AN UNNATURAL READING: THE REVISIONIST HISTORY OF ABORTION IN *HODES V. SCHMIDT*

Skylar Reese Croy[*] *& Alexander Lemke*[**]

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[1]

Abstract

Recently, in *Hodes v. Schmidt*,[2] the Kansas Supreme Court concluded that women have a natural right to procure an abortion and that this right is subject to broader protection than afforded by the Fourteenth Amendment. *Hodes* relied on some of the most influential jurists and philosophers in legal history to support its reasoning, including John Locke, Edward Coke, and William Blackstone. *Hodes* explained that these jurists and philosophers acknowledged a natural right to bodily autonomy, and we agree with that proposition. However, in this Article, we demonstrate that *Hodes* failed to acknowledge specific statements from these jurists and philosophers condemning abortion. They did not believe that the natural right to bodily autonomy encompassed the right to procure an abortion. *Hodes* further erred by referencing specific statements on matters unrelated to abortion to support its conclusion. The court's errors created a precedent with far-reaching implications. For example, under a fair reading of *Hodes*, Kansans have a natural right to assisted suicide.

We conclude that *Hodes* illustrates the danger of courts acknowledging natural rights. If courts are going to do so, they must exercise caution and restraint.

Hodes has broad significance because it relied on Section 1 of the Kansas Bill of Rights. Identical or substantially similar language exists in thirty-three other state constitutions. Pro-choice advocates may reference *Hodes* in other jurisdictions with the hope of achieving broader protection for abortion rights than afforded by the Fourteenth Amendment. Furthermore, arguably, federal courts are becoming less favorable forums for pro-choice advocates. Moreover, there are other consequences to acknowledging a natural right. We hope to call into question the legitimacy of *Hodes* so as to limit its reach.

---

* J.D., University of Wisconsin Law School.

** J.D., University of Tulsa College of Law.

1. KAN. CONST. Bill. of Rights § 1.
2. 440 P.3d 461 (Kan. 2019) (per curiam).

INTRODUCTION

Recently, in *Hodes v. Schmidt*, the Kansas Supreme Court concluded that women have a natural right to procure an abortion, protected by Section 1 of the Kansas Bill of Rights, and that this right is subject to broader protection than afforded by the Fourteenth Amendment.[3] That is a momentous holding.

For context, a natural right predates government.[4] When people create a government, they delegate to it the authority to protect their natural rights.[5] Once the government is formed, civil rights are created to address certain concerns.[6] For example, freedom of speech is a natural right.[7]

3. *Id.* at 466.

4. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 44 (2014).

5. *Id.* at 70–71, 330–32.

6. *Id.*; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. REV. 907, 909 (1993).

7. Hamburger, *supra* note 6, at 908–09.

However, the right to vote is a civil right because it can exist only after the formation of a government.[8] A natural right deserves significant protection—perhaps more than a civil right—because the impetus of forming a government is to protect natural rights.[9] Therefore, any government that restricts natural rights—unless it is acting to protect other natural rights—calls into question its legitimacy.[10]

Evidently, acknowledging a natural right has consequences. When the *Hodes* court concluded that women have a natural right to procure an abortion, it was effectively declaring not only that any act restricting the ability to procure an abortion is presumably unconstitutional, but it was also implying that any restriction presumably constitutes a grave injustice.

Hodes relied on some of the most influential jurists and philosophers in legal history.11 In relying on these sources, the court reasoned: (1) all persons have a natural right to bodily autonomy, and (2) the right to bodily autonomy includes the ability to "control one's own body."[12] Therefore, in the court's words, "[t]his right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy."[13]

We argue that *Hodes* misapplied several historical sources to support its conclusion. *Hodes* took general statements from sources about bodily autonomy, but it did not acknowledge that many of those same sources have specific statements condemning abortion. For instance, *Hodes* quoted William Blackstone's *Commentaries on the Laws of England* for the proposition that life, liberty, and property are "absolute" rights, meaning rights "not dependent upon the will of the government."[14] But *Hodes* did not acknowledge that Blackstone, in the same work—indeed, in the same page range cited by *Hodes*—called abortion after quickening

8. *Cf.* BARNETT, *supra* note 4, at 71 ("When 'surrendering' one's executive power to the government, however, one receives in return a 'civil' right to have one's retained rights protected by the police power now in the hands of the civil government. This civil right to 'the protection of the laws,' is the root of the Equal Protection Clause of the Fourteenth Amendment that mandates that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.'").

9. BARNETT, *supra* note 4, at 70–71, 330–32; *see also* James Wilson, *Of the Natural Rights of Individuals* (lecture given between 1790–92), *reprinted in* 2 THE WORKS OF JAMES WILSON 335 (1896) ("I here close my examination into those natural rights, which, in my humble opinion, it is the business of civil government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain.").

10. *See* BARNETT, *supra* note 4.

11. Hodes v. Schmidt, 440 P.3d 461, 480–81 (Kan. 2019) (per curiam).

12. *Id.* at 466.

13. *Id.*

14. *Id.* at 481 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *123, *129–38 (1765)).

a "heinous misdemeanor."[15] At other points, *Hodes* utilized specific statements from these commentators about the right to bodily autonomy in other contexts while never acknowledging they addressed abortion. For example, the court noted that "Edward Coke observed that an ordinance setting requirements on the clothes that certain merchants could wear was against the law of the land, 'because it was against the liberty of the subject, for every subject hath freedom to put his clothes to be dressed by whom he will.'"[16] While this statement is specific, it is seemingly irrelevant, especially given that Coke made specific statements condemning abortion.[17] Furthermore, *Hodes* did not address several sources contradicting its conclusion. For example, James Wilson, a key founding father, natural law scholar, and one of the first justices to sit on the U.S. Supreme Court, stated:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.[18]

Bluntly stated, *Hodes*' analysis of the historical record is wrong.

Furthermore, *Hodes*' reliance on general statements to the exclusion of specific statements, in combination with its reliance on specific statements made in a context unrelated to abortion, contravenes reason and has created a precedent that could lead to absurd results. For example, assisted suicide is arguably a constitutional right in Kansas after *Hodes*.[19] We conclude that judges must exercise caution and restraint before they acknowledge a natural right.

Moreover, *Hodes* is significant for several reasons. First, clauses like Section 1 of the Kansas Bill of Rights, which are often called "natural rights guarantees,"[20] exist in thirty-three other state constitutions.[21]

---

15. BLACKSTONE, *supra* note 14, at *130 (original publication contains "heinous mifdemefnor").

16. *Hodes*, 440 P.3d at 481 (quoting ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 47–48, 150 (1957)).

17. *Infra* Part II.B.2.

18. Wilson, *supra* note 9, at 316 (citation omitted).

19. *Infra* Part I.B.

20. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1303 (2015).

21. Other states include: Alabama (ALA. CONST. art. I, § 1), Alaska (ALASKA CONST. art. 1, § 1), Arkansas (ARK. CONST. art. 2, § 2), California (CAL. CONST. art. 1, § 1), Colorado (COLO.

Second, the Kansas Supreme Court in construing Section 1 recognized a broader right than afforded by the Fourteenth Amendment.[22] Third, *Hodes* represents a change in how these natural rights guarantees are utilized. Before the Reconstruction Amendments, natural rights guarantees in the states played an important role in American jurisprudence;[23] however, in the twentieth century, these rights were generally construed in lockstep with the Fourteenth Amendment.[24] Indeed, some states, such as Illinois, have treated natural rights guarantees as "mostly hortatory, stating ideals rather than setting specific standards."[25] Fourth, *Hodes* indicates a strategic shift in pro-choice impact litigation. Litigants, recognizing that federal forums are becoming increasingly hostile, are turning to state courts.[26]

This Article proceeds in three parts. In Part I, we provide an overview of *Hodes* and discuss its absurd breadth.[27] In Part II, we examine several of the historical sources on which *Hodes* relied.[28] We demonstrate that many of these sources contain specific statements condemning abortion that were not acknowledged. We argue that these specific statements should have governed if the court was going to rely on these sources. At a minimum, the court should have explained why the specific statements did not govern. Additionally, we consider several sources not addressed in *Hodes*. In Part III, we analyze the implications of *Hodes* and why its misuse of historical sources matters.[29]

CONST. art. 2, § 3), Florida (FLA. CONST. art. 1 § 2), Georgia (GA. CONST. art. 1, § 1, ¶ I), Hawaii (HAW. CONST. art. 1, § 2), Idaho (IDAHO CONST. art. I, § 1), Illinois (ILL. CONST. art. 1, § 1), Indiana (IND. CONST. art. 1, § 1), Iowa (IOWA CONST. art. 1, § 1), Maine (ME. CONST. art. 1, § 1), Massachusetts (MASS. CONST. Pt. 1, art. 1), Missouri (MO. CONST. art. 1, § 2), Montana (MONT. CONST. art. 2, § 3), Nebraska (NEB. CONST. art. I, § 1), Nevada (NEV. CONST. art. 1, § 1), New Hampshire (N.H. CONST. Pt. 1, art. 2), New Jersey (N.J. CONST. art. 1, ¶ 1), New Mexico (N.M. CONST. art. 2, § 4), North Carolina (N.C. CONST. art. I, § 1), North Dakota (N.D. CONST. art. 1, § 1), Ohio (OHIO CONST. art. 1, § 1), Oklahoma (OKLA. CONST. art. 2, § 2), Oregon (OR. CONST. art. I, § 1), Pennsylvania (PA. CONST. art. 1, § 1), South Dakota (S.D. CONST. art. 6, § 1), Utah (UTAH CONST. art. 1, § 1), Vermont (VT. CONST. Ch I, art. 1), Virginia (VA. CONST. art. 1, § 1), West Virginia (W. VA. CONST. art. 3, § 1), and Wisconsin (WIS. CONST. art. 1, § 1).

22. Hodes v. Schmidt, 440 P.3d 461, 472 (Kan. 2019) (per curiam).

23. *See generally* Calabresi & Vickery, *supra* note 20.

24. *E.g.*, Cty. of Kenosha v. C & S Mgmt, Inc., 588 N.W.2d 236 (Wis. 1999); Sheriff of Houston County v. Albertson's, Inc., 402 So.2d 912 (Ala. 1981).

25. ILL. LEGISLATIVE RESEARCH UNIT, 1970 ILLINOIS CONSTITUTION, ANNOTATED FOR LEGISLATORS (5th ed. 2018), https://www.ilga.gov/commission/lru/ILConstitution2018.pdf [https://perma.cc/G6QZ-WPYN].

26. *Infra* Part III.A.

27. *See infra* Part I.

28. *See infra* Part II.

29. *See infra* Part III.

I. *HODES* AND ITS BREADTH

A. *An Overview of* Hodes

The dispute in *Hodes* began with the enactment of Senate Bill 95, the Kansas Unborn Child Protection from Dismemberment Abortion Act (Bill 95).[30] Bill 95 was intended to prohibit a specific abortion method—Dilation and Evacuation (D&E)—except when "necessary to preserve the life of the pregnant woman" or to prevent a "substantial and irreversible physical impairment of a major bodily function of the pregnant woman."[31] For context, Bill 95 referred to D&E abortions as "dismemberment abortion[s]," which it defined as:

> [W]ith the purpose of causing death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body in order to cut or rip it off.[32]

Physicians who performed abortions challenged Bill 95 and sought an injunction to preclude the law from taking effect.[33] The crux of their argument was that D&E is the safest method of abortion during the second trimester and, therefore, Bill 95 restricted the right to procure an abortion in violation of Section 1 of the Kansas Bill of Rights.[34] In other words, the physicians argued that the restrictions "infringe[d] on inalienable natural rights, specifically, the right to liberty."[35] This framed the issue in such a way that the question squarely before the court was whether women have a natural right to procure an abortion protected by the Kansas Constitution.

In a *per curiam* opinion, the Kansas Supreme Court accepted the

30. 2015 Kan. Sess. Laws Ch. 22.

31. KAN. STAT. ANN. § 65-6743(a) (2019).

32. KAN. STAT. ANN. § 65-6742(b)(1) (2019). With the enactment of Bill 95, Kansas sought to join other states that had restricted D&E. Notably, Mississippi and West Virginia have D&E bans currently in force. *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST. (Updated July 1, 2020), https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester [https://perma.cc/M4FW-PVE3]. Several other states have enacted similar legislation that has been temporarily or permanently enjoined. *Id.*

33. Hodes v. Schmidt, 440 P.3d 461, 467 (Kan. 2019) (per curiam).

34. *Id.* at 466-67. The physicians also challenged Bill 95 under Section 2 of the Kansas Bill of Rights, which provides, in relevant part: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." KAN. CONST. Bill of Rights § 2. Notably, *Hodes* relied exclusively on Section 1 to reach its conclusion. *Hodes*, 440 P.3d at 467.

35. *Id.* at 467.

physicians' argument and upheld the trial court's decision to temporarily enjoin Bill 95.[36] The opinion is lengthy, but its reasoning can be distilled into three components: (1) the court, relying on some of the most influential jurists and philosophers in legal history, noted that people have a "right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination";[37] (2) this natural right to bodily autonomy, the court said, is "[a]t the heart of a natural rights philosophy";[38] and (3) therefore, the court concluded, the natural right to bodily autonomy "allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy."[39]

The court further noted that a woman's right to procure an abortion was broader under Section 1 than under the Fourteenth Amendment.[40] U.S. Supreme Court precedent has established an "undue burden" test to review restrictions on abortion.[41] The Kansas Supreme Court rejected the undue burden test and instead reviewed Bill 95 under a more stringent standard of review: strict scrutiny.[42] But it failed to examine the implications of a right so broadly construed.[43]

B. *Hodes' Breadth*

Hodes started with an uncontroversial premise—that a woman has a natural right to "continue a pregnancy"—and reached a controversial conclusion: that a woman has a natural right to end a pregnancy. Shortly after *Hodes*, a professor at Friends University in Wichita, Kansas, noted that the decision was "anything but simple."[44] He also stated that "an inalienable natural guarantee of complete bodily autonomy" is a "rather audacious thing for a state court to claim[.]"[45] We agree.

One problem with *Hodes* is that it articulated a view of the right to bodily autonomy that has traditionally been rejected. *Hodes* ignored that the natural right is limited by various natural duties, such as the duty of

---

36. *Id.* at 466.

37. *Id.*

38. *Id.* at 483.

39. *Id.* at 502.

40. *Hodes*, 440 P.3d at 472.

41. Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833, 915–17 (1992) (plurality opinion).

42. *Hodes*, 440 P.3d at 496.

43. For a recent law review article speculating about the implications, see Richard E. Levy, *Constitutional Rights in Kansas After Hodes & Nauser*, 68 KAN. L. REV. 743 (2020).

44. Russell Arben Fox, Opinion, *Kansas Supreme Court's Abortion Decision Is More Complex than the Political Arguments*, WICHITA EAGLE (May 5, 2019), https://www.kansas.com/opinion/guest-commentary/article230003034.html.

45. *Id.*

self-preservation.[46] How these duties shape the contours of the right is hard to determine. However, there are two clear principles: (1) the right limits what the State can do to a person's body without consent, and (2) the right is not without limits in the case of morally suspect actions.

First, unquestionably, the right to bodily autonomy provides a shield of protection from the State. For example, the State cannot forcefully medicate an individual without an "essential" or "overriding" state interest and due process.[47] Nor can the State force a person to donate body parts even if doing so would save the life of another and have minimal long-term consequences for the person.[48]

But, second, the right to bodily autonomy does not prevent the State from limiting what people can do with their bodies insofar as the decisions in question are morally suspect. For example, government can prohibit people from using drugs.[49] Additionally, it can prohibit euthanasia.[50] Indeed, suicide was illegal at common law.[51] As Blackstone explained:

> [T]he law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself.[52]

The version of the right to bodily autonomy discussed in *Hodes* is simply inaccurate because *Hodes* implied that the right is limitless.[53]

Hodes attempted to rely on the first principle, but it ignored the second. The court repeatedly referred to a woman's right to "continue a pregnancy"[54] as if the issue were whether the government could force a woman to receive an abortion. But that was not the issue. And insofar as the government was forcing women to continue their pregnancy, an analogous argument could be made when a person wants to die: the State is forcing that person to live by prohibiting euthanasia. Simply put,

---

46. Valerie L. Myers, Note, *Vacco v. Quill and the Inalienable Right to Life*, 11 REGENT U. L. REV. 373, 392 (1998).

47. *E.g.*, Sell v. United States, 539 U.S. 166 (2003).

48. McFall v. Shimp, 10 Pa. D. & C. 3d 90, 92 (1978).

49. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

50. Washington v. Glucksberg, 521 U.S. 702, 706 (1997).

51. *Id.* at 711–12.

52. BLACKSTONE, supra note 14, vol. 4, at *189 (1769).

53. *See Hodes*, 440 P.3d at 491–92.

54. *Id.* at 470–71.

contrary to the implications of *Hodes*, the right to bodily autonomy should not be understood as a license for individuals to do whatever it is they please with their bodies, free of all moral considerations.[55]

And by ignoring the second principle, *Hodes* did not perform a thorough analysis. Specifically, it did not consider whether a woman's right to bodily autonomy is limited in any way.[56] Relying on a U.S. Supreme Court case, *Hodes* noted that a fetus is not a "person" and simply assumed that a fetus has no rights of its own.[57] But *Hodes* was quick to perform other parts of its analysis independent of U.S. Supreme Court cases, so *Hodes* seemingly should have independently analyzed whether a fetus has rights. Had *Hodes* looked to the same sources it used to define the right to bodily autonomy to determine whether a fetus possesses rights, it would have struggled to explain that a fetus post-quickening lacks any moral consideration that might justify government intervention.[58]

Ignoring the second principle has practical implications. If a person wants to take his or her life, what interest does the State have in preventing him or her in a post-*Hodes* Kansas? Suicide is seemingly between the individual and his or her doctor under *Hodes*.[59] Similarly, is medical self-defense now legal in Kansas?[60] Can Kansas require citizens to wear seatbelts or, in the age of COVID-19, face coverings?

Indeed, Professor Richard E. Levy, who teaches constitutional law at the University of Kansas School of Law, has indicated that a fair reading of *Hodes* supports a "right to die."[61] Another Kansas professor has argued that, because *Hodes* based the natural right to procure an abortion on the right to bodily autonomy, it introduced:

---

55. Ryan T. Anderson, *Physician-Assisted Suicide Betrays Human Dignity and Violates Equality Before the Law*, THE HERITAGE FOUND. (May 11, 2015), https://www.heritage.org/health-care-reform/report/physician-assisted-suicide-betrays-human-dignity-and-violates-equality.

56. *See generally Hodes*, 440 P.3d. at 467–69.

57. *Id*. at 467 (citing Roe v. Wade, 410 U.S. 113, 157–58 (1973)).

58. *E.g.*, BLACKSTONE, *supra* note 14, at *129 ("Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.").

59. *See Hodes*, 440 P.3d at 484 ("At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life. Each of us has the right to make self-defining and self-governing decisions about these matters.").

60. Medical self-defense is the right to purchase drugs that have not been fully approved by a government entity. *See generally* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007) (discussing the use of medical self-defense to assist terminal patients with obtaining permission to take experimental drugs).

61. Levy, *supra* note 43, at 775–76.

> [A] host of questions that the court provides no guidance for. (Is "bodily integrity" to be understood as solely referring to the right of women to control their own pregnancies, or does it also imply that any Kansas law which places restrictions on what people choose to do with their bodies—like, that I must clothe my body while in public places, or that a child's body must be vaccinated before she attends elementary school—must be presumed to be unconstitutional?)[62]

Hodes did not deal with the breadth of its reasoning. It appears to contain no limiting principle.[63]

II. CLARIFYING THE HISTORICAL RECORD

Hodes' breadth is attributable, partly, to its failure to understand the historical record on which it relied. Our purpose in this Part is to describe the unsound way that *Hodes* reached its conclusion that the natural right to bodily autonomy includes a woman's right to terminate a pregnancy. *Hodes* relied on several historical sources that acknowledge a natural right to bodily autonomy; however, with respect to abortion, the sources restrict that right because they consider the fetus to have its own natural rights. Furthermore, while *Hodes* occasionally utilized specific statements from these authorities, it utilized specific statements unrelated to abortion—an odd analysis indeed. In addition, we provide several sources—never mentioned in *Hodes*—that demonstrate that the right to bodily autonomy does not include the right to procure an abortion. We also argue that specific statements must govern over general statements if a court is going to justify its opinion by reference to historical authorities. At a minimum, the court should have explained why the specific statements did not impact or govern its analysis.

A. *Why* Hodes *Cited Historical Sources*

Interestingly, *Hodes* acknowledged the legitimacy that reference to historical sources can bring. It stated:

> [T]he Doctors assert that the following natural rights underlie the right of a woman to decide whether to continue a pregnancy: personal autonomy and decision-making about issues that affect one's physical health, family formation, and family life. To test these assertions, we look to the *historical and philosophical* basis for considering those rights as "natural."[64]

---

62. Fox, *supra* note 44.
63. *See Hodes*, 440 P.3d at 517 (Stegall, J., dissenting).
64. *Id.* at 480 (per curiam) (emphasis added).

The historical authorities *Hodes* cited are all pillars of Western legal and political thought. One scholar has stated that "Locke is generally considered by American historians and legal scholars alike as a major influence on the leaders of the American Revolution."[65] The former dean of the Ave Maria School of Law once wrote that "no writer in the intervening period approached Lord Coke in providing as complete and authoritative [an] overview of the common law."[66] And, just this past term, in an opinion authored by Justice Elena Kagan, the U.S. Supreme Court described Blackstone's influence on the American founding generation as "the most profound."[67] In essence, *Hodes* referenced these sources because it recognized the gravitas associated with citing them.

But if a court is going to use such sources, it must use them faithfully. For instance, *Hodes* asserted that "[t]he philosophy of Locke and others recognized personal autonomy and bodily integrity as natural rights."[68] That is true, but these commentators—specifically, (1) John Locke; (2) Edward Coke; and (3) William Blackstone—condemned abortion; a point never mentioned in *Hodes*. Notably, numerous briefs were filed in *Hodes*, but none of them referred to these commentators.[69] Therefore, *Hodes* cited them *sua sponte*, and the check inherent to the adversarial system never occurred.[70] Part of our purpose is to provide that check.[71]

---

65. H. Wayne House, *A Tale of Two Kingdoms: Can There Be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU J. PUB. L. 203, 226 (1999).

66. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 776–77 (2004).

67. Kahler v. Kansas, 140 S. Ct. 1021, 1041 (2020).

68. *Hodes*, 440 P.3d at 480.

69. *See* Appellate Briefs, Hodes v. Schmidt, 440 P.3d 461 (Kan. 2019) (No. 114,153).

70. *Hodes*, 440 P.3d at 480.

71. The dissent did not focus on the sources cited by the *per curiam* opinion, but it did note that:

> Reading today's majority opinion is a follow-the-white-rabbit experience. One is left feeling like Alice, invited by the Queen to believe "as many as six impossible things before breakfast." Indeed, the story told by the majority is a strange one. In it, all the luminaries of the western legal tradition—from Sir Edward Coke and William Blackstone to Edmund Burke and Thomas Jefferson—would celebrate and enshrine a right to nearly unfettered abortion access. In this imagined world, the Liberty Bell rings every time a baby *in utero* loses her arm.

Id. at 517 (Stegall, J., dissenting) (citation omitted). We speculate that the dissent's statement was born out of an implicit recognition that the *per curiam*'s use of these jurists and philosophers was, at best, incomplete.

B. The Authorities Hodes Misapplied

1. John Locke

Hodes quoted the second volume of Locke's *An Essay Concerning Human Understanding* for its proposition that: "so far as a man has power to think, or not to think: to move or not to move, according to the preference or direction of his own mind; so far is a man free."[72] *Hodes* did not acknowledge that the first volume of Locke's work explicitly condemned abortion:

> When it shall be made out, that men ignorant of words, or untaught by the laws and customs of their country, know that it is part of the worship of God, Not to kill another man; Not to know more women than one; *Not to procure Abortion*; not to expose their Children; Not to take from another what is his, though we want it ourselves, but on the contrary, relieve and supply his wants; and whenever we have done the contrary, we ought to repent, be sorry, and resolve to do so no more; When, I say, all men shall be proved actually to know and allow all these and a thousand other such rules, all which come under these two general words made use of above, viz. *virtutes & peccata*, virtues and sins, there will be more reason for admitting these and the like, for common notions and practical principles.[73]

Professor Eric Manchester, a pro-life academic, citing this passage, has explained that Locke "list[ed] abortion among the most obviously immoral actions. Incredibly, this comment seems to have gone almost unnoticed by scholars."[74]

Hodes also quoted the second volume of Locke's *Two Treatises of Government* for the proposition that "every Man has a *Property* in his own Person."[75] Reliance on this work is problematic for two reasons. First, *Hodes* never considered that Locke might have believed in the personhood of the fetus. In one letter, Locke wrote, "[f]or since from the first conception and beginning of formation, [an embryo] has life."[76]

---

72. *Id.* at 480 (per curiam) (quoting JOHN LOCKE, 2 AN ESSAY CONCERNING HUMAN UNDERSTANDING, ch. 1, § 8 (27th ed. 1836) (1690) [hereinafter HUMAN UNDERSTANDING]

73. HUMAN UNDERSTANDING, *supra* note 73, at ch. 3, § 19 (first emphasis added).

74. Eric Manchester, *Locke on Bodily Rights and the Immorality of Abortion: A Neglected Liberal Perspective*, *in* 16 U. FAC. LIFE & LEARNING CONF. PROC. 383, 384 (Joseph W. Koterski ed. 2006), http://www.uffl.org/vol16/manchester06.pdf [https://perma.cc/Q4UZ-MWN7].

75. *Hodes*, 440 P.3d at 480 (quoting JOHN LOCKE, 2 TWO TREATISES OF GOVERNMENT § 27 (1690) [hereinafter TWO TREATISES]).

76. JOHN LOCKE, 2 THE WORKS OF JOHN LOCKE 77 (Scientia Verlag Aalen 1963).

Locke was a medical doctor, so he was versed in these matters.[77] As one article summarized, "[t]he study of Locke's medical ethics confirms that he was a deontologist who opposed all suicide and abortion through much of pregnancy."[78] The article considered many versions of the Hippocratic Oath from Locke's era.[79] For example, one version, published in 1586, provided: "That I shall not (although I be thereunto required) give deadly poison to any person; neither counsel the same to any other; nor give it to any woman being with child, to kill the infant in her womb."[80] Given Locke's medical background, some passages in *Two Treatises of Government* can, arguably, be interpreted to support the personhood of a fetus.[81]

Second, Locke did not believe that people had an absolute property right in their person.[82] He believed that God was the true owner of a person's body.[83] For this reason, quite famously, Locke condemned suicide in the second volume of *Two Treatises of Government*:

> [The] freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together: for a man, *not having the power of his own life*, cannot, by compact or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases. *No body can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it*.[84]

Hodes did not contend with the limits on the right to bodily autonomy outlined in Locke's *Two Treatises of Government*. As already mentioned, under a fair reading of *Hodes*, assisted suicide is now legal in Kansas.[85] But, no doubt, Locke would have disagreed with such a broad understanding of bodily autonomy.

---

77. Bradford William Short, *The Healing Philosopher: John Locke's Medical Ethics*, 20 ISSUES L. & MED. 103 (2004).

78. *Id.*

79. *Id.* at 121–25.

80. *Id.* at 123 (quoting THOMAS NEWTON, THE OLDE MANS DIETARIE (London 1586)).

81. *Id.* at 127.

82. *See* TWO TREATISES, *supra* note 75, at ch. 4, § 23.

83. *See id.* at ch.14, § 168 ("God and nature never allowing a man so to abandon himself, as to neglect his own preservation: and since he cannot take away his own life, neither can he give another power to take it.").

84. *Id*. at ch. 4, § 23 (emphasis added).

85. *Supra* Part I.B.

2. Edward Coke

Hodes also referenced Coke's *Institute of the Lawes of England*.[86] Specifically, *Hodes* stated: "Edward Coke observed that an ordinance setting requirements on the clothes that certain merchants could wear was against the law of the land, 'because it was against the liberty, for every subject hath freedom to put his clothes to be dressed by whom he will.'"[87] But in the third volume of the same work, Coke explained: "If a woman be quick with child[], and by a potion or otherwi[s]e killeth it in her womb[]; or if a man beat her, whereby the child[] dieth in her body, and [s]he is delivered a dead child[], this is a great mi[s]pri[s]ion, and no murder . . . ."[88] By "great misprision," Coke meant "serious misdemeanor."[89]

The use of Coke in *Hodes* is particularly strange. *Hodes* cited Coke's views on the legality of an ordinance regulating merchant attire.[90] We believe that context is illustrative of just how useless the referenced material is for establishing a natural right to procure an abortion. The entirety of the referenced passage is clearly about the illegality of monopolies. Whether the passage is even about the right to bodily autonomy is debatable. We think a fairer reading is that it is about economic liberty:

This word, *libertates*, liberties, hath three [s]ignifications:

> 1. Fir[s]t, as it hath been [s]aid, it [s]ignifieth the Laws of the Realm, in which re[s]pect this Charter is called, *Charta libertatum*.
>
> 2. It [s]ignifieth the freedoms that the Subjects of England have; For example, the Company of the *Merchant Tailors of England*, having power by their Charter to make Ordinances, made an Ordinance, that every brother of the [s]ame Society [s]hould put the one half of his clothes to be dre[ss]ed by [s]ome Clothmaker free of the fame Company, upon pain to forfeit [etc.] and it was adjudged that this Ordinance was again[s]t Law, becau[s]e it was again[s]t the Liberty of the Subject, for every Subject hath freedom to put his clothes to be dre[ss]ed by whom he will, *&* [*s*]*ic de* [*s*]*imilibus*: And [s]o it is, if [s]uch or the like grant had been made by his Letters Patents.

---

86. *See* Hodes v. Schmidt, 440 P.3d 461, 481 (Kan. 2019) (per curiam).

87. *Id.* (quoting POUND, *supra* note 16, at 47–48, 150).

88. EDWARD COKE, 3 INSTITUTE OF THE LAWES OF ENGLAND 50 (London 1648).

89. Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 553 (2017) (citing Roe v. Wade, 410 U.S. 113, 156–57).

90. *Hodes*, 440 P.3d at 481.

> 3. Liberties [s]ignifieth the franchi[s]es, and priviledges, which the Subjects have of the gift of the King, as the goods, and chattels of felons, outlaws, and the like, or which the Subject claims by prescription, as wreck, waif, [s]tray, and the like.
>
> So likewi[s]e, and for the [s]ame rea[s]on, if a grant be made to any man, to have the [s]ole making of Cards, or the [s]ole dealing with any other trade, that grant is against the liberty, and freedom of the Subject, that before did, or lawfully might have u[s]ed that trade, and con[s]equently again[s]t this great Charter.
>
> Generally all monopolies are again[s]t this great Charter, because they are again[s]t the liberty and freedom of the Subject, and again[s]t the Law of the Land.[91]

To reference this passage in a case about abortion, while not acknowledging a specific statement on abortion in the same work, leaves us dumbfounded. Coke would have likely taken grave issue with *Hodes*'s conclusion given his own statements on abortion and the statements *Hodes* used from Coke concerning his opinions on an ordinance regulating merchant attire are beside the point.

3. William Blackstone

Hodes further perpetuated its error by relying on Blackstone. It stated:

> William Blackstone in his Commentaries identified the private rights to life, liberty, and property as three "absolute" rights—so called because they "appertain[ed] and belong[ed] to particular men, merely as individuals," not "to them as members of society [or] standing in various relations to each other"—that is, not dependent upon the will of the government.[92]

However, in his first volume, Blackstone also wrote:

> I. THE right of per[s]onal [s]ecurity con[s]i[s]ts in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.
>
> 1. LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as [s]oon as an infant is able to [s]tir in the mother's womb. For if a woman is quick with child, and by a potion,

---

91. COKE, *supra* note 88, vol. 2, at 47.

92. *Hodes*, 440 P.3d at 481 (quoting BLACKSTONE, *supra* note 14, at *123, *129–38) (alterations in original).

> or otherwi[s]e, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and [s]he is delivered of a dead child; this, though not murder, was by the an[c]ient law homicide or man[s]laughter. But Edward Coke doth not look upon this offence in quite [s]o atrocious a light, but merely as a heinous mi[sdemeanor].
>
> AN infant *in ventre* [*s*]*a mere*, or in the mother's womb, is [s]uppo[s]ed in law to be born for many purpo[s]es.[93]

We note that this passage about abortion begins at the end of page 129 of his first volume, and the court cited page 123 and pages 129 to 138.[94] That is to say, Blackstone's statement on abortion is in the same page range considered by the court.

In a different volume of the same work, Blackstone further wrote:

> To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems . . . to be murder in such as administered or gave them.[95]

Blackstone, no doubt, also would have contested *Hodes*' conclusion that a natural right to procure an abortion exists.

C. *Sources Not Acknowledged in* Hodes

In addition to many of the sources cited by *Hodes*, several other sources contradict its conclusion. That is to say, the debate about whether there is a natural right to procure an abortion is not a close call. And had the court taken the time to examine the historical record, it surely would have noticed that.

Several commentators on English law wrote that abortion was a criminal act. Sir Matthew Hale authored *The History of the Pleas of the Crown*, which was published in 1736.[96] His work provided that abortion "is not murder nor man[s] laughter by the law of *England*, becau[s]e [the child] is not yet *in rerum natura*, tho it be a great crime."[97] Around the same time, William Hawkins, author of *A Treatise of the Pleas of the Crown*, wrote: "And it was anciently holden, that the cau[s]ing of an abortion, by giving a potion to, or [s]triking a woman big with child, was

93. BLACKSTONE, *supra* note 14, at *129–30.
94. *Id.*; *Hodes*, 440 P.3d at 481.
95. BLACKSTONE, *supra* note 14, vol. 4, at *198 (citation omitted).
96. MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN (London 1736).
97. *Id.* at 433.

murder. But at this day it is [s]aid to be a great mi[s]pri[s]ion . . . ."[98] A few decades later, Sir William Oldnall Russell, author of *A Treatise on Crime and Misdemeanors*, explained:

> We have already seen, that an infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder.[] An attempt, however, to effect the destruction of such an infant, though unsuccessful, appears to have been treated as a misdemeanor at common law.[99]

English commentators are not the only ones to have condemned abortion. Notably, there were several prosecutions in the colonies for abortion. Professor Joseph W. Dellapenna, a law professor and historian, has dedicated substantial time documenting these prosecutions.[100] Additionally, modern scholars have cited statutes from the colonial period, such as a 1716 law from New York City that criminalized "administer[ing] any herb medicine or potion or any other thing to any woman being with child whereby she should destroy or miscarry."[101] James Wilson, a key founding father, natural law scholar, and one of the first justices to sit on the U.S. Supreme Court, notably condemned abortion.[102]

Even the earliest sources of common law were against abortion. The *Leges Henrici Primi*, or *Laws of Henry I*, is traced to approximately 1114 A.D. The leading translation was edited by L.J. Downer, who commented:

> [T]he work is something of a mixture, made up of the old traditional law, the developing feudal principles, and provisions based on royal supremacy, as a result of which government and the administration of justice are more and more centralized. The picture accords well with evidence available from other sources, and it shows a continuing progress of the law in an age when the common law can at

98. WILLIAM HAWKINS, 1 A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 188 (7th ed.) (London 1795).

99. WILLIAM OLDNALL RUSSELL, 1 A TREATISE ON CRIMES AND MISDEMEANORS *671 (2d ed. 1850).

100. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 215–28 (2006).

101. Duane L. Ostler, *A Conversation About Abortion Between Justice Blackmun and the Founding Fathers*, 29 CONST. COMM. 167, 168–69 (2014) (internal quotation omitted) (quoting 3 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK, 1675–1776, at 122 (1905)).

102. Wilson, *supra* note 9, at 316.

best be described as only formative.[103]

The historian Patrick Wormald said the work "has had more effect on views of English law before Henry II than any other."[104] The first complete print of the work occurred in 1644.[105] Before this, great scholars and legal minds such as Coke had studied it.[106]

The *Leges Henrici Primi* states:

> If a pregnant woman is slain, and the child in her is living, each shall be compensated for by the full *wergeld*.
>
> If the child is not yet living, half the *wergeld* shall be paid to the relatives, based on the paternal relationship.
>
> . . . .
>
> Women who commit fornication and destroy their embryos, and those who are accessories with them, so that they abort the fetus from the womb, are by an ancient ordinance excommunicated from the church until death.
>
> A milder provision has now been introduced: they shall do penance for ten years.
>
> A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess.[107]

Henry de Bracton was an English judge on the court of *coram rege*, later known as the King's Bench, from 1247–1250 and again from 1253–1257 A.D.[108] He is generally credited with authoring a long treatise titled *De Legibus et Consuetudinibus Angliae,* or *On the Laws and Customs of England*.[109] One legal historian has called the treatise "the crown and

---

103. L.J. DOWNER, INTRODUCTION TO LEGES HENRICI PRIMI 7 (L.J. Downer ed. & trans. 1972); *see also* Steven D. Sargent, An examination of the laws of William the Conqueror 20 (Aug. 1976) (unpublished M.A. thesis, University of Massachusetts Amherst) (on file with the Masters Theses 1911 – February 2014, University of Massachusetts Amherst), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=3071&context=theses [https://perma.cc/N758-WATF] ("In spite of its name, the work is not a collection of legislative decrees of Henry I. It is instead a diligent attempt to systematize and record the law in force during the king's reign, a work of broad scope and comprehensive intention."").

104. PATRICK WORMALD, MAKING OF ENGLISH LAW 411 (1999).

105. DOWNER, *supra* note 103, at 73.

106. *Id.* at 74.

107. DOWNER, *supra* note 103, at 222–23.

108. Bracton Online, *Bracton: On the Laws and Customs of England*, HARV. L. SCH. LIB. (Apr. 2003), http://amesfoundation.law.harvard.edu/Bracton/index.html [https://perma.cc/2KU8-GUX5].

109. Some historians believe others wrote parts of the work. *Id.*

flower of English jurisprudence."[110]

The work mentions abortion twice:

> 1. "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide."[111]
>
> 2. "If anyone forcibly interferes with a woman's internal organs in order to produce abortion, he is liable."[112]

The first quote has been particularly influential. For example, WM. L. Burdick—who was once the Dean of the University of Kansas School of Law—in his twentieth-century treatise, *The Law of Crime*, argued abortion was a "crime against nature."[113] He explained:

> Abortion, when used as the name of a crime, is often defined as the unlawful and intentional causing or procuring the miscarriage of a pregnant woman, or, as otherwise said, unlawfully causing the delivery or expulsion of the human fetus prematurely, or before it is capable of sustaining life. As a crime it is very ancient, punishable by both the Mosaic and the Roman law. In the latter days of the Roman republic one who administered medicines to procure abortion was, by the Lex Cornelia, punishable by banishment or condemned to labor in the state mines, and if the woman died the penalty was death. Under the laws of Severus, in imperial times, women who procured abortion upon themselves were sentenced to exile.[114]

He rejected the common misconception that the crime of abortion "is found only in modern treatises and modern statutes. No trace of it is to be found in ancient common law writers."[115] He began with *De Legibus et Consuetudinibus Angliae* and traced its influence to Coke and then to Hale, Hawkins, and ultimately Blackstone.[116] He concluded that all these commentators agreed, "that a consummated abortion whereby a 'quickened child' is killed is 'a great crime.'"[117]

The *Fleta: Seu Commentarius Juris Anglicani*, or *On the Common*

---

110. *Id.*

111. 2 ON THE LAWS AND CUSTOMS OF ENGLAND 341 (attributed to Henry de Bracton, 1210–1268 A.D.) (S. Thorne trans.), http://amesfoundation.law.harvard.edu/cgi-bin/bracthilite.cgi?Unframed+English+2+341+abortion.

112. *Id.* at 408.

113. WILLIAM L. BURDICK, 3 THE LAW OF CRIME 263–93 (1946).

114. *Id.* at 263.

115. *Id.* at 265 (citation omitted).

116. *Id.* at 266.

117. *Id.* at 266–67.

Law of England, is an anonymous work traced to approximately 1290 A.D.[118] The *Encyclopedia Britannica* explains:

> FLETA, a treatise, with the sub-title *seu Commentarius juris Anglicani*, on the common law of England. It appears from internal evidence, to have been written in the reign of Edward I., about the year 1290. It is for the most part a poor imitation of Bracton. The author is supposed to have written it during his confinement in the Fleet prison, hence the name. It has been conjectured that he was one of those judges who were imprisoned for malpractices by Edward I.[119]

Blackstone said that "students of the common law" paid "great veneration and respect" to the *Fleta*.[120]

The *Fleta* provides:

> Moreover, whoever shall have overlain a pregnant woman, or who shall have given her drugs or blows, in such sort as to procure abortion, or non-conception after the foetus shall have been already formed and endowed with life, is, by law, a homicide: And in like manner, whoever shall have given or taken drugs to the intent that no generation or conception may take place: Also the woman doeth homicide, who, by potions and things of that sort, shall have destroyed her animate child in her womb.[121]

Indeed, until the twentieth century, few sources explicitly tolerated abortion. However, we do need to acknowledge two sources that support the position that abortion was not a crime recognized by common law. The first work, *The Mirror of Justices*, was published in approximately 1285 A.D.[122] The work is often attributed to Andrew Horn, a fishmonger, lawyer, and legal scholar.[123] Blackstone stated Horn was "one of the most learned lawyers of his day."[124] However, Blackstone's praise was reserved for another one of Horn's works, *Liber Horn*, and not *The Mirror of Justices*.[125] With that context in mind, *The Mirror of Justices*

118. *Fleta*, ENCYCLOPEDIA BRITANNICA (1911).

119. *Id.*

120. *Introduction* to BLACKSTONE, *supra* note 14, at *72.

121. This is a translation of sections of the *Fleta* provided in HORATIO R. STORER & FRANKLIN FISKE HEARD, 2 CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 151 LAW 151–52 (1868).

122. ANDREW HORN, THE MIRROR OF JUSTICES (attributed to Andrew Horn) (approximately 1285), *reprinted in* 7 SELDEN SOC'Y 139 (William Joseph Whittaker ed., 1895).

123. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PENN. L. REV. 782 (1957).

124. BLACKSTONE, *supra* note 14, at *lix.

125. *Id.*

stated that abortion cannot be homicide because "no one can be adjudged an infant until he has been seen in the world so that it may be known whether he is a monster or no."[126]

The Mirror of Justices has been discredited. Professor Dellapenna, whose scholarship is perhaps the most comprehensive overview of the legal history of abortion, explains:

> We need not worry too much about the meaning of this passage for the two great English legal historians, Frederick Pollock and Frederic Maitland, writing in general terms and without concern about abortion, dismissed *The Mirror* out of hand as "so full of fables and falsehoods that as an authority it is worthless."[127]

The second work is *Britton*. Its authorship is disputed, but the work was written in approximately 1290–1292 A.D.[128] It suggested that abortion was not a crime because "the name of the person against whom the felony was committed" could not be "set forth."[129] Professor Dellapenna has argued that *Britton* was incorrect because it did not account for a new legal instrument: the indictment.[130] As he explained, "indictment was, then as now, a prosecution in the name of the king rather than a private prosecution such as the appeal of felony."[131]

D. *Pro-choice Responses*

Pro-choice advocates may have various responses to our analysis. However, we would note that some of these critiques apply with equal force to the *per curiam* opinion. Therefore, to reject our use of these historical sources is also to reject the *per curiam* opinion's use of these sources as the basis for its conclusion. Indeed, the concurrence in *Hodes* questioned why the *per curiam* opinion relied on historical sources at all, reasoning that the sources are contradictory and provide little guidance.[132]

---

126. HORN, *supra* note 122. We would note that pre-natal medical technology has certainly erased the question of whether the fetus is a child or a monster. Furthermore, the most obvious reading of this passage reeks of either superstition or bias toward disabled persons.

127. DELLAPENNA, *supra* note 100, at 133 (quoting FREDERICK POLLOCK & FREDERICK MAITLAND, 2 HISTORY OF ENGLISH LAW BEFORE EDWARD I 478 n.1 (2d ed. 1898)). We note that Professor Dellapenna's work is not without controversy. Some scholars question his historical analysis. *See generally* Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 WM. & MARY J. WOMEN & L. 107 (2007) (criticizing Dellapenna's claims in his 2006 book, Dispelling the Myths of Abortion History).

128. THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 265 (Lawbook Exchange ed., 2001).

129. 1 BRITTON 114 (F.M.Francis Morgan Nichols ed., 1865).

130. DELLAPENNA, *supra* note 100, at 133.

131. *Id.*

132. *See* Hodes v. Schmidt, 440 P.3d 461, 503–17 (Kan. 2019) (Biles, J., concurring).

The concurrence stated, "an originalism search gets us only so far when divining meaning for words with such obvious open-ended qualities as 'liberty' or 'inalienable natural rights.' The historical back-and-forth really just boils down to how much weight is given one selected fact over another."[133] The concurrence offered a typical critique of originalism: The historical record is often contradictory and, therefore, judges with a results-oriented approach are not constrained by history.[134]

Other possible objections are: (1) there were relatively few prosecutions for abortion; (2) sometimes abortion prosecutions occurred in ecclesiastic court; (3) many commentators thought abortion was only a misdemeanor; and (4) abortion was punished primarily because it was associated with sexual promiscuity.[135] Another objection might be that many of the sources have religious undertones and that, as such, their reach should be limited.

Why some of these points matter is unclear. Even assuming that there were few prosecutions, which is a questionable assertion,[136] and that some of the prosecutions occurred in ecclesiastic court,[137] the procurement of an abortion still violated the common law. And even if it were a mere misdemeanor, *that an act is not a felony does not elevate it to the status of a natural right*. Admittedly, there is much discussion regarding whether an abortion before quickening violated the common law;[138] however, we doubt that pro-choice advocates would accept the illegality of abortions post-quickening.

As for the religious undertones of Locke, Coke, and Blackstone, we note that *Hodes* relied on these sources.[139] We are merely employing the same methodology used by the court. A pro-choice advocate cannot reject our historical analysis on the ground that we rely on sources with religious undertones unless he or she is also prepared to reject the *per curiam* opinion in *Hodes*. Furthermore, given natural law's history, many—maybe most—historical sources on the matter have religious undertones. For example, Thomas Aquinas, a Dominican friar and Catholic priest, is often considered one of natural law's "principal

133. *Id*.

134. Skylar Reese Croy, Comment, *The Problem of Change: Rethinking Critiques of "New Originalism*," DRAKE L. REV. DISCOURSE, MAR. 2019, at 114 (2019).

135. *See generally* Spivack, *supra* note 127, at 109–10, 133–34, 142–43.

136. *See generally* DELLAPENNA, *supra* note 100.

137. *Id*. at 143.

138. *See, e.g*., Mark S. Scott, Note, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199, 200 (1996); Shelley Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. LEGAL HIST. 20, 21–22 (1984).

139. *See* Hodes v. Schmidt, 440 P.3d 461, 517 (Kan. 2019) (Stegall, J., dissenting).

architects and leading spokesmen."[140] Additionally, the Declaration of Independence discusses "the Laws of Nature and of Nature's God."[141] Natural law presumes there is a structured, inherent order from which we can deduce certain transcendental principles. In summarizing the views of Aquinas, one scholar explained:

> Natural law is a "dictate of reason commanding something." It is discoverable by the use of reason to discern what is good and what is evil. Natural law is a rational man's participation in God's wisdom, and God's wisdom is the eternal law because it ordains and directs the man to the ultimate ends, which are happiness and the common good.[142]

If a pro-choice advocate were to object to the religious undertones in some of the sources *Hodes* and we discuss, they would seemingly have to reject reliance on natural law in general.

But the most straightforward response to the concurrence and other pro-choice points is this: before *Roe v. Wade*,[143] there existed a near millennium of statements in the historical record that condemned abortion and only a small number of specific statements—which were not influential—that tolerated abortion. Indeed, neither *The Mirror of Justices* nor *Britton* advocated that abortion was morally sound: they advocate that abortion might be legal for technical reasons.

E. *Specific Governs Over General*

So, contrary to the concurrence in *Hodes*, there is a debate in the historical record only if general statements from the record are relied on while specific statements are ignored. Indeed, the strongest objection to pro-choice scholars' reading of the historical record may be that they have few statements they can point to—especially if *The Mirror of Justices* and *Britton* are unconvincing—that demonstrate a right to procure an abortion. Instead, pro-choice scholars have to author books and law review articles claiming that specific statements from the likes of Coke were wrong.[144] We note that this misreading of the historical record largely started in *Roe* and continues to this day.[145]

---

140. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269 (2001).

141. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

142. Ulyana Yuryevna Altbregen, *Abortion: The Conflict of Positive Law with Natural Law and Aquinas*, 2016 AVE MARIA INT'L L. REV. J. 66, 70 (2016).

143. 410 U.S. 113 (1973).

144. DELLAPENNA, *supra* note 100, at 135; John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3 (2006).

145. *See, e.g.*, Ostler, *supra* note 101; Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 814 (1973) ("[T]he Court's understanding of the Anglo-

Hodes never acknowledged specific statements from many sources, instead letting general statements govern. In doing so, *Hodes* violated one of the basic tenants of reasoning: when there is an apparent conflict between a general rule and a specific rule, the specific rule controls.[146] Lawyers and judges utilize this tenant in all sorts of applications. As one commentator stated, "the specific" is to be "construed simply to impose restrictions and limitations on the general."[147] And this tenet is wholly familiar to Kansas courts who employ it when construing statutes,[148] contracts,[149] and pleadings.[150] Common sense requires the employment of this tenet when attempting to divine whether a natural right exists by examining the writings of Locke, Coke, and Blackstone. If the tenet is not to be employed, then there is little reason for referring to the sources at all. Of course, *Hodes* could have explained why the specific statements no longer govern, but, for unknown reasons, it did not.

Interestingly, *Hodes* was not entirely blind to some specific statements made by these sources. The court went to great lengths to explain why certain specific misogynistic statements from these jurists and philosophers no longer govern. For example, *Hodes* acknowledged that Blackstone said that a husband was lawfully permitted "to restrain a wife of her liberty."[151] *Hodes* then stated that "we cannot ignore the prevailing views justifying widespread legal differentiation between the sexes . . . and the reality that these views were reflected in policies impacting women's ability to exercise their rights of personal autonomy, including their right to decide whether to continue a pregnancy."[152] But no one today would suggest that these misogynistic views have any place in our jurisprudence. So, in a sense, *Hodes* committed a straw man fallacy: it set up an absurd argument, just to knock it down. We suspect

---

American history of the law of abortion is both distorted and incomplete."); *id.* at 814–39 (outlining, in great detail, the historical errors in *Roe*); Robert A. Destro, Note, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1267–82 (1975).

146. *E.g.*, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails . . . .").

147. JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATIONS 106–07 (1882).

148. *See* State v. Carpenter, 453 P.3d 865, 868 (Kan. 2019) ("'[L]aw is clear that a specific provision within a statute controls over a more general provision within the statute.'") (quoting *State v. Baber*, 44 Kan. App. 2d 748, 753, 240 P.3d 980 (2010).

149. Exch. State Bank v. Kansas Bankers Sur. Co., 177 P.3d 1284, 1285 (Kan. Ct. App. 2008) ("'Specific provisions in a contract control over general ones[.]'") (quoting *Colburn v. Parker & Parsley Dev. Co.*, 17 Kan. App. 2d 638, 649, 842 P.2d 321 (1992)).

150. State *ex rel.* Fatzer v. Sinclair Pipe Line Co., 304 P.2d 930, 936 (Kan. 1956) ("Also that where specific allegations conflict with general allegations the specific allegations control.").

151. Hodes v. Schmidt, 440 P.3d 461, 490 (Kan. 2019) (per curiam) (quoting BLACKSTONE, *supra* note 14, at *445).

152. *Id.* at 491.

that the court would have had a much harder time addressing, for example, Blackstone's statement that "[l]ife is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[153] But, by selecting which specific statements to review, *Hodes* was able to artificially strengthen its reasoning.

When general governs over specific, absurdity follows because a broad principle is applied to specific circumstances.[154] For instance, the reason there is a legitimate argument that assisted suicide is now a constitutionally protected right in Kansas stems from the general statements about the right to bodily autonomy governing over specific statements. This is a dangerous path that the Kansas Supreme Court is pursuing; it is untenable and must be stopped.

III. WHY *HODES* MATTERS

In this Part, we examine why *Hodes*' error matters. First, it fulfills a prediction made by scholars over a decade ago: pro-choice advocates will effectively promote abortion rights in state court by relying on the right to bodily autonomy.[155] Second, it serves as an example of how not to interpret a natural rights guarantee—judges should exercise caution and restraint before acknowledging a natural right.

A. *Abortion Litigation's Shift to State Courts*

Pro-choice advocates who seek to challenge state-specific restrictions have shifted some of their resources from federal court to state court.[156] The shift is partly a response to *Roe*'s uncertain future.[157] Additionally, even if *Roe* survives the test of time, litigating abortion rights in the state courts has a couple of distinct advantages.

1. *Roe*'s Nebulous Future

Roe is a landmark U.S. Supreme Court opinion that stated that the Due Process Clause of the Fourteenth Amendment protects a woman's right to procure an abortion.[158] However, since its inception, the story of *Roe* has been one of "decline."[159] And the viability of *Roe* is a constant subject

153. BLACKSTONE, *supra* note 14, at *129.

154. *See generally* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); Comm'r v. Brown, 380 U.S. 563, 571 (1965) (discussing the absurdity doctrine).

155. Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 183–86 (2008).

156. *Id.* at 176–77.

157. *Id.* at 185–86.

158. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

159. *See* Moss & Raines, *supra* note 155, at 181–85.

of discussion.[160] A host of commentators have argued that it should be overturned.[161] As one commentator stated:

> Despite forty-five years, *Roe* has never become settled. There has never been consistency in this Court's application of *Roe* . . . . Two of the justices who originally joined *Roe* subsequently recanted in whole or in part and virtually every abortion decision since *Harris v. McRae* has been closely divided.[162]

Even pro-choice members of the legal profession have criticized *Roe*'s legal analysis.[163] One scholar criticized *Roe* "because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[164] Others, including Dean Erwin Chemerinsky, offer an enthusiastic defense of a woman's constitutional right to procure an abortion;[165] however, even Dean Chemerinsky detects that "[a]bortion rights in the United States are in serious jeopardy."[166]

All this attention on *Roe* is not without good cause either. In *Planned Parenthood v. Casey*,[167] the Court said it upheld the "essential holding" of *Roe*.[168] In reality, "the Court actually backed away from affording women the highest level of constitutional protection for the abortion choice."[169] And notably, the Court currently has five justices that have voted—to varying degrees—to limit abortion rights.[170]

---

160. *See generally* Paul Benjamin Linton, *The Pro-Life Movement at (Almost) Fifty: Where Do We Go From Here?*, 18 AVE MARIA L. REV. 15, 21 (2020) (describing a slate of state laws that seek to limit access to abortion in a manner that would directly challenge *Roe*'s holding).

161. Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445, 447 (2018) (arguing that *Roe* ought to be overruled for recognizing a constitutional right to "terminate pregnancy").

162. *Id.* at 450–51.

163. *See* Moss & Raines, *supra* note 155, at 183–85.

164. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

165. *See generally* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1198 (2017).

166. *Id.* at 1189.

167. 505 U.S. 833 (1992) (plurality).

168. *Id.* at 846.

169. Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993) ("[By] changing the standard of review used to evaluate the constitutionality of abortion regulations, the Justices in *Casey* rejected the strict scrutiny standard of review mandated by *Roe*, adopting instead the more permissive 'undue burden' standard. Under this new standard, the right to choose abortion is no longer a fundamental right and thus, women seeking abortions are no longer entitled to the strong protections afforded other fundamental rights, such as the right to free speech and the right to vote." (footnotes omitted)).

170. *See, e.g.*, June Med. Servs., LLC v. Russo, 140 S. Ct. 2103, 2142, 2153 (2020).

Chief Justice John Roberts' abortion jurisprudence is the most peculiar. In 2016, he dissented from an opinion in *Whole Woman's Health v. Hellerstedt*,[171] striking down a state law that (1) required abortion providers to have admitting privileges at a hospital within thirty miles of the abortion clinic, and (2) required abortion clinics to meet the minimum standards for ambulatory surgical centers.[172] However, in *June Medical Services LLC v. Russo*,[173] the Court's most recent abortion opinion, Chief Justice Roberts was one of five votes to strike down a similar law.[174] The Court fractured in *June Medical Services* with a four-justice plurality concluding that the law was unconstitutional.[175] Seemingly, the only reason Chief Justice Roberts concurred was that he viewed the case as already decided: "The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[176] In his concurrence, Chief Justice Roberts doubled down on the assertion that *Whole Woman's Health* was, in fact, wrongly decided: "I joined the dissent in *Whole Woman's Health* and continue to believe that the case was *wrongly decided*."[177] So, at the very least, Chief Justice Roberts is open to restricting abortion in some circumstances.[178] Therefore, commentators on both sides of the abortion debate anxiously await Chief Justice Roberts's vote in the most recent abortion case to come before the Court, *Dobbs v. Jackson Women's Health Organization*, which was argued not long ago.[179]

As for the other "conservative" Justices, both Justices Clarence Thomas and Samuel Alito have voted to uphold every abortion restriction to come before the Court during their respective tenures.[180] Two of the Court's three newest members, Justices Neil Gorsuch and Brett Kavanaugh, have done the same in their one opportunity.[181] The third, Justice Amy Coney Barrett, indicated at her confirmation hearing that she

171. 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016).

172. Chief Justice Roberts joined Justice Samuel Alito's dissent in *Whole Woman's Health. Id.* at 2330–53 (Alito, J., dissenting). He also voted to uphold a federal ban on partial birth abortions. Gonzales v. Carhart, 550 U.S. 124 (2007).

173. 140 S. Ct. 2103 (2020) (plurality).

174. *Id.* at 2133 (Roberts, C.J., concurring in judgment).

175. *Id.* (plurality).

176. *Id.* (Roberts, C.J., concurring in judgment).

177. *Id.* (emphasis added).

178. *E.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007).

179. Docket No. 19-1392 (argued Dec. 1, 2021).

180. *June Med.*, 140 S. Ct. at 2142–53 (Thomas, J., dissenting); *id*. at 2153–71 (Alito, J., dissenting); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330–53 (2016) (5-3 decision) (Alito, J., dissenting); Gonzales, 550 U.S. at 167–69 (Thomas, J., concurring).

181. *June Med.*, 140 S. Ct. at 2176 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

did not consider *Roe* one of the Court's "super precedents."[182]

We think *Roe* is unlikely to be overruled outright; however, it might suffer a slow, plodding demise.[183] Based on the oral argument in *Dobbs*, it appears likely that *Roe* will be limited.[184] Therefore, pro-choice advocates intensely desire to obtain a sort of state-level "insurance policy." That way, even if *Roe* is limited and state regulations become so pervasive that access to abortion is effectively eliminated, pro-choice advocates can turn to state courts for a determination of whether state-specific laws protect the right to procure an abortion.

2. Advantages Offered by State Courts

Roe's nebulous future is not the only reason that pro-choice advocates are turning to state court. State courts have distinct advantages.[185] First, based on what has happened so far in state courts—in *Hodes* and other cases—pro-choice advocates tend not only to win but also to obtain broader protection for abortion rights than in federal court.[186] Second, in addition to the same arguments that could be made in federal court, in light of *Hodes*, guaranteed natural rights guarantees provide an easy, even if misguided, entry point on which to base the claim.[187] Third, as a matter of standing, pursuing an abortion claim in state court is easier.[188]

a. Broader Protection in State Court

Pro-choice advocates tend not only to win in state court but also to obtain broader protection for abortion rights than they would in federal court.[189] As previously mentioned, Kansas is not the only state to protect abortion under its state constitution.[190] Furthermore, the vast majority of

182. Brian Naylor, *Barrett Says She Does Not Consider Roe V. Wade 'Super-Precedent*,' NPR (Oct. 13, 2020), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent.

183. Serena Mayeri, Opinion, *How Abortion Rights Will Die a Death by 1,000 Cuts*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/opinion/brett-kavanaugh-abortion-rights-roe-casey.html [https://perma.cc/926V-6BRG].

184. Amy Howe, *Majority of Court Appears Poised to Roll back Abortion Rights*, SCOTUSBLOG (Dec. 1, 2021), https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippis-ban-on-most-abortions-after-15-weeks/.

185. *See* Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 527 (2009).

186. *See id.* at 512.

187. *See id.* at 499.

188. *See* Mary Ziegler, *The Question No One is Asking About the Supreme Court and Abortion*, WASH. POST (Mar 5, 2020), https://www.washingtonpost.com/outlook/2020/ 03/05/ question-no-one-is-asking-about-supreme-court-abortion/ [https://perma.cc/LR9K-W84T].

189. *See* Wharton, *supra* note 185, at 512.

190. State Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 909, 913 (Alaska 2001); Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 783–84 (Cal.

these states review abortion restrictions more strictly than the federal courts would.[191]

In federal court, a party defending a law that restricts access to abortion must demonstrate that the law does not present an "undue burden" to a woman seeking an abortion.[192] Undue burden is "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."[193] Meanwhile, of the eleven states that have recognized a right to procure an abortion under their state constitutions, eight of them, including Kansas, review a law restricting access to abortion under the strict scrutiny standard.[194] This is a much harder test for an abortion regulation to pass. Strict scrutiny is the "most rigid scrutiny" and the "most exacting judicial examination."[195] To review a law under strict scrutiny is almost certainly to doom the law. As the popular saying goes, "strict in theory, fatal in fact."[196] This is all to say, if a pro-choice advocate goes to state court, the reviewing court might adopt a stricter standard of review than the current federal standard.

1981); *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989); Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206, 237 (Iowa 2018); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 397 (Mass. 1981); Women of the State of Minn. v. Gomez, 542 N.W.2d 17, 32 (Minn. 1995); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 666 (Miss. 1998); Armstrong v. State, 989 P.2d 364, 384 (Mont. 1999); Right to Choose v. Byrne, 450 A.2d 925, 933–34 (N.J. 1982); Hope v. Perales, 634 N.E.2d 183, 186 (N.Y. 1994).

191. In Kansas, specifically:

> [T]he standard of judicial review adopted by the court in *Hodes* is so rigorous that it is likely to unsettle existing abortion law in Kansas and result in a legal landscape for abortion in this state that is more permissive of abortion than either the current federal standard or the original federal standard established by *Roe v. Wade*.

Elizabeth Kirk, *Impact of the Strict Scrutiny Standard of Judicial Review on Abortion Legislation Under the Kansas Supreme Court's Decision in* Hodes & Nauser v. Schmidt, CHARLOTTE LOZIER INST. (Mar. 19, 2020), https://lozierinstitute.org/impact-of-the-strict-scrutiny-standard-of-judicial-review-on-abortion-legislation-under-the-kansas-supreme-courts-decision-in-hodes-nauser-v-schmidt/ [https://perma.cc/G4HB-4XMS].

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

193. *Id.*

194. *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 909; *Planned Parenthood of the Heartland*, 915 N.W.2d at 241; *Hodes* v. Schmidt, 440 P.3d 461, 466 (Kan. 2019) (per curiam); *Women of State of Minn. by Doe*, 542 N.W.2d at 31; *Pro-Choice Miss*., 716 So. 2d at 654–55; *Armstrong*, 989 P.2d at 374; *Right to Choose*, 450 A.2d at 934; *Hope*, 634 N.E.2d at 186.

195. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 288 (2015) (citations omitted).

196. Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

As one article put it, state courts have the ability to:

> [I]nterpret their [own] constitutions as protecting privacy and autonomy rights derive[d] both from the text and from the history of those charters. State constitutions often contain provisions either absent from the Federal Constitution or more expansively written than those in the Federal Constitution. Further, each state constitution was enacted under unique historical conditions that sometimes evidence a particular concern with establishing broad privacy or autonomy rights.[197]

Accordingly, there is a strong sense that the battle over abortion rights will move from the federal court to state court.

Furthermore, an opinion from a state supreme court acknowledging broader protection may influence other courts. Some even argue that "[c]utting-edge state law precedent may also influence federal courts, including the Supreme Court itself."[198] Therefore, cementing a legal foundation for broader protection at the state level is a decent strategy for pro-choice advocates hoping to achieve a nationwide impact.

b. Natural Rights Guarantees

Notably, most of the states that have protected the right to procure an abortion under their state constitution have grounded the right in the right to privacy,[199] and none have gone as far as Kansas in declaring the right a natural right. That means that *Hodes* could serve as an example for achieving even broader protection than the already broad protection offered by many states. In essence, all the arguments that could be made in federal court can also be made in state court, but the inverse is not true.

As previously mentioned, *Hodes* relied on Section 1 of the Kansas Constitution Bill of Rights, which provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[200] The first question that the court answered was whether this clause is merely prefatory or whether it protects substantive

---

197. *See, e.g.*, Moss & Raines, *supra* note 155, at 203.

198. Wharton, *supra* note 185, at 528–29. Additionally, the fifty states do not exist in a vacuum, and in the context of abortion litigation, "state courts repeatedly note[] that they were [] influenced in their decision making by the outcomes in sister states." *Id.* at 528.

199. Moss & Raines, *supra* note 155, at 197–203 (noting that Alaska, California, Florida, Montana, Massachusetts, Minnesota, Mississippi, New Jersey, and, arguably, New York have protected abortion under the right to privacy).

200. Hodes v. Schmidt, 440 P.3d 461, 466 (2019) (per curiam) (quoting KAN. CONST. art. 1, § 1).

rights.[201] *Hodes* concluded the latter was true. Now, if the Kansas constitution were the only one to contain such language, pro-choice advocates would not get very far using this line of argument. However, an additional thirty-three states have either identical or substantially similar language in their respective state constitutions.[202] These constitutional provisions provide an additional anchor-point by which to bring a challenge to an abortion regulation.[203]

c. Standing in State Courts

Third, litigating abortion rights in state court is easier as a matter of standing. Broadly speaking, who has standing determines who has the "right to make a legal claim or seek judicial enforcement of a duty or right."[204] That is to say, a party has no ability to challenge a law in court without standing.[205] For a party to have standing in federal court, generally, the party must satisfy the Article III standing requirements.[206] If the party is unable to meet these requirements, they cannot bring their cause in federal court.

However, in the context of abortion litigation, litigants can typically argue that they have third-party standing (one of the exceptions to general Article III standing requirements). That is, the U.S. Supreme Court has "generally permitted plaintiffs to assert third-party rights in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'"[207]

But allowing abortion providers to pursue their patients' claims is not without debate, and there are currently four justices who would not allow

---

201. *Id.* at 466 ("We are now asked: Is this declaration of rights more than an idealized aspiration? And, if so, do the substantive rights include a woman's right to make decisions about her body, including the decision whether to continue her pregnancy? We answer these questions, 'Yes.'").

202. *Supra* note 21.

203. Moss & Raines, *supra* note 155.

204. *Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

205. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III [of the United State Constitution].").

206. *Id.* at 560–61 ("First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (citations and quotes sources omitted; alterations and ellipses in original)).

207. June Med. Servs., LLC v. Russo, 140 S. Ct. 2103, 2118–19 (2020) (plurality) (quoting Kowalski v. Tesmer, 543 U.S. 125, 130 (2004)).

third-party standing at least in some circumstances.[208] In *June Medical Services*, Justices Thomas, Alito, Gorsuch, and Kavanaugh explained that they would never reach the merits of the case because they would deny that the plaintiffs even have standing to sue.[209] Therefore, "the restrictive standing model in federal courts creates a number of circumstances in which a potential constitutional violation by the government may go unchallenged."[210]

In contrast, it is much easier for plaintiffs to establish standing in state court. That is because "many states have adopted a comparatively lax doctrine that permits citizens to sue for generalized grievances."[211] Furthermore, "many state courts have developed and successfully employed alternative standing models that allow citizens or taxpayers to sue on behalf of the public interest in cases involving issues of great constitutional importance."[212] Therefore, in contrast with federal court, in state court the plaintiff often just needs to be a taxpayer of the state. Thus, nearly anyone can bring an action in state court.

B. *The Significance of Taking Away a Natural Right*

We are further concerned that *Hodes* casually recognized a natural right to abortion and, thereby, declared that Bill 95 was illegitimate as contrary to nature itself. As previously mentioned, natural rights are those rights that predate government. That idea forms the very cornerstone of the nation—a cornerstone still in existence today.[213] One of the prevailing theories of the American governmental system is that the citizenry will form a government to better secure these rights. Indeed, the founding fathers believed that the entire object of government is to protect those rights. James Wilson said: "I here close my examination into those natural

---

208. *See, e.g.*, *id.* at 2142 (Thomas, J., dissenting) ("Under a proper understanding of Article III, these plaintiffs lack standing to invoke our jurisdiction."); *id.* at 2153 (Alito, J., dissenting) ("I would remand the case to the District Court and instruct that court, before proceeding any further, to require the joinder of a plaintiff with standing."); and *id.* at 2173 (Gorsuch, J., dissenting) ("No one even attempts to suggest this usual [standing] prerequisite is satisfied here."). Justice Kavanaugh joined Justice Alito's dissent.

209. *Id.* at 2142, 2153, 2173.

210. John DiManno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639, 639 (2008).

211. Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1169 (2018) (citing M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 739 (2015)).

212. DiManno, *supra* note 210, at 639.

213. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."). As recently as 2010, the U.S. Supreme Court recognized that some rights "predated the creation of the Federal Government[.]" McDonald v. City of Chicago, Ill., 561 U.S. 742, 754 (2010).

rights, which, in my humble opinion, it is the business of civil government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain."[214] He was not alone in that belief.[215]

Therefore, based on the founding fathers' premises, when the government takes away or restricts a natural right, it acts contrary to its legitimate purpose. That is no minor transgression. The founding fathers were keenly aware of that and so sought to design a system that made it difficult for those types of transgressions to occur. As James Madison stated, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[216] The purpose of requiring the government to regulate itself was to prevent the State from enacting laws that "violate the inherent or 'natural' rights of those to whom they are directed."[217] To accomplish that goal, the structure of government contains "procedural protections of these rights."[218] For example, three governmental powers are divided among the three branches of government, not to promote efficiency but to prevent tyranny.[219] That is, one of the primary purposes for partitioning governmental power in this way was to "protect the individual."[220] Moreover:

> The Framers were concerned not just with the starting allocation [of these powers], but with the "gradual concentration of the several powers in the same department." It was this fear that prompted the Framers to build checks and balances into our constitutional structure, so that the branches could defend their powers on an ongoing basis.[221]

---

214. Wilson, *supra* note 9, at 335.

215. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed[.]"); Calder v. Bull, 3 U.S. 386, 388 (1798) (opinion of Chase, J.) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.").

216. THE FEDERALIST NO. 51 (James Madison) (1788).

217. BARNETT, *supra* note 4, at 54.

218. *Id.*; *see also* Bowsher v. Synar, 478 U.S. 714, 730 (1986) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

219. United States v. Brown, 381 U.S. 437, 443 (1965) ("This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.").

220. Bond v. United States, 564 U.S. 211, 222 (2011).

221. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 74 (2015) (Thomas, J., concurring) (citation omitted).

When *Hodes* declared a natural right to abortion, it was in effect declaring that any governmental act that sought to subvert the exercise of that right was *contra naturam*. But judges should not be too quick to assume that every restriction on "liberty" is an illegitimate restriction on a natural right. This is especially true in a properly functioning republican government with checks and balances designed to limit the government's ability to infringe on those natural liberties.[222]

More importantly, judges should also be cautious in acknowledging a natural right. Indeed, one early U.S. Supreme Court justice explained, "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."[223] As such, when the judiciary acknowledges the existence of a natural right, it could be fairly described as an opportunity to engage in judicial activism.[224]

However, the natural rights guarantees that exist in the majority of state constitutions create somewhat of a necessity for judges to inquire about natural rights. Guarantees of natural rights have a long and storied history in this country. They first appeared in the Virginia Declaration of Rights in 1776 and quickly spread throughout the states.[225] Importantly, these clauses do "not function as simply vague, preambular language but [are] instead applied with varying degrees of judicial vigor to decide some of the most challenging and controversial issues of the day."[226] Accordingly, natural rights guarantees cannot be read out of their respective constitutions; however, natural law can exacerbate judicial activism because it is a challenging study.[227] The dangers of judicial recognition of natural rights are amplified in an age of impact litigation. Such litigation is a well-established mechanism for advancing abortion rights.[228]

While the language of these clauses is quite clear, it is also open-ended: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[229] The list of rights is not exhaustive, and that was intentional because it is impossible to enumerate all the natural rights that a person possesses. Generally, "natural rights define a private domain within which persons may do as they please, provided their conduct does not encroach upon the rightful

---

222. *See generally* BARNETT, *supra* note 4, at 44.

223. Calder v. Bull, 3 U.S. 386, 399 (1798) (opinion of Chase, J.).

224. *See* Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 177 (2001) ("[N]atural law is open to the same abuses that judicial activism engenders.").

225. Calabresi & Vickery, *supra* note 20, at 1316–17.

226. *Id.* at 1436–40.

227. *See, e.g.*, Jones, *supra* note 224, at 177.

228. PETER H. SCHUCK ET AL., MEDITATIONS OF A MILITANT MODERATE: COOL VIEWS ON HOT TOPICS 103 (2006) (describing impact litigation as "lawsuits that seek to use the effect widespread social changes" and pointing to *Roe* as an "icon[] of impact litigation").

229. KAN. CONST. art. II, § 1.

domain of others."[230] Consequently, "people have a right to do whatever they please within the boundaries defined by natural rights, this means that the rights retained by the people are limited only by their imagination and could never be completely specified or enumerated."[231]

Therefore, how is a judge to determine whether conduct qualifies as a "natural right"? They should heed the advice of Reconstruction-Era Senator John Sherman, who said judges should:

> [L]ook first at the Constitution of the United States as the primary fountain of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England, the old decisions of Lords Mansfield and Holt, and so on back to the earliest recorded decisions of the common law. There they will find the fountain and reservoir of the rights of Americans as English citizens.[232]

That is to say, judges should exercise caution and restraint before declaring a natural right—and they should do so only after an exhaustive search of the historical record. If they fail to do so, they may create more problems than they solve. And that certainly appears to be the case in *Hodes*.

If the historical record is unclear, a judge will have to make a judgment call on what natural law demands, a question much better suited for the political branches. Therefore, it is best for the judiciary not to decide lest it step into the role of a super-legislature.[233] Indeed, even Justice Ruth Bader Ginsburg has critiqued *Roe* for going too far and causing unnecessary controversy.[234] In one law review article, she wrote that the "sweep and detail" of *Roe* resulted in the "mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."[235] In another law review article, she explained:

> Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable. The most prominent example in recent decades is *Roe v. Wade*. . . .

---

230. BARNETT, *supra* note 4, at 58.

231. *Id.*

232. Senator Sherman's speech and its historical context are discussed *in* BARNETT, *supra* note 4, at 66–67.

233. *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

234. *Id.* at 1198–99.

235. Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985).

> The seven to two judgment in *Roe v. Wade* declared "violative of the Due Process Clause of the Fourteenth Amendment" a Texas criminal abortion statute that intolerably shackled a woman's autonomy; the Texas law "except[ed] from criminality only a *life-saving* procedure on behalf of the [pregnant woman]." Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed, reflected most recently in the Supreme Court's splintered decision in *Planned Parenthood v. Casey*? A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, we believe and will summarize why, might have served to reduce rather than fuel controversy.[236]

Hodes' reasoning is even more sensational than *Roe*. Calling a right natural implies that all who oppose it have taken a stance contrary to nature. As such, natural rights cannot be opposed by those educated on the subject and who have good character. Yet, there is no shortage of educated people, of good character, who object on moral grounds to abortion. When judges go too far, they can inadvertently sensationalize an issue.

CONCLUSION

To conclude, natural rights guarantees are not an authorization for judges to act, in the words of the late Justice Antonin Scalia (referencing Plato), as "philosopher kings."[237] If state courts are to turn to natural rights guarantees as a source of substantive rights, they must do so with great care and humility. They must fairly and thoroughly consider the historical record, and specific statements on the topic in question must govern. If the historical record is ambiguous, they should let the political branches decide the issue. Otherwise, especially in an age of impact litigation, they step outside their constitutional lane and become super-legislators.

---

236. Ginsburg, *supra* note 233, at 1198–99 (citations omitted).

237. *Justice Scalia Honors U.S. Constitution*, GW TODAY (Sept. 18, 2013), https://gwtoday.gwu.edu/justice-scalia-honors-us-constitution [https://perma.cc/EL6A-34B8].