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[Abortion](#), [Human Dignity](#), [Politics](#), [Supreme Court](#)

The Meaning of Kansas: Lessons from a Pro-Life Defeat

August 11, 2022 By [Elizabeth Kirk](#)

The recent defeat of a pro-life constitutional amendment in Kansas was not a consequence of strategic overreach, nor was it a rebuke of *Dobbs*. In fact, it followed from the difficulty of communicating complex legal and political principles, as well as navigating the fear and distortion generated by abortion advocates and their media allies. To help secure a pro-life future, we must learn the correct lessons of the Kansas loss, including the need to harness the emotional power of truthful narrative to shape political choices.



Growing up near the state line between Missouri and Kansas, I thought the spirited interstate rivalry was about basketball. As a young student, I learned the conflict's terrible historical origin: Missouri was a slave state and its people engaged in violent skirmishes with the Jayhawkers over whether Kansas would become a free state.

Several years ago, when my husband and I moved our family back to Kansas for a time, we shared this unfortunate history with our children by visiting [Marais de Cygnes](#).

In that spot in 1858, a group of Missouri pro-slavery raiders marched eleven free-state hostages into a ravine and opened fire on them, killing five. News of the massacre spread and the poet, John Greenleaf Whittier, immortalized the event in [a poem](#) in the *Atlantic Monthly*. The violent event shocked the nation, motivated abolitionists, and epitomized the "Bleeding Kansas" era.

Today, the site appears as an undistinguished gulley filled with scrub-grass. Only a small marker inscribed with a portion of Whittier's poem reminds visitors of the lives lost that day. As my young children scrambled down the gulley, I struggled to make concrete for them the reality of slavery and what had occurred in our nation. How could I explain to them such a bitter divide, which involved a denial of the dignity of every human person and went straight to the heart of our understanding of ourselves as a nation?

In the weeks after the Supreme Court [overruled](#) *Roe v. Wade*, and as the abortion war has transformed into more than fifty battles, it is clear we remain in the midst of another such terrible division. And Kansas may again play a pivotal role, the extent of which is yet to be fully realized.

The Failure of "Value Them Both"

In the wake of the [59-41 defeat](#) of the Kansas Value Them Both constitutional amendment, which would have confirmed that the state's

constitution does not guarantee a right to abortion, many have drawn conclusions about why the effort failed. Critics on the pro-life side claimed that proponents of the amendment had “asked for too much” and acknowledged the defeat as a reminder to practice principled incrementalism (e.g., crafting ballot initiatives such as fifteen-week gestational limits and including exceptions for rape, incest, and life of the mother). Abortion supporters praised the amendment’s defeat as a referendum on abortion and a resounding rebuke of *Dobbs*. Neither side gets it right.

First, proponents of the amendment did not overstep. Incremental political strategies may be appropriate in some states, but it overlooks the unique situation in Kansas. Recall that in 2019 in *Hodes & Nauser v. Schmidt*, the Kansas Supreme Court held that the state constitution protected abortion, declaring it to be among Kansans’ “fundamental rights” and holding that any restriction on abortion is subject to “strict scrutiny” (a test requiring the law to further a compelling government interest and to be narrowly tailored to that interest). Value Them Both was a *constitutional amendment*, a reasonable, appropriate response to this extreme decision.

No right-thinking pro-life person wants to replace the judicially invented “fundamental right” with a constitutional fifteen-week ban, implicitly protecting [over 90 percent of the abortions](#) that occur in the state. We do not embody specific policy proposals in constitutions. Weighing and enacting particular policy proposals is the province of legislatures. In contrast, constitutions provide structures of government and either grant governmental authority or limit it, thereby securing the liberties of the governed. To get it right in Kansas, it was necessary to remove the judicially invented right to abortion and to affirm the authority of the people, through their legislature, to enact abortion laws. This is all the Value Them Both amendment would have done.

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On the other hand, the amendment's defeat is hardly a ringing endorsement of *Roe v. Wade*. Though it was neutral on abortion policy, the amendment was successfully defeated because its opponents persuaded voters that sufficient restrictions were already in place, that the amendment would lead to a complete ban on abortion, and that women would be denied life-saving care in cases of miscarriage and ectopic pregnancies. To draw meaningful conclusions about Americans' attachment to legalized abortion amid such gross misunderstandings is misplaced.

We know that Kansans, like the majority of Americans, favor reasonable restrictions on abortion. The consequence of *Hodes* is that these are now all imperiled. The Value Them Both amendment would simply have reversed this. Properly understood by the people, it should have won overwhelmingly. But it failed. Now it will be nearly impossible in Kansas to pass or enforce abortion laws, even the most incremental of abortion laws that reflect the genuine will of the people, without a new successful constitutional amendment effort or a new state supreme court decision that overrules the Kansas Supreme Court's arrogation of state abortion policy to itself.

Why? Answering this question correctly is crucial to learning from the Kansas loss.

Learning from the Loss

The Value Them Both campaign focused on educating voters on the overreach of the egregious state court decision, focusing on the fact that under *Hodes* all abortion laws were “presumed unconstitutional” and subject to the strict scrutiny test. Further, they tried to persuade voters of the likelihood that many existing Kansas laws, enacted with bipartisan support, such as parental consent, the ban on government funding, and waiting periods are vulnerable to being struck down. They described the amendment as a modest response to *Hodes*, one that merely restored lawmaking authority to lawmakers. Advocates of Value Them Both urged Kansans to protect the democratic, legislative process by which citizens work out contentious issues in a way that all voices are heard and compromise is best achieved.

Is it possible that one of the lessons of Kansas is that the people rejected this message and prefer abdication to the judiciary over the difficult processes of democratic decision-making on challenging moral issues? Is it possible they don't trust the legislature to make reasonable laws? Perhaps. It may also be that the nuances of the matter—involving arcane legal details from a 199-page state supreme court decision, the likely impact of a legal test, its application to legislation, and its distortion of the proper separation of powers—were just too esoteric and theoretical for amendment proponents to convey well.

And there was another complicating factor: many in the Value Them Both coalition vigorously oppose abortion and would support additional limits. Opponents of the amendment exploited this reality, pointing to the evidence of restrictive bans in other states, and claimed that a total ban was the ultimate strategy behind the so-called “neutral” amendment. The

political reality in purple Kansas is such that the prospect of a total ban is so unlikely as to be almost absurd. (If nothing else, this vote proves that point.) Nothing close to a ban currently exists in Kansas; the *Hodes* decision giving rise to the constitutional dilemma involved a ban on a particular method of late-term abortion and the state allows abortions for *any* reason up until twenty-two weeks.

So, proponents of the amendment were in a nearly impossible position: both to warn Kansans of the *likelihood* of an extreme, unregulated abortion regime if the amendment failed, and to assure them of the *unlikelihood* of extreme abortion restrictions if the amendment passed. But Kansans were ill-equipped to understand the legal and political principles at stake and to properly judge how to weigh these two unequal possibilities.

Fear and Distortion

Thrown into high gear by the overturning of *Roe v. Wade* only weeks before the election, opponents of the amendment stepped into this gap and persuaded voters through the power of narrative, employing fear and distortion to mislead voters about the legal and political realities. A ubiquitous ad (often repeated within minutes at commercial breaks) featured a mother of small children. As beautiful family photos and images of tiny baby footprints flashed on the screen, she said that, without her abortion, her children would be without their mother. The ad didn't mention that Kansas law allows abortions up until twenty-two weeks for any reason and thereafter has an exception for the life of the mother. Another ad claimed the amendment is a strict government mandate, using fear-provoking images of COVID-19 masks and church closures. In truth, the amendment mandated nothing and left abortion policy entirely up to the people.

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In addition, opponents frightened voters that, if the amendment passed, women would be deprived of care for miscarriages and ectopic pregnancies, even though Kansas abortion laws do not prohibit life-saving care in such situations. They condemned the initiative as a dark plot of the Catholic Church to impose its beliefs on the people of Kansas, ignoring the fact that they are happy for the Church's public witness and advocacy as long as it aligns with their own beliefs (such as on the death penalty or Medicaid expansion).

Finally, amendment opponents repeatedly assured Kansans that the state already has many "reasonable" and "common-sense" abortion restrictions on the books, without ever mentioning that they opposed every one of them when introduced in the legislature, have already challenged several of them in court, and they are all imperiled by *Hodes*.

And in all of this amendment opponents were aided by a complacent media, which funneled their talking points and never pressed them on hard questions. For example, while the media repeatedly asked supporters of the amendment whether it was a step in a covert operation to impose a total ban, the media failed to press opponents of the amendment on which

existing laws they plan to challenge in court under the *Hodes* court's strict test. Spoiler alert: two laws have already been struck down (the state's ban on dismemberment abortions and a clinic safety and sanitation law) and another (a law requiring an in-person physician to perform abortions or administer abortion-inducing medications) is currently being challenged.

These strategies worked very well, and pro-life advocates nationwide should take note. We must be prepared for the worst tactics from opponents and a complicit media, and we should also be mindful of the difficulty of conveying complicated legal concepts. More importantly, while we cannot stoop to deception, we must harness the emotional power of truthful narrative to shape political choices.

The Lesson and Mystery of Kansas

This brings me back to our family's visit in 2019 to Marais du Cygnes. A few days after our visit, the Kansas Supreme Court handed down *Hodes*. Hearing my husband and me discuss, in veiled terms, the decision, my eleven-year-old asked me, "But, Mama, how do they *do* an abortion?" I couldn't bring myself to explain it to him, much as I couldn't explain how someone could execute a group of men huddled together at the bottom of a ravine.

Recall that the case involved a ban on a particular abortion method: dilation and evacuation, commonly called dismemberment abortion. Supreme Court Justice Anthony Kennedy, no hardliner on abortion, described the procedure in detail, with clear moral repulsion, in both his dissent in [Stenberg v. Carhart](#) and the majority opinion in [Gonzales v. Carhart](#). It is used largely in the second trimester of pregnancy when, due to fetal size and development, suction abortion is no longer available. Through D&E, the unborn child is dismembered while still alive and then extracted from the womb one piece at a time.

In a bipartisan legislative effort, Kansans had prohibited that gruesome practice. The Supreme Court of Kansas declared it a fundamental right. In focusing on the modest nature of the amendment, and to avoid the trap of being caricatured as “abolitionists,” the Value Them Both campaign largely avoided talking about abortion and its harms. Would telling the story of the D&E ban have captured the imagination of voters, made clear the overreach of the Supreme Court’s decision, and motivated them to vote “yes”? If not, what story would move them? That is the lesson, and mystery, of Kansas.

Poems have a meaning beyond their time. As I mourn what I hope in the grand scheme is only the loss of a small skirmish, the words of Whittier’s poem, *Le Marais Du Cygne*, never seemed truer: “Strong men of the prairies, Mourn bitter and wild! Wail, desolate woman! Weep, fatherless child!”

The author, formerly of Overland Park, Kansas, provided legislative testimony to the Kansas legislature in support of the Value Them Both amendment.

About the Author

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