THE RIGHT TO LIFE AS A SOURCE OF ABORTION RIGHTS: LESSONS FROM KANSAS

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INTRODUCTION

In the aftermath of *Dobbs v. Jackson Women's Health Organization*,[1] Kansas became the focus of national attention as the first true test of the new abortion politics.[2] This role was the result of a unique confluence of events. Although the Kansas Legislature is strongly anti-abortion, in *Hodes & Nauser, MDs, P.A. v. Schmidt*,[3] the Kansas Supreme Court held that the Kansas Constitution protected a pregnant person's fundamental right to terminate a pregnancy. In so doing, the court rejected the undue burden test from *Planned Parenthood v. Casey*,[4] concluding instead that strict scrutiny was the proper standard to apply to laws burdening abortion rights.[5]

In 2022, abortion opponents garnered the necessary two-thirds supermajority in both chambers of the Kansas Legislature to propose a constitutional amendment to the voters for approval.[6] The so-called "Value Them Both" Amendment would have provided that "the constitution of the state of Kansas . . . does not create or secure a right to abortion," and that the legislature "may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother."[7] The proponents of the amendment opted to place

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[1] 597 U.S. 215 (2022) (rejecting any federal right to abortion and overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

[2] This was not the first time that the abortion issue thrust Kansas into the national spotlight. *See generally*, Gillian Brockell & Natalia Jiménez-Stuard, *How Kansans went from bombing clinics to protecting abortion rights*, The Washington Post (Aug. 18, 2022, updated Aug. 19, 2022), https://www.washingtonpost.com/history/2022/08/18/kansas-abortion-timeline/. For example, the 1974 Senate race between Bob Dole and Dr. Bill Roy is one of the earliest examples of a conservative Republican successfully leveraging anti-abortion sentiment in a contested election. *Id.* In 1991, Operation Rescue's "summer of mercy" descended on Wichita, Kansas, engaging in demonstrations intended to prevent access to reproductive health clinics there. *Id.* And, tragically, Dr. George Tiller, a Wichita physician who provided late term abortions in cases of medical necessity was assassinated in 2009 in his church by an anti-abortion activist. *Id.*

[3] 440 P.3d 461 (Kan. 2019) (hereinafter *Hodes*) (recognizing a fundamental right to abortion under the Kansas Constitution); *see generally* Richard E. Levy, *Constitutional Rights in Kansas after* Hodes & Nauser, 68 U. KAN. L. REV. 743 (2020) (discussing the reasoning and implications of *Hodes*).

[4] 505 U.S. 833, 874 (1992) (plurality opinion) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

[5] *Hodes*, 440 P.3d at 493-97 (concluding that the undue burden test was insufficiently rigorous for the protection of fundamental rights).

[6] H.C.R. 5003, 2021 Leg., 1st Reg. Sess. (Kan. 2021) (the "Value Them Both" Amendment). I will refer to the Amendment by its formal title even though this title is inaccurate and misleading. *See infra* notes 51-52 and accompanying text (observing that nothing in the amendment values the pregnant person).

[7] *Id.*

the measure on the ballot in a special election to be held at the time of the primary election in August of 2022, apparently on the assumption that this timing would increase the likelihood of voter approval.[8]

But that was before *Dobbs*.[9] Before *Dobbs*, the amendment would have lessened the amount of protection for abortion rights, but federal law under *Casey* would have provided some protection against restrictions that imposed undue burdens or failed to protect the life and health of a pregnant person.[10] After *Dobbs*, the amendment would have given the legislature unlimited authority to ban abortions altogether without any exceptions—even to protect the life of a pregnant person.[11] The timing of the election, moreover, meant that the *Dobbs* decision was fresh and the vote would provide the first post-*Dobbs* opportunity to assess the political impact of abortion rights issues.[12]

As a result, both proponents and opponents blanketed the media with advertisements, Kansas became the focus of considerable national and even international media attention, and the sleepy little Kansas primary election took on enormous significance. The result of the election was also stunning, at least to most observers. Notwithstanding Kansas's well-earned status as a deeply red state, the voters resoundingly rejected the amendment, with nearly sixty percent

[8] *See, e.g.*, Tim Carpenter & Sherman Smith, *Kansas Voters Diving Into First Statewide Referendum on Abortion Since Roe Overturned*, KAN. REFLECTOR (Aug. 1, 2022, 3:39 PM), https://kansasreflector.com/2022/08/01/kansas-voters-diving-into-first-statewide-referendum-on-abortion-since-roe-overturned/ [https://perma.cc/H88S-UFK6] ("Advocates who delivered two-thirds majorities in the state House and Senate required to place the amendment on statewide ballots decided to conduct the vote on abortion during the August primary. Their calculation was to take advantage of typically high voter turnout among Republicans and modest turnout by Democrats in primaries.").

[9] *See* Amelia Thomson-DeVeaux & Nathaniel Rakich, *The Abortion Vote in Kansas Looks Like it's Going to be Close*, FIVETHIRTYEIGHT (July 20, 2022, 9:33 AM), https://fivethirtyeight.com/features/the-abortion-vote-in-kansas-looks-like-its-going-to-be-close/ (suggesting that lower turnout at a primary would "normally . . . benefit the amendment's supporters," but that "the U.S. Supreme Court's ruling on abortion appears to have scrambled that conventional wisdom").

[10] *E.g.*, Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (applying undue burden test to invalidate Texas abortion regulations), abrogated by *Dobbs v. Jackson Women's Health Org.*.

[11] The amendment indicates that the legislature "*may* pass . . . laws that account . . . for . . . circumstances of necessity to save the life of the mother" (emphasis added), but does not require the legislature to do so. It would also seemingly preclude reliance on other constitutional provisions to invalidate laws restricting abortion. Thus, for example, the amendment would seemingly prevent a challenge to a state law that would deny a pregnant person a life-saving abortion based on the right to life in section 1 of the Kansas Bill of Rights.

[12] *See*, *e.g.*, Alex Ebert, *First Post-Dobbs Vote Tests Kansas Abortion Foes' Strategy*, BLOOMBERG (July 28, 2022), https://about.bgov.com/news/first-post-dobbs-vote-tests-kansas-abortion-foes-strategy/ ("Voters in Kansas will be the first in the country to get a say over the future of abortion rights following the US Supreme Court's decision to hand regulation to the states.")

of the vote opposed.[13] This result, however, was a harbinger of things to come, as protecting abortion rights has proven to be a winning political issue in multiple post-*Dobbs* elections.[14]

What does all this mean for abortion rights in general and for the right to life as a potential source of constitutional protection for those rights in particular? In this symposium contribution, I will explore those implications. Part I will focus on the doctrinal foundations of abortion rights in Kansas, providing background and highlighting the conspicuous absence of the right to life from the court's analysis in *Hodes*. Part II discusses the Value Them Both Amendment and its ultimate defeat at the polls, which tend to confirm the premise of this symposium that centering the life of the pregnant person is an effective strategy for advancing abortion rights.

Part III then considers how this strategy might be translated into the litigation context through reliance on the right to life as a source of abortion rights under the individual rights provisions of state constitutions. This analysis suggests that, viewed as a stand-alone right, the right to life could support a constitutional challenge to state laws the put a pregnant person's life directly at risk, an important safeguard, but is unlikely to convince a court that is otherwise unwilling to recognize abortion rights. Nonetheless, the right to life can provide additional support for a broader right to abortion if it is understood in conceptual terms and connected to other rights through the text and history of a state's constitutional rights provisions.

I. THE CONSTITUTIONAL FOUNDATIONS OF ABORTION RIGHTS IN KANSAS

The dynamic of abortion rights in Kansas illustrates the significance of separation of powers in regard to important societal issues. The legislature is dominated by the Republican Party and has enacted many laws intended to restrict abortions.[15] The Governor's office, however, has shifted between Republican and Democratic control, which means that anti-abortion laws are sometimes vetoed, but those vetoes may be overridden when there is an anti-abortion supermajority in both chambers. The primary constraint on the legislature's zeal to

[13] *See 2022 Primary Election Official Totals*, KAN. SEC'Y OF STATE, https://sos.ks.gov/elections/22elec/2022-Primary-Official-Vote-Totals.pdf (recording the amendment's defeat, with 59.16% voting "NO" and 40.48% voting "YES").

[14] *See*, *e.g.*, Carter Sherman, *'Abortion is a winning issue': rights victories in 2023 US elections raise hopes for 2024*, THE GUARDIAN (Nov. 8, 2023).

[15] Although the legislature is supposed to be politically accountable and representative, the fate of the Value Them Both Amendment highlights the disconnect between the voters and their representatives on a critical issue of public policy: a supermajority of the legislature proposed an amendment that was rejected by nearly 60% of the voters. Indeed, even after the amendment's defeat, the legislature continued to enact anti-abortion legislation, such as a bill requiring abortion providers to falsely inform patients that the effects of a medication abortion can be reversed. *See* KAN. STAT. ANN. § 65-6716 (2023). The reasons for and implications of the non-representative character of legislative bodies is a topic for another day, however.

restrict abortion has been the constitutional protection of abortion rights, as enforced by the judiciary. The Kansas Supreme Court is more progressive that the legislature because Kansas uses "merit selection," under which a nominating commission recommends three nominees to the Governor, who then appoints one of the nominees to the Kansas Supreme Court.[16]

A. *Prelude*

Given the composition of the Kansas Legislature, Kansas statutes are replete with laws that restrict abortions in various ways.[17] Nonetheless, *Roe* and *Casey* prevented the adoption of the most extreme anti-abortion measures. After *Casey*, Kansas experienced a period of relative stability under a regulatory regime which permitted abortions prior to viability subject to informed consent requirements and waiting periods and permitted post-viability abortions to protect the life and health of the pregnant person.

The 2012 elections, however, brought a significant shift in the balance of power in the Kansas legislature.[18] Prior to 2012, the dominant Republican majority in the legislature was divided between moderates and conservatives. The moderate wing of the Republican Party wielded significant political clout because they could join with Democrats to form a working majority on some issues. After the 2010 elections, Republican Governor Sam Brownback pushed major tax cuts as a means to stimulate the state economy, but moderate Republicans in the Kansas Senate joined with Democrats to block them. Infuriated, Brownback and his allies "primaried" moderate Republicans in the 2012 elections, all but eliminating the moderate wing.

With the aid of gerrymandering, the result was a conservative supermajority that promptly enacted the Governor's tax cuts, along with a slew of conservative laws.[19] Among these laws were new laws restricting abortions, following the

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[16] For discussion of the resulting tensions between the Legislative and Judicial branches, see Richard E. Levy, *The War of Judicial Independence: Letters from the Kansas Front*, 65 U. KAN. L. REV. 725 (2017). For criticism of the Kansas method of judicial selection, see Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 KAN. J.L. & PUB. POL'Y 165 (2013); Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009); Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y 392 (2009).

[17] *See* Hodes & Nauser, MDs, P.A. v. Kobach, Case No. 23CV03140 (D. Court Johnson Cty, Kansas October 30, 2023) (enjoining enforcement of mandatory disclosure and waiting period requirements in Kansas law), available at https://reproductiverights.org/wp-content/uploads/2023/10/KS-Hodes-Nauser-v.-Kobach_PI.pdf.

[18] *See generally* Joseph A. Aistrup, *Kansas Elections: Then and Now*, 25 KAN. J.L. & PUB. POL'Y 301, 302 (2016) (documenting events described in this paragraph).

[19] For example, the legislature adopted Brownback's tax cut agenda—a disastrous policy that created severe budget problems, fueled lawsuits challenging the underfunding of public schools, and eventually forced the state to abandon those tax cuts. *See*, *e.g.*, Howard Gleckman, *The Great Kansas Tax Cut Experiment Crashes And Burns*, FORBES (Jun. 7, 2017),

same sort of playbook that anti-abortion legislatures had followed in other states. Among the laws enacted were "partial birth" abortion bans[20] and targeted regulations of abortion providers (TRAP laws).[21] Although these laws fell short of an outright ban, they had the purpose and effect of limiting abortion rights and many were tied up in court.[22]

B. *The Decision in* Hodes

It was against the background that the Kansas Supreme Court decided *Hodes & Nauser, MDs, P.A. v. Schmidt*,[23] which invalidated the Kansas Unborn Child Protection from Dismemberment Abortion Act's prohibition on certain types of late-term abortions. The plaintiffs in *Hodes* made a conscious choice to eschew reliance on the United States Constitution, basing their claims exclusively on the Kansas Constitution's Bill of Rights. This choice was rewarded when the Kansas Supreme Court held that the fundamental rights of personal autonomy and bodily integrity protected by section 1 of the Kansas Bill of Rights include the right to terminate a pregnancy.[24]

This holding effectively decoupled abortion rights in Kansas from their protection under the United States Constitution, which was critically important for two reasons. In the near term, it permitted the court to reject the undue burden test from *Casey* and hold that strict scrutiny applies to laws that burden abortion rights. In the longer term, it meant that the *Hodes* decision survived *Dobbs*.

Section 1 of the Kansas Bill of Rights provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[25] Prior to *Hodes*, the Kansas courts had generally followed

https://www.forbes.com/sites/beltway/2017/06/07/the-great-kansas-tax-cut-experiment-crashes-and-burns/?sh=557195c45508.

[20] *See*, *e.g.*, Kansas Unborn Child Protection from Dismemberment Abortion Act, KAN. STAT. ANN. §§ 65-6741–66-6749 (2015) (invalidated in *Hodes*).

[21] *See* KAN. STAT. ANN. §§ 65-4a01 - 65-4a12 (2011) (establishing licensure requirements for abortion providers and directing Kansas Department of Health and Environment to promulgate regulations to implement those requirements; Act); KAN. ADMIN REGS. §§ 28-34-126 - 28-34-144 (2011) (implementing statutory licensure requirements).

[22] *Hodes & Nauser, MDs, P.A. v. Norman*, 480 P.3d 211, 2021 WL 520661 (Kan. App. 2021) (unpublished opinion) (discussing litigation and resulting injunction against enforcement of these laws and concluding that the court lacked jurisdiction over an appeal from district court decision relating to continuation of longstanding injunction).

[23] 440 P.3d 461 (Kan. 2019).

[24] *Id.* at 472-92 (extensively analyzing text, history, and philosophical foundations of section 1 of the Kansas Bill of Rights).

[25] The court had little difficulty concluding that this provision also protected the rights of women. *See id.* at 483-84. In this respect, I would note that the court's analysis did not acknowledge the possibility of people whose sex assigned at birth does not align with their gender identity; i.e., people who are not cisgender. The state is currently embroiled in litigation challenging anti-trans legislation that was recently enacted over the governor's veto. *See* State of Kansas ex rel. Kobach v. Harper, SN-2023-CV-000422 (Shawnee Cty. Dist. Ct. July

federal due process doctrine when applying section 1.[26] Emphasizing the difference between the language of section 1 and the language of the Fourteenth Amendment's Due Process Clause,[27] however, the *Hodes* court concluded that "section 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States Constitution."[28]

The court then concluded that the right to terminate a pregnancy is among the natural rights protected by section 1. In particular, the court identified three overlapping rights that applied to decisions regarding abortion—a right to personal autonomy, a right to bodily integrity, and a right to make decisions about parenting and pregnancy. The right of personal autonomy was at the heart of the natural rights philosophy of Locke and others and had been recognized by the United States Supreme Court.[29] State supreme courts, including the Kansas Supreme Court, had recognized a natural right of bodily integrity.[30] Finally, the right to make decisions about parenting and procreation are recognized components of "liberty" and "the pursuit of happiness," which are explicit components of section 1.[31] These rights, individually and collectively, encompassed the decision to terminate a pregnancy.[32]

Having recognized the right to terminate a pregnancy as a fundamental right within the scope of section 1, the Court then concluded that strict scrutiny applied, explicitly rejecting *Casey's* undue burden test.[33] The court reasoned that the undue burden test is difficult to apply, relies on inherently subjective judgments, and is inconsistent with Kansas precedents concerning other fundamental

12, 2023) (order denying motion to dissolve temporary restraining order preventing issuance of drivers' licenses that do not reflect the holder's sex assigned at birth).

[26] *See Hodes*, 440 P.3d at 469-70 (citing cases).

[27] U.S. CONST. amend. XIV, § 1("nor shall any State deprive any person of life, liberty, or property, without due process of law"). Critically, there is no federal counterpart to the Kansas Constitution's explicit protections for "equal and inalienable natural rights."

[28] 440 P.3d at 471. In the course of this discussion, the court emphasized that the "natural rights" referenced in section 1 reflected the teachings of John Locke and that Lockean natural rights pre-existed the constitution and were therefore inherently non-textual in nature. *Id.* at 472-73. In addition, the court concluded that the history of the provision demonstrated that its framers intended these non-textual natural rights to be judicially enforceable against the legislative and executive branches of government. *Id.* at 473-80.

[29] *See id.* at 480-82.

[30] *Id.* at 482–83.

[31] *Id.* at 483. It is worth noting that the "right to life" was conspicuously absent from the discussion in *Hodes*. Although section 1's catalog of natural rights refers to "life, liberty, and the pursuit of happiness," the court relied only on "liberty" and the "pursuit of happiness." *See infra* note 36 and accompanying text.

[32] *See* 440 P.3d at 484-86.

[33] *Id.* at 494 ("Thus, the trial court and the six members comprising the Court of Appeals plurality predicted this court would adopt the undue burden standard. Several worthy reasons lead us to do otherwise and apply the strict scrutiny standard.").

rights.[34] Instead, the court concluded, that "the strict scrutiny test best protects those natural rights that we today hold to be fundamental."[35] Applying this standard, the Unborn Child Protection Act was unconstitutional because that statute, taken together with a previous statute prohibiting a different procedure, prevented the pregnant person from access to the safest procedures for terminating a pregnancy.

For the purpose of this symposium, the most relevant part of the analysis in *Hodes* is the court's discussion of why the right to terminate a pregnancy is within the natural rights protected by section 1 of the Kansas Bill of Rights. The salient feature of this analysis was the decoupling of state fundamental rights doctrine from corresponding federal law, which justified an independent analysis of the scope of protection for abortion rights as well as the adoption of a more rigorous standard for assessing the validity of measures restricting abortion rights. Any state supreme court decision protecting abortion rights would have to reach similar conclusions regarding the state's constitution.

C. *The Disappearing Right to Life*

One striking feature of the analysis in *Hodes* is the court's omission of any reference to the "right to life" as a source of abortion rights. Indeed, the court explicitly relied on every substantive rights term in section 1 *except* the right to life.[36] It emphasized section 1's explicit reference to "natural rights" to support the premise that the provision protects judicially enforceable nontextual rights of personal autonomy and self-determination that pre-existed the Kansas Constitution. And it referenced "liberty" and "the pursuit of happiness" as sources of privacy rights related to marriage, family, and procreation.

The omission of any reference to the right to life is all the more striking because the statute at issue directly threatened the pregnant person's right by preventing the use of the safest procedures for certain types of abortions. Indeed, the court ultimately relied on this consideration to conclude that the law failed strict scrutiny. Thus, *Hodes* was an ideal case for reliance on the right to life, but the court did not even mention it.

Given the underdeveloped state of the right to life, it is not really surprising that neither the court nor the plaintiffs relied on that right. Recognizing the right to an abortion under the Kansas Constitution was a significant and controversial

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[34] *See id.* at 492-98 (explaining why the undue burden test is inadequate and adopting strict scrutiny as the test for laws burdening the fundamental right to terminate a pregnancy). More fundamentally: "Imposing a lower standard than strict scrutiny . . . risks allowing the State to then intrude into all decisions about childbearing, our families, and our medical decision-making. It cheapens the rights at stake. The strict scrutiny test better protects these rights." *Id.* at 498.

[35] *Id.* at 496. In reaching this conclusion, the court emphasized its "obligation to protect (1) the intent of the Wyandotte Convention delegation and voters who ratified the Constitution and (2) the inalienable natural rights of all Kansans today." *Id.*

[36] *See supra* notes 29-32 and accompanying text.

step. We might expect that a court taking such a step would want to rely on well-established principles rather than tread entirely new ground. Outside the death penalty context, which is largely sui generis, there are few authorities addressing the meaning and scope of the right to life.[37] Put differently, while concepts like self-determination, autonomy, bodily integrity, and privacy provided a well-established basis for abortion rights, the right to life did not.

It would be fairly easy to argue that the right to life encompasses a right of self-defense, especially given the longstanding historical recognition of the right.[38] But it is less clear that the right of self-defense would apply to the termination of pregnancy—unless continuation of pregnancy would present very serious risks. Even then, the usual requirements for self-defense would not be met because the fetus is not engaged in an unlawful attack on the pregnant person. Thus, for example, a federal court of appeals concluded in *Abigail Alliance* that the right of self-defense did not include the right to seek life sustaining treatments that were unlawful because they had not been approved by the Food and Drug Administration.[39] Cases like *Abigail Alliance* reflect a "material distinction between the State effectively sticking a needle in someone over their objection and the State prohibiting the individual from filling a syringe with prohibited drugs."[40]

The connection between the right to life and abortion access has gained some traction internationally. Of particular note, the United Nations Human Rights Committee issued a comment defining the right to life for purposes of the International Covenant on Civil and Political Rights.[41] The comment, which took an expansive view of the right to life in general, explicitly concluded that "states

[37] Although there is a significant body of literature that touches on the right to life, this work is largely formative and does not reflect an established body of constitutional precedents in the United States. For a useful compilation of authority on the right to life, see Martha Davis has usefully compiled into an annotated bibliography, *see* Martha F. Davis, *Annotated Bibliography: "Persons Born" and the Jurisprudence of "Life"* (symposium contribution).

[38] In this regard, for example, the Supreme Court's seminal Second Amendment precedents emphasize the right of self-defense. *See*, *e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day . . . .").

[39] Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007); *accord* CareToLive v. von Eschenbach, 525 F.Supp.2d 952 (S.D. Ohio 2007) (concluding that patient had no right of access to unapproved cancer treatment); D.J.C. for D.A.C. v. Staten Island University Hospital-Northwell Health, 157 N.Y.S.3d 667 (Sup. Ct. N.Y (2021) (declining to order hospital to administer drug approved only for treatment of parasitic worms to treat COVID).

[40] L. W. by and through Williams v. Skrmetti, 83 F.4th 460, 476 (6th Cir,. 2023) (rejecting substantive due process challenge for law prohibiting gender affirming care for minors).

[41] *See* Human Rights Committee, General comment No. 36, Article 6: Right to Life U.N. Doc. CCPR/C/GC/36 (2019), https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1967).

parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable."[42] Although this discussion was focused on the right to life, it also referenced and relied on other rights.

Given the focus of courts in the United States on the interpretation and application of the relevant federal or state constitution, it is unlikely that the Human Rights Committee's reasoning or the decisions of international tribunals or courts in other countries will carry much weight when state courts grapple with the abortion rights issues.[43] This is especially so when international pronouncements are—like the Commission's Comment—grounded in a jurisprudence of social rights that recognizes affirmative duties on the part of government to protect lives and provide access to health care.

To be sure, laws that prohibit abortions impose burdens on rights that implicate traditional understandings of rights as protections against governmental interference. But the Human Rights Committee's formulation also draws on a larger jurisprudence of social and rights that include affirmative governmental duties in relation to basic human needs, including health care.[44] Thus, the Committee's formulation references the duty "to provide safe, legal and effective access to abortion" and is not limited to the protection of abortion rights from governmental measures that prevent access. Courts in the United States, however, have been particularly averse to the recognition of this sort of positive right in the absence of explicit constitutional text.[45]

[42] Human Rights Committee, *supra* note 41, at ¶ 8. For the argument that many states in the United States are out of compliance with international human rights law after *Dobbs*, see Sydney Chong Ju Padgett, *Abortion Rights as (Inter)National Human Rights: Dobbs and the Noncompliance of U.S. Abortion Policies under International Human Rights Law*, 27 LEWIS & CLARK L. REV. 925 (2023).

[43] Although international law is part of our law and courts in the United States are obligated to apply well established customary international law principles and self-executing treaty provisions, *see generally* John O. McGinnis & Ilya Somin, *Should International Law Be a Part of Our Law?*, 59 STAN. L. REV. 1175 (2007), the protection of abortion rights under international law is likely not yet sufficiently well-established to be binding on courts in the United States. The United Nation Human Rights Committee's views may be persuasive, but they are not legally binding and remain controversial.

[44] *See*, *e.g.*, G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR], available at http:// www2.ohchr.org/english/law/pdf/cescr.pdf.

[45] One area in which many state constitutions explicitly provide for affirmative rights is the right to an education. The judicial enforcement of the positive right to an education, however, has proven to be particularly difficult. *See*, *e.g.*, Hugh Spitzer & Andy Omara, *Catalytic Courts and Enforcement of Constitutional Education Funding Provisions*, 49 GA. J. INT'L & COMP. L. 45, 46 (2021) (analyzing "how, in multi-year, multi-decision litigation, constitutional court judges in the three jurisdictions we studied actively experimented with the

The point here is not to reject the right to life as a potential source of abortion rights, but rather to highlight the limits of the right to life under current doctrine. After *Dobbs*, constitutional protections against laws restricting abortion access will depend on the states' respective supreme court's willingness to depart from federal due process doctrine so as to recognize independent substantive rights under their own constitutions. As reflected in the Kansas Supreme Court's conspicuous avoidance of any reliance on the right to life—even in a case in which the law in question directly implicated that right to life in its literal sense—there is a lot of work to do before the right to life would offer much support in taking that step.

II. THE POLITICAL SALIENCE OF THE PREGNANT PERSON'S LIFE

If *Hodes* itself conspicuously declined to rely on the right to life, the aftermath of the decision highlighted the political value of centering the life of the pregnant person in discussions surrounding abortion. Notwithstanding its title, the Value Them Both Amendment placed no value on the life of the pregnant person, a weakness that was exploited by its opponents to maximum effect. Although it is impossible to say with certainty, as a ringside observer my impression is that media campaigns emphasizing the impact of the amendment on the pregnant person's life played a significant role in its defeat.[46]

A. *The Defeat of the Value Them Both Amendment*

Anti-abortion forces in the state, of course, did not simply accept *Hodes* and give up. They continued to enact anti-abortion measures and the Kansas Attorney General continued to defend them in court.[47] The reason we are here, however, is the legislature's effort to overturn the *Hodes* decision by means of a constitutional amendment. Under the Kansas Constitution, the legislature may propose a constitutional amendment if two-thirds of the members of the House of Representatives and of the Senate approve it.[48] The resulting proposition is then placed on the ballot and it becomes a part of the Kansas Constitution if approved by a simple majority of the voters.[49] This system gives the legislature considerable discretion concerning the content of the proposed amendment, the

challenging task of forcing, or enticing, reluctant legislative and executive branches into spending more on education—often against the backdrop of potential political retaliation").

[46] Another important part of the campaign to defeat the amendment was to characterize the amendment leading to intrusive governmental mandates—thus tapping into the libertarian strain in Kansas politics.

[47] *See supra* notes 20-22 and accompanying text.

[48] KAN. CONST. art. 14, § 1. Critically, the denominator of this fraction is the entire membership, not merely the legislators who vote. Accordingly, a vote to abstain or the failure to cast a vote would have the same effect as a vote against the measure.

[49] *Id.*

ballot explanation that accompanies the proposed amendment, and the timing of the election.[50]

After some unsuccessful efforts in 2021, anti-abortion forces garnered the necessary supermajorities in 2022 to propose the "Value Them Both Amendment" to the voters for approval. Several features of the proposed amendment stand out. First, the title and language of the amendment are misleading, and perhaps intentionally so.[51] For example, as noted above, the amendment professes to value the pregnant person, but does nothing to address that person's interests. Indeed, while the language of the amendment references the "life of the mother," which might be read by an uninformed observer as affording protection to that life, the actual language of the amendment authorizes the legislature to enact laws that completely disregard the life or health of the pregnant person.[52]

As noted above, the measure's proponents also decided to have a special election on the amendment to coincide with the August primary.[53] At the time, the amendment's proponents probably thought this timing would increase the likelihood that it would pass. As is well understood, the more extreme factions of the political parties are often more motivated to turn out in a primary election,[54] which in the case of the Republican party means—among other things—the most staunchly anti-abortion components of the party. This phenomenon helps to explain the gap between legislative support for the amendment and its resounding rejection by voters.

Another important consideration in Kansas is the comparative turnout for primaries. Because many districts in the state are solidly Republican, the election that matters in those districts is the Republican primary, which means that Republican voters have a strong interest in voting in the primary. Conversely, Democratic primaries in many districts are not competitive and independents are not allowed to vote in any primary, so those groups have fewer incentives to turn out for a primary election. Thus, the assumption was that Republicans would

[50] *See generally* Richard E. Levy, *Dubious Propositions: Misleading Ballot Language and Constitutional Amendments in Kansas*, 71 U. KAN. L. REV. 643, 651-74 (2023) (discussing constitutional amendment process in Kansas, including evolution of the amendment provision's text and its interpretation by the Kansas courts).

[51] *See, e.g.*, Alvin Chang, *Why the Language on the Kansas Abortion Ballot is so Confusing*, The Guardian (Aug. 2, 2022, 6:00 AM), https://www.theguardian.com/us-news/ng-interactive/2022/aug/02/kansas-abortion-ballot-language ("Republicans in the state legislature wrote the language on the ballot last year, and ever since experts have argued it is purposefully confusing and misleading.").

[52] Stripped of its convoluted phrasing, the language says the legislature *may* take the life if the mother into account when regulating abortions. If the legislature has discretion to take that life into account, it also has discretion not to.

[53] *See supra* note 8 and accompanying text.

[54] This phenomenon also helps to explain why the effort to "primary" moderate republicans in 2012 was so successful. *See supra* note 18 and accompanying text.

turn out for the election in much greater numbers than Democrats or independents.

For a number of reasons, however, these apparent advantages were more than offset by *Dobbs*. First, *Dobbs* greatly upped the stakes. Before *Dobbs*, abortion rights would still be protected in the state even if *Hodes* were overturned by the amendment because *Casey* was still good law. Thus, the election would have been about whether the undue burden test or strict scrutiny applied, an important issue to be sure, but nothing like the importance of the vote after *Dobbs*. After *Dobbs*, the question was whether there would be any protections for abortion rights in the state. Put simply, after *Dobbs*, the argument against the amendment was much easier to make.

Second, the circumstances of *Dobbs*, which was still quite fresh, angered and energized abortion rights supporters. Among other things, the maneuvering to deny an appointment to President Obama, to force through the confirmation of Justice Kavanaugh notwithstanding the controversy swirling around his conduct, and then the last minute confirmation of Justice Barrett, undermined the legitimacy of the *Dobbs* decision.[55] The leak of a preliminary draft (which abortion rights supporters view as an effort to "lock in" votes to overturn *Roe* and *Casey*) also roiled the waters, as did the tone and arrogance of Justice Alito's decision.[56]

Given this turmoil and political engagement, the timing of the election could not have been worse for the amendment's supporters. The Kansas election became the first true test of abortion rights as a potent political force, which meant that massive amounts of money, advertising, and grass roots support were mobilized to block the amendment. As an interested observer, I was optimistic that the amendment might be defeated, but like most observers I was stunned by the margin of the vote against the amendment. This outcome, it turns out, was not an isolated case, as abortion rights have proven to be a winning issue in many subsequent elections.

B. *Implications for the Pregnant Person's Right to Life*

The defeat of the Value Them Both Amendment tends to confirm the premises of the symposium: (1) that abortion opponents' apparent ownership of the phrase, "right to life," subordinates the right to life of the person who is pregnant;

[55] These events seem even worse in light of recent reporting surrounding the Justices' behind the scenes maneuvering to preserve the appearance—but not the reality—of legitimate judicial decision making. *See* Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html.

[56] An especially tone-deaf feature of the opinion was Justice Alito's suggestion that abortion bans would be fine because there was a demand for babies to adopt. *Dobbs*, 597 U.S. at 259 & n.46 (suggesting that the costs of an abortion ban are lessened in part because "a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home" and citing statistics to suggest that the "demand" for babies to adopt far exceed the "supply" of babies available for adoption).

and (2) that recentering the life of the pregnant person would benefit the cause of abortion rights. In practice, effective arguments for abortion rights must acknowledge the moral complexity of abortion decisions. In particular, centering the life of the pregnant person provides a necessary counterweight to legitimate concerns about the potential life of an unborn child.

In my view, whatever its doctrinal merits, *Roe v. Wade* did not make an effective *political* case for abortion rights. In particular, by focusing on the abstract concept of privacy,[57] *Roe* de-emphasized the very real consequences of abortion bans on the lives of pregnant people. Conversely, because *Roe* did not fully acknowledge the moral significance of the fetus,[58] it failed to offer a convincing account of why the rights of the pregnant person should take precedence. This failure facilitated the arguments by anti-abortion forces that centered the life of the "unborn child" and minimized the harms from anti-abortion laws.

Our common human experience tells us that while the fetus is not yet a person, it nonetheless has moral and emotional significance.[59] People form attachments to their unborn children and mourn their loss when there is a miscarriage or when an abortion is medically necessary. A compelling case for abortion rights must explain why the pregnant person has the right to terminate a pregnancy notwithstanding its profound implications. Because *Roe* did not make this case effectively, it allowed anti-abortion forces to present abortion as a choice between the convenience of the pregnant person and the life of a child.

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[57] *See Roe*, 410 U.S. at 152-53 (reviewing precedents recognizing the constitutional right of privacy and concluding that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court then devoted one paragraph to discussing, in abstract terms, harms forced pregnancies impose upon the pregnant person. *Id.* ("The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.")

[58] After concluding that the fetus or unborn child is not a person within the meaning of the Fourteenth Amendment, the Court acknowledged that "[t]he Pregnant woman cannot be isolated in her privacy." *Id.* at 159. The Court then concluded that, given disputes about when life begins, the state could not override the mother's privacy rights by adopting one theory of when life begins. *Id.* at 159-62. The Court ultimately concluded that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Id.* at 163.

[59] Notwithstanding the practice of law reviews, I refuse to cite a source for these statements, which I believe are validated by the readers' own experiences and observations and are not strengthened by citing some law review article.

This failure was, of course, the focal point of the *Casey* plurality's rejection of strict scrutiny and the resulting trimester framework from *Roe*.[60] In other words, the "undue burden" test represented an effort to strike a more nuanced moral balance between the competing interests at stake.[61] For a variety of reasons, however, the undue burden test failed to strike an appropriate moral balance in practice. Among other things, it accommodated pretextual justifications for legislative actions with the purpose and effect of denying access to abortions,[62] elevated legislative judgments about the moral balance involved in an abortion decision over that of the pregnant person,[63] and focused on the aggregate impacts of a law and therefore tolerated the imposition of severe costs for some individuals.[64]

Nonetheless, so long as *Roe* and later *Casey* prevented the implementation of the most extreme anti-abortion measures, the full consequences of such laws were not on display. The steady erosion of abortion access under *Casey* took its toll in many states, but the consequences for the lives of pregnant people could not be attributed to any particular anti-abortion measure. In addition, the most severe burdens from laws that make it more difficult, but not impossible, to get an abortion fall on marginalized communities whose suffering was often less visible.[65] *Dobbs*, however, stripped away the remaining protections afforded for

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60 *See Casey*, 505 U.S. at 873 (plurality opinion) ("A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe."*

61 *See Id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.")

62 The Court's decision in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), which reversed a lower court decision upholding this sort of law, reflects a short-lived effort to shore up the undue burden test against this deficiency.

63 There is certainly no reason to believe that the legislature's judgment concerning the complex medical, moral, and person issues involved in an abortion decision is superior to the informed decision of the pregnant person. Indeed, it is precisely because of the profound moral complexity surrounding abortion decisions that state legislatures should not be making those decisions.

64 *See* Richard E. Levy & Alexander Somek, *Paradoxical Parallels in the German and American Abortion Decisions*, 9 TUL. J. INT'L & COMP. L. 109, 157- 62 (2001) (emphasizing that both the United States Supreme Court's and the German Constitutional Court's approach to the abortion issue is flawed because they rely on generalizations about the impact of abortion regulations without accounting for the profoundly differing effects of any given abortion restriction on particular individuals seeking an abortion).

65 *See*, *e.g.*, Marlene Gerber Fried, *Abortion in the United States: Legal but Inaccessible*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, 212-13 (Rickie Solinger ed., 1998) (noting the disproportionate impact of restrictive abortion regulations on low income women, women of color, and young women).

abortion rights, facilitating the adoption of extreme anti-abortion measures that laid bare their human costs.[66]

Ultimately, whatever the moral weight of the fetus, it is part of the pregnant person's body. Preventing abortions therefore conscripts the pregnant person's body to carry the child to term and thereby to undergo the physiological changes and medical risks that are associated with that decision. Equally important, bearing a child has life-altering emotional and personal consequences—whether or not that child is given up for adoption.[67] In a post *Dobbs* world, we are reminded on a regular basis that strict anti-abortion laws subordinate the life of the pregnant person.[68]

The successful media campaign in Kansas against the "Value Them Both Amendment" highlighted this reality by centering the lives of pregnant people and characterizing the amendment as a government mandate that would interfere with deeply personal life and death decisions.[69] Although the amendment proclaimed that "Kansans value both women and children" and paid lip-service to "circumstances of necessity to save the life of the mother," the actual language of the amendment would have authorized the legislature to ban abortions from the onset of pregnancy with no exceptions whatsoever. It did nothing to protect the interests of a pregnant person even when that person's life was at stake.

This reality proved to be a significant problem for the amendment, as opponents repeatedly emphasized that the amendment would produce a total ban on abortions, highlighting the sort of dramatic cases that have emerged in other states since *Dobbs*.[70] Although its supporters insisted that the amendment itself did not ban abortions, given the composition of the legislature there was no doubt that with *Roe* and *Casey* out of the way, Kansas would have enacted a strict ban if the amendment had passed.[71] Other red state legislatures were

[66] In this respect, both *Roe* and *Dobbs* may reflect the old adage, "be careful what you wish for." Just as *Roe* galvanized anti-abortion groups into a potent political force, *Dobbs* has galvanized abortion rights advocates into a potent political force as well.

[67] For this reason, Justice Alito's suggestion that the availability of adoption somehow minimized the burden of forcing pregnant people to carry a fetus to term reflected an especially conspicuous lack of empathy. *See supra* note 56.

[68] *See*, *e.g.*, Sarah Green Carmichael, *'Life of the Mother' Abortion Laws Are Still Risky*, WASH. POST (June 23, 2023), https://www.washingtonpost.com/business/2023/06/23/post-roe-life-of-the-mother-abortion-laws-are-still-risky/4e3c885c-11b7-11ee-8d22-5f65b2e2f6ad_story.html.

[69] *See* Bill Scher *The Ads That Won the Kansas Abortion Referendum*, WASHINGTON MONTHLY (Aug. 5, 2022), https://washingtonmonthly.com/2022/08/05/the-ads-that-won-the-kansas-abortion-referendum/.

[70] *See id.*

[71] Indeed, the rejection of the Value Them Both Amendment did not stop the Kansas Legislature from continuing to propose and at times adopt anti-abortion legislation. *See*, *e.g.*, Rose Conlon, *Abortion remains hotly contested in Kansas heading into the 2024 legislative session*, KCUR (Jan. 2, 2024) (discussing, inter alia, new abortion restrictions passed by anti-abortion

enacting strict bans and the resulting horror stories provided a vivid warning to Kansas voters.[72]

These consequences of abortion bans provide a more effective moral counterweight to the "life of the unborn child" than any abstract conception of privacy and personal autonomy can. While it is impossible to say with certainty, my personal impression from experiencing the campaign is that attacks on the amendment featuring the devastating consequences of abortion bans on the lives of pregnant people and their families were an essential component of the strategy that led to its defeat. In other words, centering the life of the pregnant person resonated with voters—even in a deeply red state.

The question then becomes, given the limited doctrinal foundations for applying the pregnant person's right to life as a source of abortion rights, how can abortion rights advocates develop the pregnant person's right to life as a source of abortion rights?

III. A Doctrinal Role for the Right to Life

How can abortion rights proponents translate the political success of arguments that center the life of the pregnant person into doctrinal arguments for abortion rights that will resonate with state supreme courts? As reflected in *Hodes*, doctrinal arguments for recognizing abortion rights are most likely to be successful when they are rooted in text and history, especially if the relevant precedents are limited. As a result, I think it unlikely that any court will recognize a stand-alone right to life as a source of broad abortion rights, it may provide a basis to challenge extreme measures that place a pregnant person's life directly at risk. Nonetheless, there are textual and historical arguments to support a more conceptual understanding of the right to life as part of the Lockean natural rights tradition, and this sort of argument may add weight to related arguments based on rights of personal autonomy.[73]

A. *The Meaning of "Life"*

Although natural rights declarations may be phrased in a variety of ways, the right to life typically features as an essential component of those rights. The Due Process Clauses of the Fifth and Fourteenth Amendment refer to "life, liberty,

legislators in 2023), https://www.kcur.org/2024-01-02/abortion-remains-hotly-contested-in-kansas-heading-into-the-2024-legislative-session.

[72] Of particular note in this regard was the story of a 10-year-old Ohio rape victim who was forced to travel to Indiana to obtain an abortion. *See* David Folkenflik & Sarah McCammon, *A rape, an abortion, and a one-source story: a child's ordeal becomes national news*, NPR (updated July 13, 2022) (discussing story, claims that the story was faked, and ultimate confirmation of the story), https://www.npr.org/2022/07/13/1111285143/abortion-10-year-old-raped-ohio.

[73] These ideas are in their formative stages and do not reflect comprehensive research or a fully formed theory of the right to life. Rather, they represent a starting point for thinking about the right to life as a source of abortion rights.

and property." The Declaration of Independence and the Kansas Constitution refer to "life, Liberty, and the pursuit of happiness." Likewise, while the precise formulations vary, virtually every state constitution in the United States recognizes the "right to life" as an inherent natural right.[74] These provisions share a common link to Lockean natural rights theory, of which the right to life was a central component, even if the precise meaning of that Lockean heritage is the subject of considerable debate.[75]

As a matter of text, what do constitutions mean when they reference the right to life? Most obviously, the right to life implies the right to stay physically alive.[76] But this aspect of the right to life supports only a relatively narrow and limited right to abortion applicable only in those cases when a state law prohibits treatment that is reasonably necessary to protect the life of the pregnant person. Even then, cases like *Abigail Alliance* suggest that this sort of claim would face an uphill battle.[77] To be sure, after *Dobbs* a state court that recognizes abortion rights must depart from federal doctrine, which means that they would not be bound by such decisions. Assuming a state court did take that step, however, the resulting right would necessarily be a narrow one.

As reflected in the Human Rights Commission's comment, laws that restrict access to abortion increase risks to the life of the pregnant person.[78] But it seems to me highly unlikely that any court in the United States would be prepared to follow this route to recognize a broad right to abortion as necessary to protect the lives of pregnant people.[79] If the right to life protects broad access to abortion, the same logic would seemingly apply to any state action that increases risks of death. In our complex society, virtually any health or safety law creates at least some potential risks to life and laws that decrease some risks will create others.[80] Thus, a jurisprudence that invalidates government actions based on increased risks to human life would be unworkable in practice.

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[74] *See*, *e.g.*, Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HAST. CON. L.Q. 1, 2-5 (discussing typology of state constitutional provisions).

[75] *See*, *e.g.*, Patrick Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457 (2011) (critiquing modern libertarian interpretations of the phrase).

[76] *See* B. Jessie Hill, *Medical Authority and the Right to Life* (symposium contribution) (discussing the "medical" framing of the right to life in the abortion context and the possibility of moving toward a more robust conception of the right to life that includes the "right to 'enjoy a life with dignity,' or a 'minimum quality of life,' and to cognate concepts such as liberty and happiness").

[77] *See supra* notes 39-40 and accompanying text.

[78] *See supra* notes 41-42 and accompanying text.

[79] As noted above, the right to life was implicated in *Hodes* in just this way, but the court did conspicuously declined to rely on it. *See supra* notes 29-32, 36 and accompanying text.

[80] For example, laws that permit ambulances to exceed the speed limit increase the risk that they will strike other vehicles or pedestrians, risking the loss of life. But a law that required ambulances to go slowly increases the risk that a patient in the ambulance will die before receiving treatment.

Accordingly, focusing on the physical life of the pregnant person would effectively limit the scope of any resulting abortion rights to circumstances in which anti-abortion laws present a direct and appreciable risk of death.[81] A physical right to life would therefore provide some protection against extreme abortion bans, but would not necessarily apply to other laws, even if bearing a child is riskier than having an abortion.[82] Recognizing that the state may not force a pregnant person to undergo an significant risk of death to carry a pregnancy to term is an important step that could prevent some tragedies, but it remains a narrow right that would not apply to the typical case.

Thus, the critical question is whether the right to life encompasses something more, what we might call ownership of your life. Viewed through this sort of conceptual lens, the right to life shares much with the concepts of "liberty" and "the pursuit of happiness" (or property), with which it is commonly grouped.[83] Indeed, the right to life does not typically appear in isolation, but rather is part of a collection of rights, such as the rights to "life, liberty, and the pursuit of happiness," or "life, liberty, and property." The terms "liberty" and "pursuit of happiness" are not technical terms used in a strict sense so as to incorporate narrow and specific legal concepts. Indeed, the court in *Hodes* did not distinguish between liberty and the pursuit of happiness as the foundation for the right of personal autonomy.[84]

The right to life should be read in a similar way. Consider, for example, the circumstance of people who are enslaved. They may still be alive in the physical sense, but they have been deprived of their "lives" in a conceptual sense because they are no longer able to make the most fundamental decisions about how they live. While we might say that slavery therefore interferes with the right to liberty, the pursuit of happiness, or even one's ownership of property in oneself, it makes as much or more sense to say that enslavement deprives slaves of ownership of

[81] Abortion rights grounded in Free Exercise arguments confront similar limitations, since they would only apply to particular religions and particular circumstances. *See* David A. Carrillo, Allison G. Macbeth, and Daniel Bogard, *The Free Exercise Right to Life* (symposium contribution).

[82] In the absence of an emergency exception, a waiting period might create a measurable risk of death in an extreme case and some laws requiring physicians to provide false information might as well. But to identify these cases is to suggest how limited this sort of right would be in practice.

[83] In this sense, the interpretive maxim, "*noscitur a sociis*" (words are known by their associates), is instructive. The canon is usually used to give more a narrow meaning to broad terms. *See*, *e.g.*, Yates v. United States, 574 U.S. 528, 543-45 (2015) (relying on canon to narrowly construe term "tangible object" in 18 U.S.C. § 1519). Nonetheless, the same logic would suggest that when a term is surrounded by broad and conceptual terms, it is appropriate to give it a broad conceptual reading, rather than a narrow technical one.

[84] *Id.* at 483 ("Few decisions impact our lives more than those about issues that affect one's physical health, family formation, and family life. We conclude that this right to personal autonomy is firmly embedded within section 1's natural rights guarantee and its included concepts of *liberty and the pursuit of happiness*.") (emphasis added).

their own lives, and thus violates their right to life. Indeed, the concept of inalienable or inherent natural rights has at its core the premise that all of us are entitled to own our lives.

As a linguistic matter, it may even be incorrect to read phrases like, "life, liberty, and the pursuit of happiness," as referencing distinct concepts at all. Sometimes an oft-repeated phrase of this sort takes on a distinct meaning that is more than the sum of its constituent parts.[85] Constitutions are replete with such phrases. Thus, for example, phrases like "necessary and proper laws," "cruel and unusual punishments," or "treason, bribery, or other high crimes and misdemeanors" might be better understood as referencing collective concepts rather than constituent parts.

In this sense, "life, liberty, and the pursuit of happiness" and similar phrases might be best understood as referring collectively to the right of self-determination implicit in the Lockean understanding of natural rights. In other words, the phrase "life, liberty, and the pursuit of happiness" is not merely a catalog of examples of the natural rights protected by a constitution, they are a shorthand for the entire concept of natural rights and its core premise that each of us has the right to live our own lives free of unwarranted government interference.[86]

B. *A Path Forward*

Ultimately, while there is a plausible case to be made that the right to life encompasses the right to abortion, at least in some cases, I think it unlikely that state courts will rely on a stand-alone right to life as a source of abortion rights. Recognizing a right to abortion under a state constitution is a significant and controversial step. We might expect a court making such a decision to be cautious in other respects and therefore to rely as much as possible on well-established principles. Conversely, it is hard to see how a state supreme court justice who is unwilling to recognize abortion rights as within the more well-established rights of self-determination, bodily integrity, and privacy would nonetheless find abortion rights to be protected by the right to life.

All this is not to say that the pregnant person's right to life lacks doctrinal significance. Instead, it suggests a two-pronged strategy for the deployment of the right to life. First, case law in other contexts indicates that although the government has no affirmative duty to save anyone's life, it may violate the right to life if it actively prevents others from providing assistance.[87] This scenario

[85] Consider, for example, the statement that someone has "bought a lie hook, line, and sinker." Although the phrase originated as a reference to three distinct elements of fishing gear, its use now means something distinct from those constituent parts.

[86] Indeed, it is arguably the duty of government to protect and advance those rights in an affirmative or positive sense. Recognizing this sort of affirmative duty, however, is not an essential prerequisite to recognition that the right to life encompasses the right to self-determination.

[87] *See*, *e.g.*, Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990) (concluding that a county policy of the plaintiff alleges that the county had a policy of "arbitrarily cutting off

would seem to apply in those states in which abortion bans provide only limited exceptions that do not adequately protect the pregnant person's life and health, because they prevent private persons from rendering assistance that could save the pregnant person's life.[88] This sort of claim has limited scope, but it may provide essential protections in states whose legislatures imposes strict bans with limited exceptions and whose courts do not recognize abortion rights.

Second, emphasizing the impact of abortion restrictions on the life of the pregnant person is central to the case for abortion rights under more conventional sources of constitutional rights, including self-determination, bodily integrity, and privacy. This sort of analysis should emphasize the interconnectivity of the constituent elements of the phrase "life, liberty, and the pursuit of happiness." Take together, those elements refer to the principle that each of us is entitled to live our lives without undue interference from the government. Ultimately, the recognition of abortion rights depends on the recognition of this core principle, regardless of the particular right to which it attaches, but emphasizing the pregnant person's right to life may add weight to the argument against abortion restrictions.

CONCLUSION

Kansas is an important case study in the new politics of abortion rights. The dramatic reaffirmation of abortion rights by a clear majority of voters in a deeply red state offers important insights for abortion rights advocates. In particular, it suggests that centering the pregnant person's right to life is a critical step in advancing the right to abortion. As a doctrinal matter, although Kansas offers little in the way of direct support for the right to life as a source of abortion rights, the Kansas experience suggests that the right to life could be an important component of resurgent state constitutional jurisprudence of abortion rights.

private sources of rescue without providing a meaningful alternative" violated the right to life).

[88] In advancing this argument, litigants could distinguish cases like *Abigail Alliance*, in which the prohibited medical treatment was not medically accepted or effective. *See supra* notes 39-40 and accompanying text.