begins with *Casey*, Maya Manian argues, "These so-called 'informed consent' to abortion regulations belie a deep suspicion of women as medical (and moral) decision-makers" (226). In other words, by dictating the terms of the information women must consider when making their decision, including waiting periods and ultrasounds, the state is implying that women are not capable of making a thoughtful, well-considered decision without state interference. Indeed, the *Casey* joint opinion says as much by contrasting a woman's right to choose with the state's interest in "taking steps to ensure that this choice is thoughtful and informed" and holding that "the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term" (872). The clear assertion here is that without such state regulations women could not possibly be aware of such arguments.

This view of the incapable woman is exacerbated by the reemergence of stereotypical gender roles and loss of equality progress in the *Carhart* majority opinion. Notably, Greenhouse suggests that the Court's questioning of women's decision-making abilities began with *Roe*'s centering of physicians' judgment. Responding to *Carhart*'s protection narrative, she asserts that although the Court's "depiction of the moral and psychological disaster that awaits any woman who chooses to terminate a pregnancy" cannot be found in any previous abortion decision, including *Roe*, "the image of women as less than fully capable adult decision-makers, who cannot be assumed to know their own best interests, does at least mark a return to familiar territory" ("How" 73). However, Rebecca Ivey, who also observes the rationale overlap between

Roe and *Carhart*, argues that the proffered solution is inverted: "The basis for [*Carhart*'s] woman-protective argument is that women are unable to protect themselves from the unwanted psychological consequences of their own choice to abort. This is striking in its similarity to the language in *Roe* suggesting similar consequences as a result from *denying* a woman's choice" (1490-1491). The "overarching difference," she explains is who the Court assumes is "in the best place to decide whether aborting or carrying her pregnancy to term is ultimately the best choice"; *Roe* assumes the woman, while *Carhart*, believing "that women cannot foresee this psychological trauma, cannot protect themselves," assumes the state (1491). Accordingly, even allowing for the problematic aspects of the *Roe* narrative, the issue is significantly worsened by *Carhart*'s positioning of the government as protector, which denies any consideration of individual medical circumstances.

Critically, in addition to delivering a significant blow to women's autonomy in reproductive choices, this narrative of women as incapable decision-makers has implications beyond abortion regulations. Discussing the implication of her analysis, Manian asserts, "Beyond abortion law, *Carhart*'s incapacitation of women as healthcare decision-makers could have a significant impact on how courts and legislatures view women, particularly pregnant women, as patients" (289). Specifically, she claims, "The woman-protective anti-abortion claim not only reinforces the familiar notion that women are irrational decision-makers, but also the notion that women serve their ultimate role in society when they are mothers and that, as mothers, their only choice is to be self-sacrificing" (289). Given the myriad of ways women continue to fight for equality, including the repeated failure to pass the Equal Rights Amendment, reinforcing such views about women could easily reach well beyond even health care. Moreover, because of the way Supreme Court narratives, which are steeped in tradition and authority, contribute to the

shaping of the society it governs, this view of women negatively impacts and limits women's place in society as well.

Unsettling Liberty

Finally, this rhetorical analysis reveals flaws in our legal system that are being manipulated to further deny individual rights as well as cracks that threaten the integrity of the system itself. Because a community's laws are a reflection of its values, there is an inherent connection between the Court and the political apparatus that purports to voice those values. That said, the federal judicial branch is designed to be somewhat insulated from the political process, entrusted with upholding the values that protect individual rights, some of which being so fundamental that they apply even in the face of opposition by the majority. For example, while implementation is often lacking, rights protected in *Brown vs. Board* were intended to protect racial minorities against protests by the majority in many communities. Indeed, certain aspects of the High Court's operation are directly tied to its nonpolitical position. Like all federal judges, Justices have lifetime appointments to avoid the need to cave to political pressure, and the conferences following oral arguments are intentionally secret.[160]

Significantly, in addition to rhetorically expanding its powers through loosening the constraint of precedent, the Court's overt collaboration with political actors, both inside and outside the government, directly impacts rights and encourages other lobbying efforts. Perhaps the most substantial result of the collaboration between the judicial and legislative branches is

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[160] As one relatively recent example of judicial review transcending politics, Justice Souter was nominated by President George H. W. Bush as a conservative, but became known as a swing vote, upholding *Roe* as one of the authors of the *Casey* joint opinion and dissenting from the conservative majority in *Bush v. Gore*. He retired during President Obama's first term, ensuring he would be replaced by a liberal Justice, although not explicitly stating such a rationale.

restrictions based on morality, particularly when presented as fact in a way that obscures the true nature from the voting public. In an analysis of Court response to legislative factfinding in abortion regulations, Caitlin Borgmann argues that the Court's willingness to allow laws based on morality began with *Casey*, but because of the confusing legal standard simultaneously created, legislatures "have felt compelled to disguise these moral viewpoints as scientific fact" ("Judicial" 16). Acknowledging that "[l]egislative factfinding will inevitably be a mixture of morality and science," she contends that because of this, "courts must approach legislative factfinding cautiously and skeptically" (53). However, she notes that the *Carhart* Court did the opposite and asserts that by defaulting to a near complete deference to legislatures, even over lower courts, the Court devised an environment ripe for misinformation. Critically, Borgmann suggests, the Court's strong language of deference even in the face of the activist origins for "partial-birth abortion" bans, "appeared to send a message to state legislatures, encouraging them to continue their biased factfinding on abortion, and to lower courts, urging them to defer," an offer the Eighth Circuit Court of Appeals accepted "wholeheartedly" (54-55). Thus, this coordinated effort between legislatures and the Court leaves no genuine check on the entirely political whims of the legislatures and a corresponding absence of protection for individuals. Put another way, our famed system of checks and balances becomes unchecked and unbalanced.

In addition to its disingenuous collaboration with the legislatures, the Court's inclusion of the women's regret narrative, an overt adoption from antiabortion activists, further ignores its duty to fairly assess the facts when applying law. In her analysis of press releases issued by the Elliot Institute, the organization behind the Justice Foundation and Operation Outcry, Melody Rose notes the support for the women's regret claims was often the organization's own research and identifies numerous logical fallacies within the "findings" (13). Among these is a similar

method of presenting "facts" based on something other than scientific data: "Additionally, these releases substantiate the argument that abortion harms women using another logical fallacy by demonstrating that position's popularity, '[research] . . . has found that 86 percent of American adults believe significant emotional problems after an abortion are common or very common,' as if popularity of a position is evidence of its truth" (13). By accepting and authorizing this narrative, the Court is not only basing its decision on weak information, but also adding its own ethos and presenting it as fact.

Significantly, the women's regret narrative is particularly dangerous because it could be used expansively in future cases, especially by a Court that has already demonstrated its willingness to bend the facts to fit the desired result. As Ronald Turner points out, "the logic of the regret rationale sweeps far beyond the partial-birth abortion context" and could extend to justify restrictions on other procedures (41). Coupled with the open invitation to legislatures, the potential is nearly limitless. Critically, though, I argue that such vague and subjective support in the hands of a legislature encouraged to provide unreviewable facts could expand into any number of areas that legislatures decide they want to control, particularly to restrict the rights of traditionally marginalized groups. For example, many state legislatures claim to be basing voter ID laws on preventing voter fraud without any showing of fraud occurring, instead relying on the public's beliefs regarding fraud, failing to acknowledge that the proponents created the concern in the first place. This pattern sounds remarkably similar to supporting a ban on a medical procedure because of public concerns over the procedure that were caused by activists now seeking the ban.

Furthermore, not only are there practical issues related to adopting a narrative from the antiabortion movement but doing so publicly further encourages such lobbying efforts.

Describing the long history of the women's regret narrative, including publishing books, filing amicus briefs, and participating in a state-led study in South Dakota, Turner suggests that "all of these actions were part of a committed and perseverant campaign to rewrite the narrative and to change the terms of the abortion-rights debate" (43). Following the *Carhart* decision, he asserts, "This sustained politico-legal movement has now achieved one of the desired objectives of the antiabortion position—the Supreme Court's placement of its imprimatur on the 'women's regret' rationale (43). In other words, all that work paid off through acceptance by the highest Court in the United States. Notably, the antiabortion activists receive the Court's implied message of endorsement. In the legal strategy memorandum to the South Dakota Pro-Life Leadership Coalition, their lawyers use the mother's love quotation from *Carhart* as evidence that Justice Kennedy "demonstrated a predisposition and receptiveness to proof about such harm" and describe him as writing "with passion about the beauty of the bond between mother and child" (Casey and Cassidy 10). Moreover, the lawyers assert "It was not a coincidence that Justice Kennedy cited to the 'friend of the court' brief of Sandra Cano … which related the experiences of post abortive women" (10), thus drawing a direct link between the Court's selection of co-rhetor and its support of their position. This supported their efforts to persuade the Court directly as well as their interactions with the public. In her analysis of the relationship between the two, Siegel observes that "the antiabortion community greeted *Carhart*'s discussion of the woman-protective rationale for restricting abortion with elation," pointing out that "Operation Outcry now quotes *Carhart* as reason to expand its internet drive" for testimonials of regret ("Dignity" 1733). In addition, activists publicly represent the Court's selection as listening to "real women," implying that only their singular representation is the real one. For example, in a short article in the *Vermont Law Review*, Allan Parker, the president of the Justice Foundation and one of the

lawyers on the Cano brief, asserts that "one of the most hidden things" about the case is that the Court "listened to real women rather than the abortion industry" citing the opinion's reference to the Cano brief (657). By affirming a singular view of women based on a one-sided narrative, the Court informs the community of its acceptable values, a recursive narrative particularly when coupled with legalized shame culture. That the one side can then use the narrative to increase its testimonial evidence, the singular view of women has come full circle. Thus, the Court's open collaboration with the antiabortion movement adds to the normalization of such action and directly impacts the work of the activist organizations, creating a recursive conversation between themselves and the Court. Moreover, that the campaign was so visibly effective encourages other activists to take their grievances directly to the Court.

Arguably, the most significant impact to our legal system is the threat to the Court's own legitimacy. Although a shift in public acceptance of some political bias by the Court may soften the impact somewhat, such open integration of an argument by an activist organization contributes to bias concerns, particularly as Justices begin to display more openly partisan behavior. Perhaps owing to the efficacy of the narrative campaign against "partial-birth abortion" such that many saw the upholding of the ban as simply stopping a rare and disfavored procedure, the early signs of the Court moving firmly into political territory were noted but not seen for the potential danger they reflected. Even more critically though, while the Court may have found a way to rhetorically cloak its turn away from adherence to precedent in *Carhart*, the concerns so vehemently raised by the *Casey* Court, even while they performed a slightly lesser version of the same turn, did not go away.

As recently as 2021, Justice Breyer echoed these concerns in an essay that he describes as "expand[ing] on the importance of public acceptance in safeguarding the role of the judiciary"

(2). Examining what he sees as threats to continued public acceptance of the rule of law, Justice Breyer highlights the important role the press plays, asserting that the "vast majority of Americans" understands courts only through the press's reporting and noting that it has only been in the past two or three decades that reporting routinely identifies the political party of the appointing president or labels judge as liberal or conservative (49-51). Significantly, he observes that "the popular perception has grown that Supreme Court justices are unelected political officials" and contends that although most judges do not see themselves that way, "it has become a matter of concern that this is what the public thinks" (51). He offers several ideas for addressing public confidence, both outside and within the Court, including suggesting that Justices make more effort to compromise and to consider the broader perspective, or "spirit" of the Constitution, when considering "the minority of cases that address important and deeply held social or political beliefs, such as the right to an abortion or to the freedom of religion" (85). Significantly, Justice Breyer is clear about what is at stake: "For if the public comes to see judges as merely 'politicians in robes,' its confidence in the courts, and in the rule of law itself, can only decline. With that, the Court's authority can only decline, too, including its hard-won power to act as a constitutional check on the other branches" (63).

Critically, while the *Dobbs* Court may have felt politically empowered to ignore *Casey*'s warnings and deliver the result conservatives desired with no regard for explaining their actions as "anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance" (*Casey* 867), the public response outside of a small conservative circle has been as the *Casey* Court predicted, insisting that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question" (867). In answer to

the legitimacy issue raised in *Casey*, the *Dobbs* Court claims first, " [w]e do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*," a disingenuous position given the public response to the leaked draft, and second, "even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision" (slip op. 69). However, the Court's decision to ignore or deny threats to its own authority does not make the threat itself disappear. In addition to the various examples of individual expressions of outrage, a Gallup poll from September 2022 reveals that only forty-seven percent of US adults report trusting the judicial branch (Jones). Notably, Gallup reports, "This represents a 20-percentage-point drop from two years ago, including seven points since last year, and is now the lowest in Gallup's trend by six points" (Jones). Similarly, a Marquette Law School Poll national survey reflects a sharp decline in public approval of the High Court over the last two years ("New Marquette"). Specifically, the poll showed 66% approval in September 2020 but only 40% in September 2022. It also shows an increase of those reporting their confidence in the institution as "very little" or "none at all" from 16% to 36% in the same time period. Although opinion polls offer a limited reflection of public perception, the rapid substantial decline in the public's confidence in the Court suggests the *Dobbs* decision has damaged the Court's authority.

In the wake of legitimacy questions following *Dobbs*, Chief Justice Roberts defended the Court, telling a conference of lawyers that "simply because people disagree with an opinion is not a basis for questioning the legitimacy of the court" (Rosenblatt), a statement widely reported in the media. Quoting *Casey*, journalist Eric Lutz criticizes the Chief Justice's assertion, contending, "Where justices once said they believed the Supreme Court's legitimacy must be 'earned over time,' the current conservative chief justice appears to hold that its legitimacy is

inherent, absolute, and unconditional." Lutz suggests that while Chief Justice Roberts's comments are "hardly surprising with public confidence in the court plummeting," they are "notable in their wild mischaracterization of the backlash," observing that "it's not just the outcome" but rather "the way that decision…came to pass." Another journalist, Steve Benen, similarly asserts the Chief Justice is "missing the point" and observing that he "can't help but wonder whether the chief justice fully appreciates the nature—and the nuances—of the criticism." Notably, among Justice Breyer's suggestions for compromise to improve public perception is deciding a case on narrow grounds (73). This idea is clearly reflected in the Chief Justice's concurring opinion in *Dobbs*, in which he admonishes the majority for doing more than overturning only the viability line and insisting, "I would take a more measured course" (slip op. 1). Indeed, he specifically acknowledges that "[t]he Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases," asserting, "A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case" (slip op. 11). This language suggests he does understand the potential threat to the Court's legitimacy and that his pushback, while disingenuous, is perhaps a Hail Mary attempt at saving his Court's legacy with rhetoric alone.

Critically, because the Court's authority is voluntarily granted by the governed community, such questions of legitimacy threaten its ability to function at all. Justice Breyer begins his essay, "Put abstractly, the Court's power, like that of any tribunal, must depend upon the public's willingness to respect its decisions" (1), thus recognizing this stark reality. Though it may not do much damage for a single individual or even a small group to assert they are not going to follow the Court's edicts, if the group of dissenters grows large enough, sharing a collective belief that the current system no longer reflects their values, the community could

fracture in substantial ways. And though it may seem like quite a leap to suggest a significant enough number of community members would simply stop recognizing the authority of the High Court, it was not that long ago that an outright overturning of *Roe v. Wade* seemed impossible legally if not rhetorically.

Moving Forward from Here

In his concurring opinion in *Casey*, Justice Blackmun, seeing the right he so carefully crafted substantially diminished and hanging on by a single-vote thread, pointedly summarizes the constitutional issue with the states' rights argument at the forefront of conservative efforts to overturn *Roe v. Wade*:

> But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box. (943)

Following the Court's decision in *Dobbs*, the ballot box is the only refuge remaining, as each state decides what its communal values are. While undoubtedly there are efforts to restore federal constitutional protection for an individual's right to make their own reproductive choices, the urgency of establishing empathetic identification within each community, at both the state and national levels, calls for a greater attention to the connection between storytelling and rights-making. Moreover, these efforts can contribute to aligning community values in a number of ways beyond reproductive rights.

Although *Casey*'s undue burden standard is no longer governing law, the lessons from the judiciary's efforts to implement it highlight the importance of telling stories, particularly diverse stories, to expand the world view of those in power within our legal system and increase identification with others. There are options for telling stories directly within the legal system, through party briefs and other filings, such as voices briefs and victim impact statements. Yet,

any formal channel raises access issues, regardless of intent to be more inclusive, and thus, while pushing to include more individual stories in the formal legal process, we should also expand our sites of analysis and consider the larger picture. Because of the Court's inextricable connection to the public—its creation and reflection of community values—the stories it (and the public) hears are as important as the stories it tells. Moreover, because the public is an important audience that must be persuaded by laws and court opinions, continuing to share stories publicly will impact resulting laws, by reshaping society's view of its value system and how its members are affected. These shifts affect how people vote, which becomes even more important as decisions about rights are, ostensibly at least, returned to voters.

For matters that are in the court system, societal beliefs affect the rhetorical choices courts must make to influence the public, which in turn impacts the discourse. Gibson asserts that the *Carhart* dissent "was crafted to constitute a set of rhetorical resources for future judges and present-day activists" ("In Defense" 134). Explaining the significance of its inclusion of equality language, she contends, "Legal opinions also serve as models for practical argument: they instruct us how to argue and they help to constitute the boundaries of public deliberation" (134). Accordingly, judicial discourse can be a useful tool for activists and is worthy of study for its potential use. Because of the specialized nature of judicial discourse, such narratives should be examined within their legal context in order to best understand how they operate.

Significantly though, an individual story is always only one individual's story. Outlining potential advocacy issues with respect to abortion specifically, Oliveri argues that "that abortion rights are inextricably bound up with individual choice" and notes that because individuals "have infinitely diverse life experiences and needs," no one story can represent the best solution for all (441). Highlighting how the stories around who might seek a later-term abortion impacted

how the group was defined in advocacy discourse in a “tremendous” way, she asserts, “While the use of individual narratives was both powerful and empowering, it was also inherently limiting” (441). Where such representations and definitions of the affected group could then have a material impact on the rights themselves, such as when the *Casey* Court was able to consider the possibility of domestic violence, such choices should be made with great care. Furthermore, the inclusion of a wide range of stories may lead to an understanding that the variables are too vast to be addressed by a single solution, ideally resting choice back with the individual.

In addition to sharing individual stories, it is also imperative that activists and scholars consider the role the press plays in filtering judicial discourse before it reaches the public. In order for the public to properly express its views regarding reproductive rights, or any rights, it needs a clear understanding of what those rights are. The Court-centric story that emerged from the reporting on the *Casey* opinion likely contributed to much of the inaction following that decision; a larger response to the substantial diminishing of the right articulated in *Roe* may have led down a path that did not end in *Dobbs*. Similarly, because, as Justice Breyer observes, sometimes public perception is more important than reality, the media’s reflection of the judiciary, such as the Court’s political function and its ability to simply overturn cases the current members do not like, directly affects constraints by altering public expectations. In the current age of disinformation, ensuring accurate public perception is next to impossible, but it is nonetheless an area of the collective rhetorical situation worth considering.

Another important consideration is the law’s limited ability to compel behavior. As such, study of court narratives should consider the possibility of other stakeholders. For reproductive rights, this suggests a reevaluation of the exclusion of the medical community. Although it is a fair request that women be granted bodily autonomy, and the medical story should not eclipse the

individual one, it is crucial that the medical community be included in the conversation about reproductive rights as well as other rights that involve health-related issues. Such inclusion brings the health risk arguments back into focus and helps alleviate shame for both individuals exercising their rights and physicians, and, in turn, creates the possibility of additional providers and fewer access issues to be exploited by those who seek to prevent women from obtaining abortions. Furthermore, including the medical community makes it more difficult for legal rhetors to retell the medical story in misleading ways. While people whose reproductive rights are being infringed upon are understandably frustrated by perceived centering of physicians, the practical effects of this shift in the conversation should not be ignored, as these effects not only impede individual rights but also contribute to significant health risks.

This is not to suggest that physicians must be treated as the absolute authority, as there are certainly weaknesses within the medical community, especially with regard to traditionally marginalized patients. Yet, by recognizing the central role of the medical community in providing access to abortions, we can consider how to best use individual stories to persuade medical providers toward identification with individuals seeking abortions, particularly those with fewer resources. In an article for *JAMA* following *Casey*, Janet Benshoof, one of the lawyers involved in the case on behalf of Planned Parenthood, offers that one way the medical community can help safeguard reproductive rights is by encouraging older physicians to train younger ones. Specifically, she suggests, “Young doctors would benefit from hearing what practice was like for an obstetrician/gynecologist specialist in a hospital prior to *Roe*” (2257). Stories directly about and from those who seek their services would likely similarly move them. Further, such identification with the individual needs of patients could improve patient care in other areas.

The current state of reproductive rights in the United States is both alarming and unsettling. One question that emerges is how two versions of the same Court could read the same Constitution yet reach such different results, particularly when they both considered historical context and similar rights like access to contraception. The short answer for how seven Justices in 1973 and five Justices nearly fifty years later came to opposite conclusions on the question of whether the US Constitution protects an individual's right to decide whether to continue a pregnancy lies not in the law but in the exigence of each. The *Roe* Court sought to address a growing concern of women being harmed in back-alley abortions and saw the medical community as its partner in that effort, while the *Dobbs* Court was motivated by political power and saw women as a group to exert power over, if it saw them at all. These differing exigences are reflected in the narrative of each opinion and a focus on health versus rights. Though the *Roe* narrative is imperfect, it includes women in their capacity as patients, which necessarily suggests attention to health risks and, though overshadowed by the medical narrative, tells a small part of Jane Roe's story, including the fact that she could not afford to travel to another jurisdiction. Conversely, *Dobbs* excludes women's health entirely as if it is not implicated in the decision and fails to acknowledge, as part of its historical discussion, women's exclusion from participation in creating the country's founding documents. Instead, like *Casey*, *Dobbs* tells a Court story; however, rather than standing in solidarity with all Courts, past and future, this time it tears its former self apart.

Recognizing the difficulty of adhering so persistently to precedent set by previous Courts, the three conservative Justices authoring the *Casey* joint opinion acknowledge, "Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal" (867). Speaking

directly to fellow conservatives, they continue, “An extra price will be paid by those who themselves disapprove of the decision’s results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law” (867-868). To future Courts, they implore, “To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing” (868). Eight years later, at the next major opportunity, one of those authors would retreat from this duty, stretching the veil of purported adherence to precedent in dissent from the majority. In an act of foreshadowing, Justice Blackmun admits in his *Casey* concurrence, “I do not underestimate the significance of today’s joint opinion. Yet…I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light” (923). Only seven years after his initial departure from the values grounding the *Casey* joint opinion, Justice Kennedy would turn his *Stenberg* dissent into a *Carhart* majority by that single vote. And only fifteen years later, a mere five days shy of thirty years after three conservative Justices remained steadfast in their duty to the rule of law for the sake of the nation’s liberty, that price was indeed paid for nothing. Yet, by heading the warnings found not just in the law but in the narratives used to craft it and telling the stories that reflect the innumerable experiences that undergird our community’s value system, we can reclaim some value in that price paid.

In October 1977, my mother faced the loss of a desperately wanted pregnancy, the second in as many years. Due to complications, she received an abortion procedure as part of the standard medical care to save her life and fertility. As this occurred prior to my birth, her abortion saved my life as well. Thankfully for both of us, the medical professionals treating her did not have to assess how close to death she was or wait for her health to decline before acting. When I began this project, I believed in the importance of sharing abortion stories even though I

thought I did not have one of my own. Yet, as our society faces this new landscape and our jurisprudence of doubt, I have come to realize that I do. Had the physicians then faced the same impossible choices as many do now, my mother may have lost her fertility, or worse, her life. Even had she been spared those outcomes, an ordeal similar to those happening now may have led her to not risk trying again. There are two notable aspects to my abortion story. One, I came to realize the significance of my situation because of the stories that others told, many in the wake of *Dobbs*, thus demonstrating how sharing stories can move others to identify with the storyteller not only through empathetic understanding, but also through coming to understand themselves through a different lens. Two, I happen to be a person with a uterus, but my abortion story is not based on my own childbearing ability, thus illustrating the potential impact to anyone, no matter how narrowly some attempt to draw the lines or how they create a narrative that insists only immoral women will be affected. Moreover, my abortion story demonstrates the impossibility of ever effectively accounting for all possible exceptions, which, in turn, elucidates the need for considering who is in the best position to address individual circumstances—I suggest the individual. Returning to Glenn's call for hope, she asserts that "[f]eminist rhetorical studies creates possibilities, not blueprints for an imagined utopian future" (193). Toward that end, this dissertation reveals unexpected sites of judicial power to illuminate additional possibilities for intervention. While we may not be able to predict precisely when Justice Ginsburg's proffered more intelligent future day may come, we can consider the power of the stories told, the impact of the words chosen, and the values that best represent the society that we want to be.

With sorrow. And hope.

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