

DEMOCRATIC CHANGE, FAST AND SLOW: NAVIGATING TENSIONS IN PRO-ABORTION ORGANIZING

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INTRODUCTION

Minor v. Happersett rejected a vision of robust constitutional protection for “privileges and immunities” of national citizenship and consigned vital rights to state political processes.¹ Today, 150 years later, its message seems strangely resonant. In the volatile field of gender, also centrally implicated by the case, a longstanding constitutional right to reproductive autonomy has been rejected, and control over abortion, in particular, has devolved to the states.

In many states, where protections for reproductive autonomy do not exist, such control now lies in democratic processes. Both representative and direct democracy are being mobilized, vigorously and strategically, by proponents and opponents of abortion. In conservative states, legislative processes, often shaped by the gerrymandering of political subdivisions,

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1. 88 U.S. (21 Wall.) 162 (1875).

have produced a cascade of abortion bans, whose stringency may exceed the preferences of their constituencies.² In answering this torrent of restrictive legislation, pro-abortion advocates have prioritized initiative petitions aimed at amending state constitutions.³ Citizen-initiated constitutional amendments, which place abortion-protective changes on the ballot for a state-wide vote, provide a path around unaccountable legislatures and activate the public to engage in reproductive policymaking.⁴

Yet the tactic of amending state constitutions by plebiscite⁵ has not received universal endorsement by proponents of reproductive autonomy.

2. Twelve states have total bans on abortion; seven more have bans between six and eighteen weeks; one has a ban at twenty-two weeks. See Talia Curhan, *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (July 7, 2025), <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans> [<https://perma.cc/3JET-WUL3>]. These laws do not always match the reproductive preferences of the citizens of a given state. See Matthew A. Baum, Alauna Safarpour & Kristin Lunz Trujillo, *Four Reasons Why Abortion Laws Often Clash with the Majority's Preferences in the US, from Constitutional Design to Low Voter Turnout*, THE CONVERSATION (Aug. 25, 2022, 11:02 AM), <https://theconversation.com/4-reasons-why-abortion-laws-often-clash-with-the-majoritys-preferences-in-the-us-from-constitutional-design-to-low-voter-turnout-188180> [<https://perma.cc/TG6Z-HF2Y>] (identifying gerrymandering in district apportionment and low voter turnout as the first two reasons legislators may not represent their constituents on these issues).

3. In the November 2024 election, citizen-initiated constitutional amendments passed in seven of the ten states where they were on the ballot. Isabel Guarnieri & Krystal Leaphart, *Abortion Rights Ballot Measures Win in 7 out of 10 US States*, GUTTMACHER INST. (Nov. 6, 2024), <https://www.guttmacher.org/2024/11/abortion-rights-state-ballot-measures-2024> [<https://perma.cc/7E9U-RTVP>]. In earlier post-*Dobbs* elections, ballot amendments had prevailed in every state in which they had been proposed. See Emily Bazelon, *The Surprising Places Where Abortion Rights Are on the Ballot, and Winning*, N.Y. TIMES (Sept. 12, 2023), <https://www.nytimes.com/2023/09/12/magazine/abortion-laws-states.html> [<https://perma.cc/4CKU-EMBA>].

4. See Jessica Winter, *Can Direct Democracy Save Abortion Rights?*, NEW YORKER (Nov. 7, 2024), <https://www.newyorker.com/news/the-lede/can-direct-democracy-save-abortion-rights> [<https://perma.cc/2SRP-MLAH>] (discussing power and limits of citizen initiated state constitutional amendments as a response to abortion bans); Mabel Felix, Laurie Sobel & Alina Salganicoff, *The Opportunities and Realities of Citizen-Initiated State Ballot Abortion Measures*, KFF (Oct. 16, 2024), <https://www.kff.org/womens-health-policy/issue-brief/opportunities-realities-citizen-abortion-ballot-measures/> [<https://perma.cc/VPQ6-J7EW>].

5. The term “plebiscite” refers to “a vote by which the people of an entire country or district express an opinion for or against a proposal especially on a choice of government or ruler.” *Plebiscite*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plebiscite> [<https://perma.cc/8W5W-X9KE>]. A plebiscite may be triggered either by a citizen-initiated petition (an “initiative” election) or a referral from the legislature (a “referendum” election). In the abortion area, both kinds of plebiscites have been used. Conservative state legislatures such as Kansas or Kentucky have sought to incorporate anti-abortion changes in the state constitution through referenda. See Bruce Schreiner & Beth Campbell, *Kentucky Voters Reject Constitutional Amendment on Abortion*, PBS, (Nov. 9, 2022, 9:13 AM), <https://www.pbs.org/newshour/politics/kentucky-voters-reject-constitutional-amendment-on-abortion> [<https://perma.cc/BUA2-75ZE>]; Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/SG3L-TRZA>]. Citizens of both conservative and progressive states have sought to use the initiative method to include abortion-protective changes in the state constitution. See Felix et al., *supra* note 4. Whether either of these forms of direct democracy can be used to enact constitutional amendments depends on the state’s constitution.

Pointed and painful disagreements have emerged in some states about the scope and value of plebiscitary amendments to protect abortion and other reproductive rights. Differences over temporal limits on the abortion right have been the most frequent ground of disagreement, but conflict has also emerged over the scope of reproductive threat, the appropriate time frame for change, and the inclusiveness of the coalition orchestrating the initiative campaign. Threading through these disagreements are divergent views of change in a democratic system: how processes of self-governance should be structured, and who and what they should prioritize in the reproductive domain.⁶

In this Article, I will draw on my ongoing empirical work, focused on Missouri and several other abortion-restrictive states, to elaborate the views of democratic change in the area of reproduction that underlie competing positions on abortion-protective ballot amendments. I describe the primary bases of disagreement and often-painful divisions they have created. Then considering the intensifying landscape of reproductive threat, I examine one strategy for easing these tensions: identifying discrete efforts that might allow for incremental collaboration between the contending parties.

I. TWO VISIONS OF REPRODUCTIVE CHANGE

A. *Proponents of the Initiative Strategy: “Fast” Democratic Change*

The vision animating many supporters of plebiscitary change is of a crisis produced by *Dobbs*.⁷ This crisis was initiated by *Dobbs*'s removal of

6. Notwithstanding my elaboration of two archetypal or paradigmatic views, there are some organizers whose work falls into both categories. These might include, for example, ballot supporters who use the growth of volunteer forces through a ballot election to organize a core of those volunteers for longer term action, or viability opponents who see a(n unlimited) ballot initiative as a vehicle for drawing attention to a wide range of reproductive inequalities. However, the dynamics of ballot campaigns—which include a need to agree on precise language (often involving the question of viability), a sense of urgency on the part of supporters, or an effort to tailor a message that appeals to what is perceived to be the widest range of voters—may transform these potentially overlapping views into sharply opposed positions. See Christine Fernando & Summer Ballentine, *Disputes Over Viability are Dividing Abortion-Rights Groups and Complicating Ballot Measure Efforts*, PBS (Jan. 16, 2024, 1:59 PM), <https://www.pbs.org/newshour/politics/disputes-over-viability-are-dividing-abortion-rights-groups-and-complicating-ballot-measure-efforts> [<https://perma.cc/A3QD-U9UD>].

7. Although *Dobbs*'s removal of *Roe*'s protections is the origin of the crisis, supporters' discourse often targets the actions of a given state's legislature, because they pose the immediate threat to citizens' abortion access. This kind of argument is made, for example, by Abortion Action Missouri, one of the leaders of the ballot initiative campaign in Missouri. In exhorting citizens to vote for the ballot initiative, they state, “Despite decades of Targeted Restriction of Abortion Provider (TRAP) laws that whittled down access to care, the enactment of our state's abortion ban in 2022, and continual, baseless attacks by anti-abortion, anti-democracy politicians, Missourians have built power and triumphed over the obstacles thrown our way.” Abortion Action MO, FACEBOOK (Oct. 10, 2024), <https://www.facebook.com/watch/?v=559490516759917> [<https://perma.cc/VV2Z-ACHE>].

a federally protected right to end a pregnancy via abortion: the constrained but nonetheless constitutionalized right protected by the regime of *Roe v. Wade*.⁸ Without the protections of the *Roe* regime—a line of cases that defended abortion while defining those state interests that could justify restriction of reproductive choice—states could enact legislation that could strictly limit or wholly proscribe the choice to end a pregnancy.⁹ Close to two dozen states ultimately did.¹⁰ These bans had the predictable effect of thwarting the efforts of many pregnant people with unwanted pregnancies to secure abortions.¹¹ They also had the less predictable effect of rendering legally perilous, and practically uncertain, the care of conditions from miscarriage to ectopic pregnancy to fatal fetal anomaly, which also occur in wanted pregnancies.¹² In this view, the anxiety, trauma, and myriad physical harms produced by these bans, as well as the financial and logistical expense of traveling for abortion care, demanded prompt action.

Precisely what shape this action has taken has depended in part on the legal context of the state.¹³ Where there are existing state constitutional protections that might be given effect through the courts, litigation is a strategy. This has sometimes worked temporarily by staying the effect of a ban.¹⁴ It has occasionally produced a more conclusive decision where an applicable provision exists *and* the state supreme court is more protective

8. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

9. The majority in *Dobbs* held that overruling *Roe* returned the power to regulate or to prohibit abortion to the states. *Dobbs*, 597 U.S. at 232 (“It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

10. See *State Bans on Abortion Throughout Pregnancy*, *supra* note 2.

11. See Suzanne O. Bell et al., *US Abortion Bans and Fertility*, 333 JAMA 1324, 1331 (2025) (finding a 1.7% increase in live births, equivalent to more than 22,000 excess births, in states with abortion bans, with the highest impacts on racially and economically marginalized groups).

12. In fact, one irony of the current moment is that the discussion of these unanticipated consequences has largely swamped the discussion of “ordinary” abortions: both because these consequences were not anticipated, and because the actors involved may be more “relatable” to members of the public who are assessing the costs of abortion bans (both in ballot amendment states and other state contexts). I make this point in Kathryn Abrams, *Lawyers on the Post-Dobbs Landscape: The Case of the Ballot Initiative*, 113 CALIF. L. REV. 917 (2025). Lawyers for the plebiscitary campaign in Ireland have noted the same focus in campaign storytelling. See Fiona De Londras, Remarks at the Law and Society Annual Meeting: Dispatches from the Frontlines (June 2024) (notes on file with the author).

13. The move to plebiscitary solutions reflects an implicit critique of some conventional democratic processes: gerrymandering, and the ideological capture of state representatives have made state legislatures unresponsive to their constituents. But in its effort to secure a rapid response, suited to what proponents frame as the exigencies of the moment, the use of initiatives seeks to steer around unrepresentative legislatures, rather than engage in a more direct way the failings that render them unaccountable. For a more extensive discussion of these perceived benefits, see Abrams, *supra* note 12.

14. The Ohio legislature’s six-week ban, adopted almost immediately after *Dobbs* in June 2022, was enjoined by a trial court more than a year before the ballot election. See *Preterm-Cleveland v. Yost*, No. A2203203 (Ohio Ct. Com. Pl. Sept. 14, 2022).

of abortion than the state legislature that has enacted the ban.¹⁵ If appealing to the state supreme court seems questionable because of its personnel, sometimes a judicial election is the answer. After Wisconsin voters elected Justice Janet Protaseiwicz, who campaigned on her support for abortion, the attorney general brought a case challenging the nineteenth-century ban to which the state reverted following *Dobbs*.¹⁶

Occasionally public pressure on the state legislature can produce action. In Arizona, two Republicans in the Republican-controlled legislature were persuaded to vote with Democrats to repeal a Civil War-era near-total abortion ban, leaving in place a 2022 law establishing a ban after fifteen weeks.¹⁷ Often, however, advocates can rely on no extant state constitutional provision protecting abortion; moreover, in many states they face state bans of great stringency, enacted through gerrymandered representation schemes that render legislators unaccountable to the preferences of their constituents.¹⁸ Under these circumstances, the tool of the plebiscite has become the most promising strategy. It serves to invalidate post-*Dobbs* abortion bans; to respond to unrepresentative legislatures; and importantly, to engage large swaths of the population in the post-*Dobbs* project of defending access to abortion.

Most often, the goal of initiative campaigns has been to restore, in broad terms, the protections of the *Roe* regime itself.¹⁹ While some proponents

15. Kansas's Supreme Court, for example, struck down a state law banning a common second trimester abortion procedure, holding that the state constitution protected a fundamental right to person autonomy, which includes a right to decide whether to end a pregnancy. *Hodes v. Kobach*, 551 P.3d 37 (Kan. 2024).

16. See Todd Richmond, *Wisconsin Supreme Court to Consider Whether 175-Year-Old Law Bans Abortion*, AP NEWS (July 2, 2024, 4:24 PM), <https://apnews.com/article/wisconsin-supreme-court-abortion-rights-lawsuit-bad9f2dd642bf58df201811aeaa97a> [<https://perma.cc/URF7-AX59>]; see also Alex Groth, *Three Ways the Wisconsin Supreme Court Could Shape Your Life*, MILWAUKEE J. SENTINEL (June 14, 2023, 7:12 AM), <https://www.jsonline.com/story/news/politics/2023/06/14/abortion-law-gerrymandering-voting-coming-to-wisconsin-supreme-court/70272976007/> [<https://perma.cc/87AQ-66AH>] (discussing potential influence of the election of Justice Protasiewicz). However, a change in personnel produced the opposite result in South Carolina, with the state supreme court upholding a six-week abortion ban it had struck down a year earlier. See *Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121 (S.C. 2023).

17. Anita Snow & Morgan Lee, *Arizona Lawmakers Vote to Undo Near-Total Abortion Ban from 1864, with Gov. Hobbs Expected to Sign*, AP NEWS (May 1, 2024, 8:32 PM), <https://apnews.com/article/arizona-abortion-1864-ban-repeal-24578e546b69ca087e01034bc4af4aa01> [<https://perma.cc/QB5X-TZJZ>].

18. Where Republican representatives come from strongly gerrymandered, supermajority districts, or command a supermajority of districts in the legislature relative to the percentage of their party's voters in the state, they are capable of winning re-election even if they are not supported by those constituents who diverge sharply from their views on abortion. See Baum et al., *supra* note 2.

19. Sometimes proponents have argued that ballot amendments improve upon the protections provided by the *Roe* regime, even as they retain its temporal structure. Proponents of Missouri's Amendment 3 note, for example, that Section 3 provides that "the right to reproductive freedom shall

may endorse the substantive accommodation of interests reflected in the viability standard (that was referenced in *Roe*'s trimesterization and formalized in *Casey*²⁰)—assenting to the notion that viability represents some meaningful phase in the development of fetal life that warrants protection²¹—many more view the reinstatement of a viability limit as a

not be denied, interfered with, delayed, or otherwise restricted unless the Government demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means," adding that "a governmental interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintaining the health of a person seeking care, . . . and does not infringe on that person's autonomous decision-making." MO. CONST. art. I, § 36(3). This standard preserves the "strict scrutiny" review imposed by *Roe*, and limits interests that may qualify as "compelling," as compared with the more forgiving "undue burden" test that became the constitutional standard in *Roe*'s progeny. See e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–77 (1992). Proponents have argued that this provision means that Amendment 3 provides a basis for invalidating TRAP laws that were upheld under the *Roe* regime. See Imani Gandy, *Why Missouri Republicans Are Clinging to 'Roe' for Dear Life*, REWIRE NEWS GRP. (June 4, 2025, 9:14 AM), <https://rewirenewsgroup.com/2025/06/04/why-missouri-republicans-are-clinging-to-roe-for-dear-life> [<https://perma.cc/SU5D-RQUK>]. (quoting Abortion Action Missouri ED Mallory Schwarz: "The Amendment was written with such a high standard of scrutiny, with such intentional level of protection, that these [TRAP] laws are blatantly unconstitutional").

However, the feature of the *Roe* regime that those critics discussed below find most problematic—the acknowledgment of the state's power to regulate abortion after fetal viability—is preserved in Amendment 3. Section 4 of the Amendment provides that the state:

may enact laws that regulate the provision of abortion after Fetal Viability, provided that under no circumstance shall the Government deny, interfere with, delay, or otherwise restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person.

MO. CONST. art. I, § 36(4). This provision is arguably more explicit about the medical findings that would justify exemption from governmental regulation. Compare MO. CONST. art. I, § 36(4) ("life or physical or mental health of the pregnant person"), with *Casey*, 505 U.S. 833 ("life or health of the mother"). Moreover, unlike *Roe* or *Casey*, it does not justify post-viability prohibitions by referencing the "potential life" of the fetus. Because the provision defining "fetal viability" cites the "good faith judgment of a treating health care professional and based on the particular facts of the case," MO. CONST. art. I, § 36(8)(1), it raises, at least hypothetically, the possibility that a medical professional might contest the state of fetal development or cite a threat to maternal life or health to challenge a regulation. But as a general matter, the structure of this clause, which acknowledges the power of the legislature to regulate the provision of abortion after viability, tracks the language and logic of *Roe* progeny such as *Casey*. See *Casey*, 505 U.S. at 879. It is primarily because ballot proposals like Amendment 3 are structured around temporal limits—in particular, the viability limit—that such amendments are described by critics (and sometimes by proponents themselves) as reinstating the *Roe* regime.

20. *Casey*, 505 U.S. 833.

21. This view of viability seemed to be implicit in the opinion of Judge McBurney, a Fulton County Superior Court judge, who struck down Georgia's statute, the LIFE Act, banning abortion after six weeks as a violation of the state's constitution. See *Sister Song Reprod. Just. Collective v. State*, No. 2022CV367796 (Ga. Super. Ct. Fulton Cnty. Sept. 30, 2024) ("At some point, the pregnancy acquires its own rights that deserve protection, protection that can conflict with the mother's exercise of her rights. We struggle mightily -- and not always peaceably -- with determining when that point arrives. . . . For many others, including Georgians until the LIFE Act was passed, that tipping point is viability, when the fetus -- now fully formed -- can survive outside the mother.").

pragmatic accommodation of the pressures of the moment.²² Embodying the protections of the Roe regime in a state constitutional amendment evokes a standard that is recognizable and reassuring to many members of the public; it may seem to avert costly controversies about the possibility of abortion “up until the moment of live birth”; and its return to a familiar regime of constitutional protections for reproductive choice is *terra cognita* for the lawyers who often play a central role in initiative campaigns.

Supporters of initiative campaigns also share several larger assumptions about the democratic change that is required to restore reproductive rights. First, they assume that the problem of abortion restriction can be resolved, or importantly ameliorated, by a discrete solution with a relatively short time horizon. This premise, in turn, rests on a second assumption: that the conventional institutions of representative democracy, or the more exceptional (if constitutionally authorized) practices of direct democracy can do the necessary work. In the latter cases, it is necessary to mobilize voters to achieve the desired results. But because it requires only a single act—often timed to coincide with congressional or presidential elections—existing organizations and coalitions are presumed to be sufficient to the task. There is little in the way of re-envisioning institutions, or asking whether or how they reflect a fully democratic “voice,” that is required. For these reasons, I label this approach—prominently embodied in support for ballot elections but also reflected in the legislative or judicial approaches described above—a vision of “fast” democratic change.

Not coincidentally, the demand imposed by this vision of democratic change in the reproductive field corresponds to views of political process and political engagement that prevail in many quarters of our society.²³ The operation of established electoral institutions and practices (which are often

22. See Christine Fernando & Summer Ballentine, *Why ‘Viability’ Is Dividing the Abortion Rights Movement*, AP NEWS (Jan. 17, 2024, 3:37 PM), <https://apnews.com/article/abortion-viability-ballot-initiatives-2024-roe-fcf440373973b01f740912cd3bbd98a4> [<https://perma.cc/6M8DBQSH>] (quoting Mallory Schwartz, executive director of Abortion Action Missouri: “We have to consider both what is politically possible and also look at why that is possible in this moment”). For a searching interrogation of the arguments undergirding the viability limit, that ascribes its “stickiness” to its status as a kind of pro-abortion “orthodoxy,” see Susan Frelich Appleton, *Viability as Abortion-Rights Orthodoxy*, 90 MO. L. REV. (forthcoming 2025). As Appleton perceptively notes, while critics of ballot amendments that preserve the temporal structure of Roe offer explicit arguments against the viability limit, proponents—as in the case of Missouri—tend to maintain a “low profile” on the viability issue, allowing their support for a viability limit to remain largely implicit, rather than arguing for it in analytical or empirical terms. *Id.* at 10.

23. Another factor that makes this “fast” vision of democratic change (particularly in its direct democratic version) appealing is the way it speaks to the emotions of those who feel dispossessed by *Dobbs*. Those who have participated in ballot campaigns have described to me the way that they felt stunned or hopeless after *Dobbs*, and the way that the ballot campaign restored their sense of possibility, or their capacity to take action on their own behalf. See Interview with B (Sept. 2024); Interview with J (Sept. 2024); Interview with K (Sept. 2024).

viewed as temporarily but not irreparably dysfunctional) requires only intermittent focus and participation on the part of the larger public. The challenge becomes activating extant coalitions for leadership, and mobilizing strongly-motivated voter-volunteers for the more intense but short-term effort necessary gather signatures for a ballot petition and encourage the participation of their fellow citizens.²⁴ For the average voter, the ask is simply that they turn out to make the discrete change that will reverse the abortion-restrictive effect of *Dobbs*. These efforts are similar to those elicited by many “Get out the vote” campaigns, and to the routine exercise of the franchise that characterizes most elections. As with most elections, voters can then expect to leave the remaining resolution to the aggregative processes of vote tallying, and then to implementing institutions.²⁵

If the challenge is the relatively bounded one of restoring the *status quo ex ante* with respect to abortion, and the process involves a (relatively) familiar set of institutions, what counts as knowledge or justifies leadership in this substantive and procedural landscape appears to be straightforward. Qualifications for leadership include legal knowledge, organizational capability to work at scale, relationships to funders (ballot initiatives are an expensive means of reproductive change),²⁶ and access to and experience with mainstream media.²⁷ This understanding of knowledge and expertise

24. Interview with B, in St. Louis, Mo. (Apr. 2024) (noting the intensity of signature gathering for the Missouri abortion initiative, and way that volunteers rose to the effort); Online Interview with G (Sept. 2024) (same).

25. Some groups heavily involved in the ballot campaigns have used the uptick in participation they produce as an opportunity for organizing, appealing to participants to become involved in reproductive activism over the longer term. One organization involved in the Missouri campaign has focused on “building power” in its aftermath, by organizing participants to form constituent-led groups that will seek to build longer-term relationships with elected representatives to advance their reproductive agenda. See Online Interview with G (Sept. 2024). The precise content of that agenda, while generally pro-abortion, remains to be clarified by participants.

In other state contexts, however, participants have lamented that they sought to turn their post-campaign energy toward longer-term goals, but the organizations that had previously mobilized them provided no opportunity to do so. See Interview with J (Sept. 2024). Part of the difficulty may be that while ballot campaigns draw on the visibility, expertise, and networks of established reproductive rights organizations, they are often formally orchestrated by leaders and entities that exist only for the duration of the campaign, which can diffuse efforts if there is no clear “hand-off” when it ends.

26. In conservative or divided states, supporters spent extremely large sums on ballot elections. See April Rubin, *Abortion-Rights Groups Spend Big on Ballot Measures*, AXIOS (Nov. 4, 2024), <https://www.axios.com/2024/11/04/abortion-campaign-spending-election-2024> [<https://perma.cc/28GU-JFWA>] (reporting that supporters in Florida spent \$76 million, supporters in Missouri spent \$31 million, and supporters in Arizona spent \$17 million on 2024 ballot elections).

27. Elsewhere, I have argued that plebiscitary elections present more of a challenge to this presumed qualification for leadership than this argument might suggest. This is because current organizational leadership on reproductive issues was constituted with the assumption that most details would be hammered out in courts, while solutions now entail the navigation of a range of democratic

tends to favor the “legacy” organizations that protected abortion under the Roe regime. It surely requires coalitional efforts—with pollsters, to test ballot language, or with organizations skilled at ballot campaigns, or voter registration and turnout—but this vision introduces few new assumptions about what constitutes privileged knowledge.

B. Critics of the Initiative Strategy: “Slow” Democratic Change

Critics of recent plebiscites begin with a different view of the current reproductive challenge. This position has generated debate in several recent ballot elections, perhaps most notably in Missouri.²⁸ It was also elaborated at length in a recent policy brief titled “Abortion Justice, Now.”²⁹ This brief was drafted by five advocates (two of whom publicly debated the language and limits of the Missouri ballot issue) and endorsed by several dozen organizations and individuals who prioritize its more ambitious view of the requirements for meaningful reproductive change.³⁰ Its ultimate goal is to support federal protection for abortion that is *free of the gestational limits imposed by Roe*, and *guided by a reproductive justice vision of centering those most impacted by such restrictions*.³¹ But it argues that a similar position must be taken by advocates in the states, who must confront

institutions. But it is also because, in the face of concerted anti-abortion opposition, these initial votes—even to amend state constitutions—will likely not resolve the issue and new coalitions aimed at a kind of implementation that involves the transformation of both the opinions and the role of non-professionalized members of the public is likely to be required. See Abrams, *supra* note 12.

28. See Alice Miranda Ollstein & Megan Messerly, *Harris Wants to Restore Roe. For Many Activists, That’s Not Enough.*, POLITICO (Aug. 20, 2024, 12:00 PM), <https://www.politico.com/news/2024/08/20/harris-restore-roe-abortion-activists-00174816> [https://perma.cc/3USF-799M]; see also Fernando & Ballentine, *supra* note 6; Alice Miranda Ollstein & Megan Messerly, *Democrats Want to Restore Roe. They’re Divided on Whether to Go Even Further.*, POLITICO (Apr. 4, 2023, 4:30 AM), <https://www.politico.com/news/2023/04/04/divisions-threaten-abortion-rights-ballot-campaigns-00090021> [https://perma.cc/5N4Z-H4VS].

29. ABORTION JUSTICE, NOW: PROTECTING ABORTION AT THE FEDERAL LEVEL (2024); see also SHELLEY SELLA, BEYOND LIMITS: STORIES OF THIRD-TRIMESTER ABORTION CARE (2025) (documenting a provider’s experience with late term abortions and advocating for a paradigm not structured by temporal limits).

30. See *id.* See generally Ollstein & Messerly, *Harris Wants to Restore Roe. For Many Activists, That’s Not Enough.*, *supra* note 28 (describing pro-abortion opponents of a return to *Roe* as uniting behind the policy platform announced in Abortion Justice, Now). Positions outlined in the brief have also been articulated in interviews that I have done with critics of the ballot initiative approach in Missouri and elsewhere (where I cite these interviews, I will anonymize the speakers, as the issue remains highly controversial). Some of the brief’s substantive positions, along with other arguments that are distinct, are also captured an online response to announcement of the Missouri Ballot campaign by one Missouri reproductive justice organization. See Reale Justice Network, *Official Position on the Missouri Abortion Ballot Initiative*, FACEBOOK (Feb. 16, 2024), <https://www.facebook.com/photo?fbid=723066176614967&set=pcb.72306624328162>[https://perma.cc/8PG4-XUZM].

31. ABORTION JUSTICE, NOW, *supra* note 29, at 1.

legislative or initiative-based proposals that incorporate temporal limits on the availability of abortion.³²

In the view of these critics, the need for change at this moment is driven not simply by *Dobbs*,³³ but by the ways in which prominent campaigns for change, and their supporters, are responding to it. The present moment demands not a restoration of the *Roe* regime, but an exposure and interrogation of the limits inherent in *Roe* and its progeny themselves. In the words of the brief, “a return to a *Roe*-era status quo squanders a once in a generation opportunity to reimagine reproductive rights, health, and justice. It squanders the opportunity to repair the fundamental issues with a rights framework most of us were born into”³⁴ Critics frame their goal as asserting an encompassing right to abortion access for all, as one element of a *reproductive justice* framework.

This framework, developed by Black women in the 1990s, defines reproductive justice as “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”³⁵ This vision highlights not simply abortion restriction, but disparities in access to abortion. It connects these disparities to other reproductive inequalities structured by race, class, and gender identity: in health care; in competent, respectful, and responsive medical attention during delivery and postpartum periods; and in the ability to parent children free of state surveillance, intervention, or criminalization. These disparities impose life-threatening burdens on those at the margins, including Black women and other women of color, those living in poverty or embroiled in the carceral system, immigrants, and trans and gender non-binary people seeking reproductive or other healthcare.³⁶

Against this backdrop, the problems with initiative campaigns are manifold. Substantively, campaigns that aim to reinstate a viability limit either misread what is required to establish justice in the reproductive field and settle too readily for a compromise that fails those they should be most concerned to help. The *Roe* regime itself reflected a series of compromises,

32. *Id.* pt. 4.A., at 10.

33. *Id.* pt. 1.C., at 4 (“Under *Roe*, tens of thousands of abortion seekers were denied care every year The *Dobbs* decision, while catastrophic on many levels, is also an opportunity to escape *Roe*’s flawed framework that left so many people behind.”).

34. *Id.* pt. 4.A., at 10.

35. *Reproductive Justice*, SISTER SONG, <https://www.sistersong.net/reproductive-justice> [https://perma.cc/R8KB-ALKU]. Sister Song, an organization led by Black women, is one of the originators of the reproductive justice vision.

36. For members of these communities, abortion may be simply one issue on a spectrum of reproductive inequities. See Online Interview with A (Mar. 2024); Interview with A, in St. Louis, Mo. (July 2023) (describing this view in the context of the lives of Black women).

first, through its gestational or viability limits.³⁷ The difficulty of securing treatment within its prescribed limits bore most heavily on those with limited access to health care, who were already managing their reproductive needs amidst a host of other challenges produced by structural racism, poverty, punitive immigration enforcement and more.³⁸ The Roe regime acquired additional restrictions when the Court upheld limits on public funding of at both state and federal levels, placing abortion beyond the reach of many who had relied on Medicaid to support their healthcare, and complicating the path to care event for those who sought to pay through private funds.³⁹ These barriers to abortion care, particularly within the prescribed periods, became more acute over half a century of doctrinally approved TRAP restrictions, which required, among other things, waiting periods that increased the need for travel, time off from work, childcare, and other tangible costs.⁴⁰ Abortion seeking under *Roe* and its progeny became an enervating obstacle course,⁴¹ whose barriers were particularly acute for those at the margins,⁴² including the four in ten abortion seekers who live below the poverty line, three in ten who are low-income,⁴³ and the one in

37. See ABORTION JUSTICE, NOW, *supra* note 29, pt. 2.A.–B., at 4–7.

38. *Id.* pts. 2.B.–C., at 5–8. The brief notes that “[u]nder *Roe*, tens of thousands of abortion seekers were denied care every year due to abortion bans based on gestational duration or viability.” *Id.* pt. 1.C., at 4.

39. As of 2009, more than one million women had been unable to afford abortion care as a result of the Hyde Amendment, upheld in *Harris v. McRae*, 448 U.S. 297 (1980), because they relied on Medicaid for their health care. See STANLEY K. HENSHAW, THEODORE J. JOYCE, AMANDA DENNIS, LAWRENCE B. FINER & KELLY BLANCHARD, GUTTMACHER INST., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW 3, 27 (2009).

40. See Tracey A. Wilkinson & Caitlyn Bernard, Editorial, *Abortion Restrictions and the Impact on Families*, 178 JAMA PEDIATRICS 15 (2024) (stating that TRAP laws, which began to be enacted immediately after *Roe*, restrict abortion access, and produce harms to families, but do not make abortion safer).

41. This was in fact the name of a leading book on abortion, pre-*Dobbs*. See DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA (2020). The harms of such barriers extend beyond enervating path to and potential denial of abortion itself. The Abortion Justice, Now brief notes,

Advancing New Standards in Reproductive Health’s (ANSIRH) Turnaway Study compared abortion seekers on either side of a gestational cutoff, documenting differences between those who were able to get an abortion with those who were denied care. . . . “Being denied a wanted abortion is associated with an increase in household poverty, worse physical health, lower ability to care for existing children, and being less likely to set aspirational plans.”

ABORTION JUSTICE, NOW, *supra* note 29, pt. 2.B., at 6 (emphasis omitted) (quoting SOC’Y OF FAM. PLAN., SCIENCE SAYS: PREGNANCY GESTATIONAL DURATION LIMITS AND BANS ON ABORTION ARE HARMFUL 2 (2024), <https://societyfp.org/wp-content/uploads/2024/05/SCIENCE-SAYS- Pregnancy-gestational-duration-limits-and-bans-on-abortion-are-harmful.pdf> [<https://perma.cc/DW74-X74Y>] (citations omitted).

42. These challenges led the Reale Justice Network to declare: “We are unwavering in the belief that *Roe* will always, always, always be the absolute floor. There is no real choice if people don’t have access to the health resources they need.” Reale Justice Network, *supra* note 30.

43. ABORTION JUSTICE, NOW, *supra* note 29, pt. 2.B., at 6.

ten who, even before *Dobbs*, were forced to travel across state lines to secure abortion care, because of restrictions upheld under that regime.⁴⁴ Since *Dobbs*, these problems of access have become markedly more widespread, as state bans have required one in five abortion seekers to travel for abortion care.⁴⁵ However, the problems with the *Roe* regime and its viability limits, extend beyond abortion.⁴⁶ language that recognizes a state interest in the developing fetus—even before birth—may be used *a fortiori* to justify interventions such as criminalization and family separation⁴⁷ that occur after a pregnancy culminates in live birth.

This understanding of the problem of reproductive care also points to process-based problems with the initiative strategy. First, ballot elections prioritize speed and simplicity of response, professedly for purposes of ending the suffering of childbearing people and their families under the bans. But as the above analysis contends, arduous and health-threatening restrictions on abortion access are new (and thus reversible by a return to the *Roe* regime) primarily for those who enjoy relative privilege. Thus, the urgency that drives support for initiative campaigns redounds primarily to the benefit of those who are already better able to navigate restriction.⁴⁸ Second, the rush to implement what critics view as an inadequate remedy also forecloses a process of democratic re-assessment that critics see as vital to sound long-term change. Abortion Justice, Now argues that the goal is for state advocates to “*coalesce* around expansive policies, defuse influence from outside interest groups, and disrupt the harmful narrative . . . that ‘some access is better than none.’”⁴⁹ Critics of the ballot issue, and of the *Roe* regime, describe several steps that are necessary to promote this goal.

The first is the reconstitution of the coalition for reproductive change. This requires not simply the inclusion, but the leadership, of those most

44. *Id.* pt. 1.C., at 4. The brief also notes that there are many who are simply unable to travel for abortion care:

either because they cannot overcome the logistical burdens, because of their immigration status, because they are young and lack support from their guardians, because their health or disability status does not enable them to, or because they are not legally allowed due to probation, incarceration, or detention. And this list is not exhaustive.

Id. pt. 2.B., at 6.

45. *Id.*

46. As Abortion Justice, Now observes, “[e]nshrining a viability standard . . . is not an incremental step toward expansive rights or harm reduction. Instead, it is an incremental step toward fetal personhood.” *Id.* pt. 2.A., at 5.

47. These justifications intersect with myths or stereotypes about Black women as flawed or unworthy mothers. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 3–21 (1997).

48. For this reason the Reale Justice Network calls the sense of urgency that animates ballot campaigns (and supports the argument that “something—i.e., reinstating *Roe*’s viability limit—is better than nothing”) acting “at the speed of white supremacy.” Reale Justice Network, *supra* note 30.

49. ABORTION JUSTICE, NOW, *supra* note 29, pt. 4.A., at 10 (emphasis added).

affected by the inaccessibility of abortion rights, as well as other reproductive inequalities. “[T]hose most impacted by limits and compromises as well as those working directly with those groups,” Abortion Justice, Now explains, “must lead the effort to rebuild the reproductive rights landscape.”⁵⁰ This is not only a reparative move, given the relative marginalization of those most affected and the reproductive justice groups that advocated for them during the Roe regime. It also reflects a re-assessment of the claims that justify inclusion and leadership in reproductive coalitions. The experience of being directly affected by intersecting systems of reproductive inequality is a vital source of knowledge about the problem and its prospective solutions.⁵¹ It brings to policy discussions a concrete familiarity with the paths through which reproductive inequality manifests and can point to changes or supports that could short-circuit these paths. Such knowledge is sometimes utilized in mainstream pro-abortion campaigns: storytelling has been a central strategy ballot campaigns, and public discourse advocating for reproductive rights.⁵² But these are often the stories deemed most “relatable”—of white, married women who have faced fetal anomalies in wanted pregnancies.⁵³ And the experience they reflect does not so much drive priorities as mobilize support for policies arrived at through other organizational processes. Ballot critics’ prioritization of experience has often been supplemented with other forms of knowledge by those who share this vision. The Abortion Justice, Now brief “draw[s] from a range of areas of expertise including medical evidence, public health research, legal analysis, public opinion research,

50. *Id.* at 1.

51. Commitment to experience as a source of leadership may also entail capacity building, to enable those with first-hand experience to transition into leadership roles. See Interview with C, in St. Louis, Mo. (Apr. 2024); Interview with A, in St. Louis, Mo. (July 2023).

52. Sometimes this advocacy includes the stories of those at the intersections of reproductive disadvantage: such as the narrative of Amber Nicole Thurman, a Black woman who died after doctors failed to treat her for an incomplete medication-induced abortion. See Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say this Mother’s Death Was Preventable.*, PROPUBLICA (Sept. 16, 2024, 5:00 AM), <https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death> [<https://perma.cc/YT6H-GBYF>]. Arguably this death received particular visibility, as the result of the presidential campaign of Kamala Harris, herself a Black woman, who publicized the story. See Colleen Long, Amanda Seitz & Josh Boak, ‘She Should Be Alive Today’ – Harris Spotlights Woman’s Death to Blast Abortion Bans and Trump, AP NEWS (Sept. 21, 2024), <https://www.ap.org/news-highlights/elections/2024/she-should-be-alive-today-harris-spotlights-womans-death-to-blast-abortion-bans-and-trump/> [<https://perma.cc/9UUR-49JS>].

53. A good example is the litigation in *Zurawski v. Texas*, where white, married, middle-class prospective mothers such as Amanda Zurawski and Dr. Austin Dennard have struggled to find care in states such as Texas when they faced complications in wanted pregnancies. See *State v. Zurawski*, 690 S.W.3d 644, 655 (Tex. 2024). This case, which comprised more than 20 tragic examples of failures of care, was not only the subject of extensive litigation; it was the focus of a critically acclaimed documentary. See *Zurawski v Texas Documentary Film*, CTR. REPROD. RTS., <https://reproductiverights.org/zurawski-v-texas/> [<https://perma.cc/K5GV-V9L5>].

practical abortion support and funding organizations, and the perspectives of providers and patients impacted by these limits.”⁵⁴ A reproductive health organization in Missouri points to three sources of knowledge that inform its work: policy analysis, public health evidence, and the experience of affected Black women.⁵⁵ But despite the hybridity of their knowledge claims, critics take a skeptical view of the assumptions, reflected in the composition of many ballot coalitions, that organizational leadership during the *Roe* era, relationships with funders, or access to mainstream media are presumptive qualifications for leadership in the post-*Dobbs* period.⁵⁶

Second, while the Abortion Justice, Now brief focuses primarily on the goals of reproductive justice and on the critique of gestational limits and a singular focus on abortion care,⁵⁷ its proponents and other reproductive justice organizers also point to a series of practices that can build toward longer-term change. The first combines re-framing and community outreach.⁵⁸ The object of this effort is to change views of reproductive care through a gradual and deliberate process of ongoing dialogue. One organizer offered examples of reframing that aims to transform public views of the issue. One shift that is vital is for people to “understand the connection between the public health outcomes that we have and the lack of access to reproductive health care.”⁵⁹ This effort may also include conceptualizations that draw more on history and affective associations. It is important, one organizer argued that “people feel toward abortion access the way that they feel toward Social Security”⁶⁰—as a form of support vital to their well-being.

But these kinds of conceptual shifts are not achieved overnight: they require that organizers come to understand the views that members of the public currently hold on issues where they aim to inspire movement, and that they have an opportunity, carefully and responsively, to introduce new frames for understanding. This requires a time and labor-intensive process

54. ABORTION JUSTICE, NOW, *supra* note 29, at 2.

55. Interview with A, in St. Louis, Mo. (July 2023).

56. The Reale Justice Network’s position, for example, criticizes legacy reproductive rights organizations for conducting the planning stages of the campaign without any outreach to organizations representing BIPOC individuals. See Reale Justice Network, *supra* note 30.

57. A group called Raven Lab for Reproductive Liberation, two of whose founders are co-authors of the Abortion Justice, Now brief, aims to develop and support programmatic and organizing efforts that aim to implement the goals of the brief. *About Raven Lab*, RAVEN LAB, <https://www.ravenlab.org/about> [<https://perma.cc/47DQ-KGSQ>]; see also *Our Work*, RAVEN LAB, <https://www.ravenlab.org/our-work> [<https://perma.cc/6QPB-SZN8>].

58. See Online Interview with D (Feb. 2024); Online Interview with M (Dec. 2024); see also Online Interview with N (Oct. 2024) (describing similar strategy to reframe abortion rights through deep canvassing in Texas).

59. Online Interview with D (Feb. 2024).

60. *Id.*

sometimes described as “deep canvassing” and “deep education.”⁶¹ While organizers in some ballot states, like Missouri, have done brief periods of deep canvassing,⁶² it has been the focus of more sustained effort in states like Texas, where organizers do not have the option of pursuing a ballot strategy.⁶³ Sustained, doorstep conversations with community members about their views of reproductive health and freedom, what they see as necessary and what premises they might be encouraged to reconsider, allow organizers to understand where they are starting from and what kind of engagement might be generative. They also give community members a sense of being heard and lay the groundwork for mutual respect and trust⁶⁴ that might provide the basis for future collaboration or coalition.

Further ideas focus on what might be described as institutional pluralism and renovation. This means taking a close look at the structures or institutional arrangements through which solutions might be promulgated, and generating strategies for their utilization, renovation, or supplementation. This facet of a “slow” vision recognizes that there are many kinds of institutions and programs that might contribute to the achievement of reproductive justice objectives and aims to undertake the experimentation and assessment that can be the basis for effectiveness and innovation. Some suggestions go to the more effective navigation of existing democratic institutions. Organizers talk about strategies for “build[ing] power”⁶⁵ or learning to “speak truth to power”⁶⁶ among participants unaccustomed to sustained engagement with legislative or administrative institutions; this may include varied efforts at capacity-building among these less-institutionally experienced participants,⁶⁷ or building long-term relationships with receptive elective officials.⁶⁸ They

61. *See id.* (“You can’t do it any other way. You’re going to have to get out, meet people, and explain to them why it matters.”).

62. *See* Interview with G (Sept. 2024) (describing the incorporation of deep canvassing in organizing).

63. An organization called Avow in Texas has made deep canvassing a centerpiece of its long-term strategy of reproductive change. *See* Online Interview with N (Oct. 2024). This strategy has been particularly important because in Texas, the constitution does not allow citizens to put initiatives on the ballot. *See* Sarah Asch, *Why Can’t Texans Bypass the Legislature and Put a Referendum on the Ballot?*, TEX. STANDARD (Nov. 4, 2024, 3:20 PM), <https://www.texasstandard.org/stories/why-texas-does-not-have-citizen-led-ballot-referendums/> [<https://perma.cc/R2XY-S7H4>] (“Though Texas does go to voters for constitutional amendment referendums, these issues have to be put on the ballot by state lawmakers – not citizens gathering signatures.”).

64. *See* Online Interview with N (Oct. 2024).

65. Interview with G (Sept. 2024).

66. Online Interview with D (Feb. 2024).

67. Interview with C, in St. Louis, Mo. (Apr. 2024); Interview with G (Feb. 2024).

68. In some cases, groups that have participated in ballot initiatives have sought to recruit participants for longer-term participation in building relationships with legislators and supporting pro-

may also involve the use of pilot programs and demonstration projects that do not rely on legislative direction, funding, or approval, but might be used to inform larger-scale, governmental efforts.⁶⁹ In all of these efforts, organizers prioritize the building of a robust coalition that is neither driven nor limited by individual programmatic efforts and—depending on the particular vision articulated—encompasses community members, organizations, and government officials.⁷⁰

A final direction is highly practical: as these longer-term efforts unfold, the coalition must also attend to the ongoing needs of those who have the most difficulty accessing reproductive care. Strategies of “harm reduction” are mounted by abortion funds and navigation organizations (which provide practical and financial support to those who must seek abortion care out of state), distribution networks for medication abortion, hotlines for the provision of reproductive advice and information, and more. They have prevented those most affected, as well as their more privileged counterparts, from suffering even greater harms during the imposition of abortion bans.⁷¹ But a key question, in the words of one organizer, is whether these harm reduction efforts are “built for five to ten years,”⁷² particularly given that private donations, which moved generously toward abortion funding and practical support organizations in the wake of *Dobbs*, “are drying up.”⁷³ These harm-reduction interventions must be supported and scaled for the mid-term.⁷⁴ As the Abortion Justice, Now brief declares: “We must approach this moment with abundance, not scarcity, and abundantly resource crisis responders like abortion funds, practical support organizations, clinics, and providers, while investing in long-term solutions that will guarantee nobody has to relive the trauma of abortion bans.”⁷⁵

abortion candidates. Such efforts, if persistent and broad in the scope of change they seek, could potentially provide a means of bridging “fast” and “slow” activist efforts. Interview with G (Sept. 2024).

69. Interview with A, in St. Louis, Mo. (July 2023) (describing pilot program).

70. One organizer referenced the sustained and apparently successful effort mounted in the state of Colorado to move the state from Republican to Democratic control. See Online Interview with D (Feb. 2024). This effort is described in ADAM SCHRAGER & ROB WITWER, *THE BLUEPRINT: HOW THE DEMOCRATS WON COLORADO (AND WHY REPUBLICANS EVERYWHERE SHOULD CARE)* (2010).

71. Online Interview with D (Feb. 2024). These efforts are likely responsible for the striking finding of the WeCount study published in October 2024, that the number of abortions provided had actually increased slightly during the two years following *Dobbs*. See SOC’Y OF FAM. PLAN., *#WECOUNT REPORT 2* (2024), <https://societyfp.org/wp-content/uploads/2024/10/WeCount-Report-8-June-2024-data.pdf> [<https://perma.cc/9P23-YGZQ>].

72. Online Interview with D (Feb. 2024). The election of Donald Trump and subsequent federal policy changes, which occurred after this interview, likely extends the frame during which such harm reduction efforts would have to be fortified and supported.

73. ABORTION JUSTICE, NOW, *supra* note 29, pt. 2.B., at 6.

74. See Online Interview with D (Feb. 2024); Interview with C (Apr. 2024).

75. ABORTION JUSTICE, NOW, *supra* note 29, at 13.

Each of these features points to a longer-term project. If shorter-term solutions—such as initiative petitions—are to be considered, they must be crafted in a way that serves, rather than conflicts with, these larger objectives. Reproductive justice advocates decry the logic of organizations that promise to “come back for you” once a narrow solution has been achieved.⁷⁶ This is a vision that cannot be achieved in the short-term, or via a single campaign; indeed, some of its features are incompletely defined and remain schematic or aspirational. But it is a more comprehensive vision of democratic change, in which claims of urgency are deferred, in favor of priorities aimed at substantive, coalitional, and institutional transformation.

C. Is There Common Ground for Reproductive Change?

The mixed consequences, and limited future, of ballot amendments may be one answer to the question about the larger vision of change. Ballot amendments prevailed in seven of ten state elections in 2024—slightly tarnishing though not substantially undercutting their winning performance in years following *Dobbs*.⁷⁷ More concerning has been the resistance in some states to acknowledging the change produced by ballot amendments. In Ohio, pro-choice attorneys were required to sue to invalidate TRAP laws, such as a twenty-four-hour waiting period. But the delay occasioned by this litigation (of close to a year to achieve a preliminary injunction against the 24-hour waiting period, for example),⁷⁸ was less detrimental than it might have been because the state—whose six-week ban had been enjoined by a state court⁷⁹—already permitted some abortions. Of more concern is the

76. See Pamela Merritt, Exec. Dir., Med. Students for Choice, Engaging with Rights Not to Have Children at the Washington University Symposium: Reflecting on Reproductive Justice (Sept. 6, 2024).

77. See Guarneri & Leaphart, *supra* note 3. The three losses were in Florida, where a majority-supported amendment was defeated by a state supermajority requirement; Nebraska, where partisans ran two different ballot issues and the anti-abortion ballot issue—maintaining the state’s ban after the first trimester—prevailed; and South Dakota, where the ballot amendment, which permitted abortion only in the first trimester, was defeated. *Id.*

78. See *Preterm-Cleveland v. Yost*, No. A2203203 (Ohio Ct. Com. Pl. Sept. 14, 2022) (granting a preliminary injunction against a 24-hour waiting period nine months after Ohio’s ballot amendment was approved by voters). Even given this victory, some in Ohio are concerned that such results could be undone by a state supreme court majority that now includes six of seven justices endorsed by Ohioan Right to Life. See Samantha Wildow, *Abortion Is Protected in Ohio, but Could That Change? Here’s What Could Come*, DAYTON DAILY NEWS (Nov. 21, 2024), <https://www.daytondailynews.com/ohio-abortion-is-protected-in-ohio-but-could-that-change-heres-what-could-come/QHSDR5SWY5GDRA4VENLXC6H7QU/> [<https://perma.cc/V4JV-LTD8>].

79. See Press Release, ACLU, Ohio Judge Permanently Strikes Down Six-Week Abortion Ban, Which Clearly Violates the Ohio Constitution’s Reproductive Freedom Amendment (Oct. 24, 2024), <https://www.aclu.org/press-releases/ohio-judge-permanently-strikes-down-six-week-abortion-ban-which-clearly-violates-the-ohio-constitutions-reproductive-freedom-amendment> [<https://perma.cc/9CYM-8EEZ>] (noting that Ohio’s six-week abortion ban had been temporarily enjoined since September

response in Missouri to the victory of Amendment 3.⁸⁰ Following a dramatic and disciplined campaign in which organizers fought off state challenges to the ballot initiative, gathered twice the number of required signatures to place the amendment on the ballot, and mobilized voters across the state,⁸¹ the Missouri electorate voted by a margin of 51.6% to adopt the amendment placing abortion protections in the state constitution. Yet from the outset, some state legislators argued that the modest margin of victory delegitimized the victory (itself a bizarre response to a majority vote in a democratic system);⁸² others argued that proposed restrictions on the newly-created right offered Missourians “an opportunity to modify and clarify the abortion laws of Missouri.”⁸³ In late May, the Republican-controlled legislature approved a bill that will refer to the voters a new constitutional amendment which would reverse the effects of Amendment 3, allowing abortion only in cases of rape or incest (up to twelve weeks), medical emergencies and fatal fetal anomalies.⁸⁴ Amendment 3 has also encountered challenges in the Missouri courts. Initially, a state lower court judge issued a preliminary injunction against a host of TRAP laws, including what clinics had described as the final barrier to resuming procedural abortion services: a law requiring state licensure of abortion facilities.⁸⁵ Three clinics

14, 2022, after three months of implementation, but that a permanent injunction against the ban was entered after the ballot amendment passed).

80. See Anna Spoerre, *Missouri Republicans Want to Restrict Abortion Again. Can They Agree on How?*, MO. INDEP. (Dec. 20, 2024, 7:00 AM), <https://missouriindependent.com/2024/12/20/missouri-republicans-restrict-abortion-amendment-3/> [<https://perma.cc/TAM9-VAAW>].

81. Jason Rosenbaum, *Missourians Overwhelmingly Pass Amendment 3, Legalizing Abortion up to Fetal Viability*, ST. LOUIS PUBLIC RADIO (Nov. 6, 2024, 1:12 PM), <https://www.stlpr.org/government-politics-issues/2024-11-05/missouri-pass-amendment-3-legalizing-abortion-fetal-viability-election-2024> [<https://perma.cc/2T5L-GQU6>].

82. Jeremy Kohler, *Missouri Voters Enshrined Abortion Rights. GOP Lawmakers Are Already Working to Roll Them Back*, PROPUBLICA (Dec. 5, 2024, 5:00 AM), <https://www.propublica.org/article/missouri-abortion-amendment-republican-bill-proposals> [<https://perma.cc/K2KV-AY36>] (citing a Republican legislator as stating “[a] clear mandate has not been achieved . . . [s]o I think it’s fair to again bring the question up”).

83. Sarah Kellogg, *Missouri Legislators Seek to Overturn Abortion Rights Passed Under Amendment 3*, STLPR, (Feb. 5, 2025, 5:00 AM), <https://www.stlpr.org/government-politics-issues/2025-02-05/missouri-legislators-seek-to-overturn-abortion-rights-passed-under-amendment-3> [<https://perma.cc/6C9F-LNLJ>].

84. See Kurt Erickson, *Missouri Senate GOP Slams Door on Democrats in Bid to Repeal Abortion Rights, Paid Sick Leave*, ST. LOUIS POST-DISPATCH (May 15, 2025), https://www.stltoday.com/news/local/government-politics/article_6349734a-87bb-49cf-94f3-9c1855059302.html [<https://perma.cc/C5C8-APN5>].

85. Order Granting in Part and Denying in Part Plaintiffs’ Motion for Preliminary Injunction, Comprehensive Health of Planned Parenthood Great Plains v. State, No. 2416-CV31931 (Mo. Cir. Ct. Feb. 14, 2025); see also Hannah Wyman, *As Abortion Services Resume in Missouri, Protests Do Too*, ST. LOUIS POST-DISPATCH (Feb. 17, 2025), https://www.stltoday.com/news/local/crime-courts/as-abortion-services-resume-in-missouri-protests-do-too/article_e9ef28bc-ed3f-11ef-8ac2-c317aca561fc.html [<https://perma.cc/C8FL-WFY4>]. For a discussion of the barrier created by state licensure

subsequently began to offer limited procedural abortion services.⁸⁶ However, on May 27, the state Supreme Court instructed the lower court judge to vacate and reconsider its preliminary injunction, responding to the state's argument that the court had applied an incorrect standard, and imposing, in the words of Amendment 3 proponents, "a de facto abortion ban."⁸⁷ On July 3, the lower court restored the preliminary injunction (including the order against state licensing requirements), allowing procedural abortions to resume; the state has declared its intention to appeal.⁸⁸ The future of ballot elections is also constrained by the fact that only two remaining ban states can even utilize a ballot election to change their state constitutions: in the other restrictive states, citizen-initiated amendments are not authorized by the state constitution.⁸⁹ These mixed outcomes make clear that while ballot amendments may have yielded benefits, ranging from a change in abortion policy to a valued assertion of agency for participants in a number of states, they do not provide a silver bullet, nor have they ratified a vision of reproductive change as something that can be achieved readily, through discrete campaigns. Even those that have succeeded make clear the need for longer-term organizing for the sequential barriers that can arise.⁹⁰

The 2024 elections provide stronger reasons to question "fast" visions of reproductive change. First, victories on ballot issues—and broader pro-abortion commitments—proved to be oddly decoupled from support for

requirement, see Anna Spoorre, *Missouri Judge Strikes Down Abortion Ban, but Clinics Say Access Remains Blocked*, MO. INDEP. (Dec. 20, 2024, 5:39 PM), <https://missouriindependent.com/2024/12/20/missouri-amendment-3-abortion-regulations-trap-laws/> [<https://perma.cc/2ZJM-BLGA>].

86. See *Planned Parenthood St. Louis Resumes Surgical Abortions, While Missouri Blocks Others*, CNN (Mar. 29, 2025, 11:36 AM), <https://www.cnn.com/2025/03/29/us/abortion-missouri-planned-parenthood> [<https://perma.cc/2T5P-VE9B>] (reporting that procedural abortions have begun to be offered in Kansas City, St. Louis, and Columbia, but an emergency change in state regulations for medication abortion triggered a rejection of pending applications for resumption of medication abortion services in the state).

87. Jack Suntrup, *Missouri Back Under a 'De Facto Abortion Ban' After Supreme Court Order*, ST. LOUIS POST-DISPATCH (May 28, 2025), https://www.stltoday.com/news/local/government-politics/article_e5636c36-368d-4916-b883-1444ef93d115.html [<https://perma.cc/W488-P6AT>].

88. Kaycen Bayless, *Abortions Can Resume in Missouri After New Ruling*, *Planned Parenthood Says*, ST. LOUIS POST-DISPATCH (July 3, 2025), https://www.stltoday.com/news/local/government-politics/article_5bf46d21-1599-4fa8-84c7-b954344fa479.html [<https://perma.cc/Q87P-RWG2>].

89. Mabel Felix, Laurie Sobel & Alina Salganicoff, *What's Next for State Abortion Ballot Initiatives?*, KFF (Dec. 18, 2024), <https://www.kff.org/policy-watch/whats-next-for-state-abortion-ballot-initiatives/> [<https://perma.cc/VH8M-YYU5>].

90. Some proponents of ballot initiatives seem to recognize this longer-term need. On the night of the victory of Missouri's Amendment 3, ACLU Missouri Executive Director Luz Henriquez told a crowd of celebrants: "While passing Amendment 3 is a crucial step in restoring access to reproductive freedom in Missouri, it is not the last step. As attempts to undermine our new right ensue, we have to turn this extraordinary moment into an enduring movement." See Rosenbaum, *supra* note 81. How this transition will be managed with a coalition of activists that was organized for an intense, short-term effort is a key question pro-ballot amendment organizers must now address.

candidates who embraced pro-abortion positions. Not only did the predicted wave of abortion supporters fail to lift Vice President Kamala Harris to victory, but in states such as Arizona and Missouri—where a majority of voters supported ballot issues—larger majorities supported Donald Trump and Republican legislators who had vocally advocated for abortion restriction.⁹¹ This perplexing outcome suggests that not all voters understand the relationship of representative democracy to abortion rights; moreover it puts in place officials who may be committed to undoing any incremental gains achieved since *Dobbs*—through further amendments, legislation, state executive intervention, and more. These results portend a need for a longer effort—to educate the public and to push back against duly elected officials who remain committed to an anti-abortion agenda, despite the pro-abortion positions of many of their constituents.

The clearest sign that a longer and more complicated struggle will be required is, of course, the reelection of Donald Trump. His first weeks in office have demonstrated not only a will to embrace the anti-abortion positions on which he equivocated during the campaign, but a plan to declare war on those at the reproductive margins through a range of novel institutional strategies. This the importance of two central tenets of the reproductive justice (or “slow democratic”) agenda: a need to give voice and centrality of reproductive threats facing those at the margins, and a skepticism that recourse to mainstream institutional strategies will be sufficient to ensure victory. A review of some initial moves by the administration, along with the blueprint provided by Project 2025, helps to clarify the stakes of the present moment.

On the first day of his presidency, Trump signed an executive order declaring that

It is the policy of the United States to recognize two sexes, male and female . . . [which are] not changeable and are grounded in fundamental and incontrovertible reality. . . . “Female” means a person belonging, at conception, to the sex that produces the large reproductive cell. . . . “Male” means a person belonging, at conception, to the sex that produces the small reproductive cell.⁹²

This Order sought to erase trans persons from official discourse and deny them any form of recognition from the federal government; it also made a somewhat subtler bid to establish fetal personhood, by referencing

91. See Danielle Campoamor, *Abortion Wins at the Ballot Box, Again—but Republicans Do Too*, THE NATION (Nov. 8, 2024), <https://www.thenation.com/article/politics/abortion-ballot-initiatives-election/> [<https://perma.cc/S9WE-CZBJ>].

92. Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025).

conception, rather than birth, as the moment at which sex classification takes place.⁹³ This deeply devaluative shot across the bow may presage the adoption of family policies advocated by many Trump allies and concretized in Project 2025.⁹⁴ Although it remains to be seen precisely how this blueprint will be implemented, several of its authors and organizers have been selected for central roles in the Trump administration.⁹⁵

Project 2025 stands strongly behind the vision of two genders articulated in the Executive Order, yet it also makes clear the scope of changes that can follow from this position. The plan identifies the married, heterosexual family as “the foundation of a well-ordered nation and healthy society.”⁹⁶ It finds that present family policies are “fraught with agenda items focusing on ‘LGBTQ+ equity,’ subsidizing single-motherhood, disincentivizing work, and penalizing marriage.”⁹⁷ It demands their repeal and replacement with “policies that support the formation of stable, married, nuclear families.”⁹⁸

The vision enacts broad erasure or immiseration as one vehicle for fostering the traditional family form. It treats respect for the self-determination of gender identity as “harmful identity politics that replaces biological sex with subjective notions of ‘gender identity,’”⁹⁹ and research supporting gender affirming care as “junk gender science.”¹⁰⁰ The focus on

93. Carter Sherman, *Trump’s Executive Order on Gender Uses Language Pointing to ‘Fetal Personhood,’* THE GUARDIAN (Jan. 23, 2025, 7:29 AM), <https://www.theguardian.com/us-news/2025/jan/23/trump-executive-order-fetal-personhood> [<https://perma.cc/MLZ4-55CG>] (explaining how assessing maleness or femaleness at “conception,” rather than live birth, points to fetal personhood).

94. Roger Severino, *Department of Health and Human Services, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE* 449, 451 (Paul Dans & Steven Groves eds., 9th ed. 2023).

95. See Patrick Svitek, *Trump Picks People Who Worked on Project 2025 Despite Distancing Himself,* WASH. POST (Nov. 20, 2024), <https://www.washingtonpost.com/politics/2024/11/20/trump-project-2025-second-administration/> [<https://perma.cc/NU4F-TBXT>]. Roger Severino, who wrote the chapter on the Department of Health and Human Services, has thus far failed to secure a top post in that department, based in part on the unqualified and strenuous character of his opposition to abortion. See Megan Messerly & Adam Cancryn, *Project 2025 Author Rejected for Top Health Position,* POLITICO (Nov. 21, 2024, 1:36 PM), <https://www.politico.com/news/2024/11/21/project-2025-author-rejected-for-top-health-position-00190887> [<https://perma.cc/3V39-9J8B>]. But despite the administration’s apparent desire to avoid a Senate confirmation fight centered on that issue, the Order suggests that several key views articulated in that chapter are already finding purchase.

96. Severino, *supra* note 94, at 451.

97. *Id.*

98. *Id.*

99. *Id.* at 450.

100. *Id.* at 462. The first of these insights are operationalized in the January 20 Executive Order, which describes “gender ideology” and “gender identity” as “replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from biological facts.” Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025). The rejection of gender affirming care, which the administration characterizes as “chemical and surgical mutilation” is accomplished through a second Executive Order, published eight days later, that declares that “the United States . . . will not fund,

heterosexual, cisgender marriage also stigmatizes LGBTQ individuals, whether or not they have formed nuclear families.¹⁰¹ Similarly, this vision also denigrates the 44%¹⁰² (or 4.15 million)¹⁰³ of Black families headed by single mothers.

More concretely, it penalizes families at the economic margins by withdrawing important elements of even the meagre social safety net that has allowed them to parent with some degree of dignity and sustainability.¹⁰⁴ It imposes restrictions on funding for reproductive health (including denial of Medicaid or other taxpayer funding to Planned Parenthood),¹⁰⁵ notwithstanding the persistence of sharp disparities in Black maternal morbidity and mortality. It eliminates the Head Start program,¹⁰⁶ allows child welfare funding to be used for “marriage and relationship education,”¹⁰⁷ and extends TANF work requirements to many non-cash benefits.¹⁰⁸ It signals an intention to intensify the surveillance and separation of Black and native families, through the policing of “abuse and neglect,” which has historically been highly racially discriminatory,¹⁰⁹ and the facilitation of speedy adoption, which entails the separation, rather than the support and intended reunification, of these families.¹¹⁰

Yet while this blueprint imposes particularly acute and punitive costs on those at the margins, it also has consequences for those heterosexual cisgender families in more privileged positions. Hailing a return to stereotypic gender roles, it describes the father as the family’s “protector”

sponsor, promote, assist, or support the so-called ‘transition’ of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures.” Exec. Order No. 14,187, 90 Fed. Reg. 8771, 8771 (Jan. 28, 2025).

101. Severino, *supra* note 94, at 451.

102. *Living Arrangements of Children by Race/Ethnicity*, OFF. JUV. JUST. DELINQ. PREVENTION, U.S. DEP’T OF JUST. (July 23, 2024), <https://ojdp.ojp.gov/statistical-briefing-book/population/faqs/qa01202> [<https://perma.cc/RM4G-Q88V>].

103. *Number of Black Families with a Single Mother in the United States from 1990 to 2022*, STATISTA (Sept. 2023), <https://www.statista.com/statistics/205106/number-of-black-families-with-a-female-householder-in-the-us/> [<https://perma.cc/K7FQ-ZXTS>].

104. Trump’s disregard for such benefit programs was demonstrated through the pause on federal grants implemented briefly during the second week of his presidency. Head Start programs and state Medicaid offices, for example, were thrown into confusion, with many unable to access funds, creating uncertainty over whether they could make their payrolls and provide continuity of service. See Moriah Balingit, *Head Start and Medicaid Providers Hit Glitches as Trump Freezes Federal Money*, AP NEWS (Jan. 28, 2025, 7:10 PM), <https://apnews.com/article/head-start-medicare-federal-funding-4fe440e35df70c7ede8ce8e0409cb581> [<https://perma.cc/5GL5-8YY4>].

105. Severino, *supra* note 94, at 471–72.

106. *Id.* at 482.

107. *Id.* at 480.

108. *Id.* at 476.

109. *Id.* at 480.

110. *Id.* at 451.

and the mother as its “nurturer.”¹¹¹ This language prescribes bifurcated roles that are understood to emanate directly from biological sex,¹¹² and that constrain the life possibilities of those who wish to perform their gender differently, not only in terms of identity or presentation, but in terms of parenting roles, or the decision to parent altogether. Its valuation of unborn life forms one of its five key goals, yielding the declaration that: “abortion . . . [is] not health care.”¹¹³ This tenet of the report’s vision is advanced through reversing the approval of medication abortion, or at the very least returning its regulation to 2016 protocols,¹¹⁴ as well as through proposed enforcement of the Comstock Act,¹¹⁵ and prohibitions on the use of taxpayer funds for abortion travel.¹¹⁶ Finally it proposes a re-interpretation of EMTALA, a federal law utilized by the Biden administration to protect the health and lives of women and other childbearing people, declaring that “EMTALA requires no abortions, preempts no pro-life state laws, and explicitly requires stabilization of the unborn child.”¹¹⁷ The radical curtailment of abortion care, abortion travel, and federal protection of pregnant persons in crisis, demands a sacrificial commitment of the person—in this vision, a woman—whose body serves primarily for carrying unborn life,¹¹⁸ and whose family role is defined through the nurturance and support of children. This is an archaic vision in which even those women whose role is ostensibly celebrated, rather than punished and immiserated, will be confined to narrow traditional roles and confront reproductive dangers.

A common foe will not make immediate allies of advocates with different visions of reproductive change and the democratic strategies it

111. *Id.* at 481 (“For the sake of child well-being, programs should affirm that children require and deserve both the love and nurturing of a mother and the play and protection of a father.”).

112. This seems to be one implication of the Executive Order as well, when it claims to “protect” those occupying the “true and biological category of ‘woman’” from the false and harmful effects of “gender ideology” and “gender identity.” Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025).

113. Severino, *supra* note 94, at 450.

114. *See id.*

115. *Id.* at 459 & n.16.

116. *Id.* at 471.

117. *Id.* at 473–74.

118. *Id.* Project 2025 states that “[f]rom the moment of conception, every human being possesses inherent dignity and worth, and our humanity does not depend on our age, stage of development, race, or abilities,” *id.* at 450, and repeatedly refers to fetuses as “babies” or “children.” *See, e.g., id.* at 457, 458 (noting that misoprostol induces the “delivery of the dead child” and that medication abortion is responsible for the deaths of “thousands to millions of babies”). Project 2025 also argues that governmental policy should recognize “the heroism of every choice to become a mother.” Kevin D. Roberts, *Foreword* to MANDATE FOR CHANGE, *supra* note 94, at 1, 6.

requires.¹¹⁹ But the vision of Project 2025, which seems already to be unfolding through the Trump administration, provides a chilling view of what is at stake in current controversies over reproductive freedoms. On the one hand, it validates important insights of viability critics (or proponents of “slow” democratic change). Those at the margins have suffered and will suffer stark forms of erasure and punitive deprivation that are distinctive and demand immediate focus and prioritization. Moreover, change will require a broad and institutionally innovative strategy, executed over years, rather than a quick restoration via legislation or the ballot. Yet on the other hand, by exposing the scope of the challenge, the emerging Trump agenda points to the benefits of greater collaboration. Furthermore, it demonstrates that even those relatively privileged are threatened with an escalating loss of autonomy and face—to a greater extent than some have foreseen—an intensification of political pressure to conform to narrow, bifurcated familial roles.

These insights land on a pro-abortion community that has been, as one ballot-critic lamented, “decimated” by divisions over the goals, means, and pace of change.¹²⁰ Whether and how this repair can take place remains uncertain. But in what follows, I consider one incremental strategy: collaboration on discrete initiatives that advance tenets of a broader reproductive justice (or “slow” democratic) perspective, through arguments or efforts that proponents of recent ballot amendments (or “fast” democratic perspectives) may find convincing or tenable. Notably, at least some of these efforts respond to the most ominous undertakings of the Trump administration. The experience of joint effort on common (if differently motivated) objectives may help to build at least modest levels of trust and generate common ground. By emphasizing links between restrictions on abortion access and a host of reproductive inequalities that impose disproportionate costs on low-income women of color and gender expansive people, these efforts can also cultivate greater public support for an agenda

119. Indeed, in Missouri, opposition by the anti-abortion state legislature to Amendment 3, *see supra* text accompanying notes 80–84, precipitated further friction between the two groups of pro-abortion activists. Pro-abortion ballot critics have argued that compromise on state regulation after fetal viability has empowered the state legislature. *See* Michele Munz, *Advocates for Abortion Right Still Fractured; Abortion Rights Advocates are Divided as Missouri Legislature Pursues New Laws*, ST. LOUIS POST-DISPATCH (Jan. 25, 2025), <https://www.stltoday.com/news/local/government-politics/abortion-rights-advocates-are-divided-as-missouri-legislature-pursues-new-laws/article3faac7a4-d9c5-11ef-b6e1-7ffe0c76171b.html> [<https://perma.cc/VX8V-MHR8>]. Proponents of the amendment have accused critics of walking away from the coalition for an amendment that was pragmatic, given the political climate of the state. *Id.* “We did a huge and transformative thing very quickly,” a leader of the Amendment 3 coalition declared, emphasizing the achievement of the ballot win and the temporal element, although no Missouri abortion clinic has yet re-opened. *Id.*

120. *Id.* As one advocate noted, “[w]e are so fractured, and it’s so deeply harmful, and it’s going to take such a reckoning to come back from.” *Id.*

of reproductive justice. The present moment, when impending ballot issues do not exacerbate the divisions among the pro-abortion organizers¹²¹ and both camps face the threat of an altered federal policy landscape, may be a promising time to initiate such efforts.

1. Highlighting the Larger Context of Abortion Restriction

One message of the Executive Order, and of Project 2025, is that abortion restriction is part of a larger project of reconstituting society around traditional, binary gender roles, derived from biological sex, and a traditional vision of a heterosexual, nuclear family.¹²² The Executive Order inserts a nod to fetal personhood in a declaration that erases trans and non-binary existence and makes biological sex (at conception) the basis of what it means to be a “female.”¹²³ Project 2025 elaborates the meaning of “true” womanhood: being the “nurturer” of children, whose unborn lives they share the commitment of the federal government to preserve.¹²⁴ It is this involuntary conscription into a bifurcated, hierarchized, pro-natalist role that more privileged advocates may most strongly fear and resist as the consequence of abortion restriction. Yet it does not threaten the power of that resistance to note that this larger vision has distinct and ominous

121. This may be an optimistic view of this ballot “interregnum,” at least in states where resistance to ballot amendment, like that in the Missouri legislature, may spark mutual recriminations between ballot supporters and ballot critics. *See id.*

122. The executive order focuses on the centrality of distinct, biologically determined sexes, and makes more oblique references to the role of a biologically-determined gender binary in the broader American culture. *See* Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615 (Jan. 30, 2025) (“[The] two sexes, male and female . . . are not changeable and are grounded in fundamental and incontrovertible reality.”); *id.* (“Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system.”). Project 2025 contains the similar language about a biologically determined sex binary. *See* Severino, *supra* note 94, at 450 (“Replac[ing] ‘biological sex with subjective notions of ‘gender identity’ . . . threatens American’s fundamental liberties as well as the health and well-being of children and adults alike.”). But Project 2025 is more explicit in its defense of a traditional, two-parent, heterosexual family. *Id.* at 451 (“Families comprised of a married mother, father, and their children are the foundation of a well-ordered nation and healthy society.”).

123. Exec. Order No. 14,168, 90 Fed. Reg. at 8615 (“‘Female’ means a person belonging, at conception, to the sex that produces the large reproductive cell.”).

124. Roberts, *supra* note 118, at 4. In an evocation of highly gendered familial roles, Project 2025 states that “programs should affirm that children require and deserve both the love and nurturing of a mother, and the play and protection of a father. Severino, *supra* note 94, at 481. Project 2025 also appears to embrace the stance of woman-centered anti-abortion arguments that women have an instinctive desire, from the time of conception, to preserve the lives of their unborn children, but that they may “find themselves in immensely difficult and often-tragic situations,” Roberts, *supra* note 118, at 6, that may induce them to abandon these instincts.

consequences for other groups.¹²⁵ For example, if the traditionalist vision of gender foretells hierarchization and conscription into childrearing for cisgender, heterosexual women in nuclear families, it foretells deprivation and separation for those not part of nuclear families, and erasure for those whose identities place them outside the gender binary. Joint resistance to the erasure of the Executive Order, and to state prohibitions on access to gender-affirming care¹²⁶ could be an effort that does not directly implicate ballot divisions and might allow collaboration. Opposing policies endorsed by Project 2025, such as redirecting public assistance funds from child welfare or Head Start to pro-marriage education and programming, or expediting removal of children from parents accused of “neglect” (an accusation disproportionately lodged against Black and indigenous mothers), which would support those who at the racial and socioeconomic margins who choose to parent, might be another.¹²⁷

2. *Pluralizing Narratives of Abortion and Pregnancy Loss*

A second site of potential collaboration could be an effort to expand the range of stories told about abortion and pregnancy loss. As noted above, the focus on “relatable” stories—to galvanize broad public support against restrictive legislation and for ballot amendment—has often resulted in an emphasis on stories of wanted pregnancies, often in white, married, heterosexual couples, which were transformed into cases of stark physical danger or emotional trauma, when doctors in restrictive states were afraid to treat ruptured membranes, ectopic pregnancies, or fetal anomalies because it would require procedures that could be criminalized as “abortions.”¹²⁸ But the harm stemming from abortion restriction extends beyond these cases, to cases that demonstrate how bans on abortion interact

125. But it requires that they look beyond their own—genuine, undeserved—sense of being under threat. This may require, as the Abortion Justice, Now brief suggests, a departure from a mindset of scarcity, in which one group’s political gain is another’s detriment, toward a mindset of greater abundance. ABORTION JUSTICE, NOW, *supra* note 29, at 12–13.

126. The Supreme Court’s decision to uphold Tennessee’s restrictions on gender affirming care for minors, in the case of *L.W. v. Skrmetti*, is one possible site of such collaborative organizing. See *United States v. Skrmetti*, 145 S. Ct. 1816 (2025). While protest will not change the outcome of the case, or likely its application in other state contexts, it can be a bulwark against erasure and against the labelling of support for gender affirming care as grounded in “junk gender science.” *E.g.*, Severino, *supra* note 94, at 462.

127. Severino, *supra* note 94, at 476 (advocating reassessing the priorities of TANF to give greater attention to “[m]arriage, healthy family formation, and delaying sex to prevent pregnancy”); *id.* at 480 (“Allow child welfare funding to be used for marriage and relationship education.”); *id.* at 482 (“Eliminate the Head Start Program.”); *id.* at 451 (“In cases involving biological parents who are found by a court to be unfit because of abuse or neglect, the process of adoption should be speedy, certain, and supported generously by HHS.”).

128. See, *e.g.*, *supra* note 53 and accompanying text.

with other forms of reproductive oppression. The case of Brittany Watts, who suffered a miscarriage after doctors were unresponsive to her complaints of pain and leakage from premature ruptured membranes and then was charged with “felony abuse of a corpse,” is one such case.¹²⁹ It demonstrates not only the discomfort of doctors with treating premature rupture of membranes in a context of abortion restriction, but medical failures to respond to the physical complaints of Black women, police overreach (which included collaboration with an ER nurse to build a case against Watts, a subsequent search and seizure of her toilet), and criminalization (subsequently rejected by a grand jury) which have disproportionately impacted low-income women of color.¹³⁰ The story of Amber Nicole Thurman, who sought to terminate a pregnancy first through an unsuccessful effort to travel and then through medication and who died of sepsis when doctors failed to give her the D&C procedure that she needed to complete the process, is another example.¹³¹ This case, another involving a Black woman, highlights a large category of women who have been less visible in recent campaigns against restriction—those who seek to end unwanted pregnancies through “ordinary” abortions—while also demonstrating the paralysis in medical response to emergencies produced by abortion restriction, and raising questions about comparative indifference to the suffering of pregnant women of color. Such cases do not detract from the suffering of an Elizabeth Zurawski, Kate Cox, or Austin Dennard,¹³² but they demonstrate the life and liberty-threatening complications that occur when the effects of abortion restriction intersect with disparate medical care or criminalization.

129. See Remy Tumin, *Grand Jury Declines to Indict Ohio Woman Who Miscarried at Home*, N.Y. TIMES (Jan. 11, 2024), <https://www.nytimes.com/2024/01/11/us/brittany-watts-ohio-miscarriage.html> [https://perma.cc/JGZ8-RWW4].

130. See Fabiola Cineas, *Reproductive Rights Have Never Been Secure. Ask Black Women.*, VOX (July 13, 2022, 7:00 AM), <https://www.vox.com/23205101/abortion-rights-reproductive-justice-black-women> [https://perma.cc/2HTA-25RR] (interviewing Prof. Dorothy Roberts, who describes (disproportionate) criminalization of pregnancies of Black women as dating back to the 1980s War on Drugs); Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1262–67 (2020) (discussing failures of care, including dismissing of patients concerns, that contribute to racially disparate maternal mortality). *But cf.* WENDY A. BACH & MADALYN K. WASILCZUK, PREGNANCY JUSTICE, PREGNANCY AS A CRIME: A PRELIMINARY REPORT ON THE FIRST YEAR AFTER *DOBBS* 10 (2024) (finding increase in criminalization of poor white pregnant women, likely connected to an increase in enforcement against opiates).

131. Surana, *supra* note 52.

132. These three are white, middle class, married women, who suffered fetal anomalies or pregnancy complications which doctors, facing Texas’s unqualified prohibitions on abortion, were unwilling to treat. Their cases, which were the subject of ultimately unsuccessful litigation, were highly publicized in the period following *Dobbs*. See *State v. Zurawski*, 690 S.W.3d 644 (Tex. 2024); *In re State*, 682 S.W.3d 890 (Tex. 2023).

3. *Encouraging Public Discussion of Abortions Later in Pregnancy*

A key site of contention between pro-abortion organizers in ballot elections has been whether to implement viability limits in pro-abortion state constitutional amendments. When the question of *Roe*-type restrictions on ballot amendments are not immediately before the public, pro-abortion organizers in both camps may have an opportunity to reconsider ground they may actually share. As Patient Forward, an organization aims to legitimize and legalize abortion throughout pregnancy, explains, there are two categories of factors that tend to move pregnant persons past the point of viability before they are able to access an abortion.¹³³ One is “new information that changes the course of a pregnancy,” which includes late discovery of the pregnancy, poor fetal diagnosis, or new health threats to the pregnant person, or sudden changes in life circumstances.¹³⁴ The other is “barriers to obtaining care as early as desired”: a central cause of this category of problems is state-enacted abortion restrictions and regulations; but other causes include difficulty paying for abortions, interaction with Crisis Pregnancy Centers (and the misinformation they provide), childcare struggles, disagreements with a partner about termination of a pregnancy, and difficulty locating or traveling to an abortion provider.¹³⁵

Supporters of a return to the *Roe* regime have been extremely wary of mentioning the prospect of post-viability abortions—observing that it may inflame more conservative members of the public, or prompt accusations of abortion “up until (or even, in Trump’s parlance, “after”¹³⁶) birth.”¹³⁷ However, two observations suggest that this caution is misplaced, and that members of the pro-*Roe* contingent have greater reason to promote frank dialogue on later-term abortions. First, their efforts to diffuse controversy by describing post-viability abortions as “rare” and declining to discuss them, has been largely unsuccessful in curtailing such charges. Efforts by abortion opponents to tie supporters to abortions up to (and following) live

133. Patient Forward’s two principals participated in the drafting of *Abortion Justice, Now*. They offer information about late-term abortions at WHONOTWHEN.COM, <https://whonotwhen.com/> [<https://perma.cc/D79F-X262>].

134. *See id.*

135. *See id.*

136. *See* Sarah McCammon, *Trump Repeats the False Claim that Democrats Support Abortion ‘After Birth’ in Debate*, NPR (Sept. 10, 2024, 10:02 PM), <https://www.npr.org/2024/09/10/nx-s1-5107942/abortion-roe-wade-ivf-donald-trump-kamala-harris-debate-2024> [<https://perma.cc/LVR4-H3RU>].

137. Fernando & Ballentine, *supra* note 6 (saying that supporters of viability limits raised concerns of anti-abortion forces attacking proposals without a viability clause and saying it was an attempt to legalize abortion “up until birth”).

birth, have been a staple of recent ballot campaigns.¹³⁸ More conspicuously, House Republicans' sponsorship, in the first week of Trump's second term, of the "Born Alive Abortion Survivors Protection Act"—a bill that failed in the Senate and is unlikely to be enacted—aimed primarily to compel opposition that will associate Democrats in the minds of the public with late-term abortion.¹³⁹ Second, explanations of how pregnant persons may be compelled to access abortions after viability, are themselves consistent with important parts of the messaging of pro-ballot amendment organizers. The discovery of fetal anomalies—a “relatable” rhetorical focus for legacy reproductive rights organizations and ballot supporters—is also a key reason that people seek later abortions. These stories are not often narrated as “later” abortion stories, although as Professor Mary Ziegler notes, they sometimes serve to inform the public about the reasons that abortion care may be necessary later in pregnancy.¹⁴⁰ In contrast, Erika Christensen, a co-founder of Patient Forward, has narrated her story with an emphasis on the temporal element, and a discussion of the factors, including a fatal fetal anomaly, the laws of the pro-abortion state of New York and the paucity of providers of later-term care, that led her to seek abortion in the thirty-second week.¹⁴¹ Bringing out this element in stories that have already garnered a sympathetic hearing from the public, or highlighting stories such as Christensen's, where timing is a primary focus, could be the first step toward public discussion.

138. In Missouri, proponents who had embraced an explicit viability limit had to litigate to prevent the state attorney general from adopting short-form language (intended to describe the ballot proposal for voters) stating that the amendment provided for abortion “at any time in pregnancy.” Anna Spoerre, *Judge Calls Ashcroft's Characterization of Abortion Amendment 'Unfair' and 'Misleading'*, MO. INDEP. (Sept. 5, 2024, 5:07 PM), <https://missouriindependent.com/2024/09/05/judge-rules-ashcrofts-abortion-amendment-unfair-misleading/> [<https://perma.cc/4DDR-ZWCN>].

139. In January 2025, House Republicans passed the “Born-Alive Abortion Survivors Protection Act” (which subsequently failed in the face of a filibuster in the Senate). S. 6, 119th Cong. (2025). The law required that doctors performing late abortions offer “the same degree of professional skill, care, and diligence” that would be offered during a normal childbirth.” *Id.* § 3. Such protection, as Senator Dick Durbin observed, was entirely duplicative. *US Republicans Pressure Democrats with 'Born-Alive' Abortion Bill*, FRANCE24 (Jan. 24, 2025, 1:05 AM), <https://www.france24.com/en/live-news/20250124-us-republicans-pressure-democrats-with-born-alive-abortion-bill> [<https://perma.cc/VRT8-2GC8>] (“[I]t is already law that any child born in America -- regardless of the circumstances surrounding that birth -- is afforded equal protections.”). But its enactment in the House sought to put Democrats on record as supporting late interventions that Republicans described as tantamount to “infanticide.” *Id.*

140. *Transcript: Ezra Klein Interviews Mary Ziegler*, N.Y. TIMES: THE EZRA KLEIN SHOW (Mar. 8, 2024), <https://www.nytimes.com/2024/03/08/podcasts/transcript-ezra-klein-interviews-mary-ziegler.html> [<https://perma.cc/R8Q8-CXGP>] (interviewing legal historian and reproductive scholar Mary Ziegler).

141. See Susan Rinkunas, *Catching Up with the Woman Who Had an Abortion at 32 Weeks*, JEZEBEL (May 11, 2022, 10:55 PM), <https://www.jezebel.com/2022-interview-women-who-had-abortion-at-32-weeks-1848913142> [<https://perma.cc/GJ3B-QEKD>]; Jia Tolentino, *Interview with a Woman Who Just Had an Abortion at 32 Weeks*, JEZEBEL (June 15, 2016, 3:30 PM), <https://www.jezebel.com/interview-with-a-woman-who-recently-had-an-abortion-at-1781972395> [<https://perma.cc/RPW2-XX54>].

Emphasizing the consequences of “barriers to early care” is another argument that can gain support from both groups of advocates, albeit for different reasons. Bans that prevent care in the early stages of pregnancy have been a central target of ballot campaigns: they radically curtail the number of women who can find abortion care in their home states when they discover an unwanted pregnancy. But these bans also create impediments for those who seek abortion later in pregnancy, by extending travel and increasing patient pressure on existing clinics.¹⁴² Shared concern by ballot proponents and opponents about factors that lead to late abortions may make public education about late-term abortions possible, particularly during periods when state constitutional amendments are not specifically on the ballot.

4. *Promoting Research into the Effect of Viability-limited and Unlimited State Constitutional Protections*

Critics of viability limits can marshal, and have marshaled, historical evidence of the categories of pregnant persons who were most disadvantaged by the limits of the Roe regime. Yet given that recent restrictions have exacerbated this disadvantage and, given the interest of many pro-abortion advocates in evidence about the effects of state constitutional amendments, there may be value in empirical investigation of how temporally-limited ballot amendments function, as their implementation unfolds. A coalition of ballot amendment critics in Missouri placed this issue on the public agenda through a media campaign called “whatsnext4mo.”¹⁴³ This campaign aims to hold supporters accountable by publicizing the number of clinics that have reopened and the number of abortions that have been provided since the enactment of the amendment.¹⁴⁴ But this is an area in which academics could move off the sidelines of this

142. Bans may also create increased pressure by shuttering existing clinics, including sometimes in pro-abortion states. See Rachel K. Jones, Candace Gibson & Jesse Philbin, *The Number of Brick-and-Mortar US Abortion Clinics Drops, as US Abortion Rate Rises: New Data Underscore the Need for Policies that Support Providers*, GUTTMACHER INST. (June 2024), <https://www.guttmacher.org/report/abortion-clinics-united-states-2020-2024> [<https://perma.cc/G954-7YM8>] (attributing much of decrease to cessation of care in states with abortion bans); see also Susan Rinkunas, *Planned Parenthood of Illinois Will Close 4 Clinics That Offered Medication Abortion*, JEZEBEL (Jan. 22, 2025, 4:46 PM), <https://www.jezebel.com/planned-parenthood-of-illinois-will-close-four-clinics-that-offered-medication-abortion> [<https://perma.cc/59CE-UACQ>] (reporting that Planned Parenthood closed clinics that provided medication-only abortion, citing financial shortfalls due to rising numbers of patients).

143. *What’s Next for Abortion in Missouri?*, WHATSNEXT4MO, <https://www.whatsnext4mo.org/> [<https://perma.cc/GS86-6GC4>].

144. For efforts to do this, see *What’s Next: Newsroom*, WHATSNEXT4MO, <https://www.whatsnext4mo.org/newsroom> [<https://perma.cc/A4P7-CNEK>] (citing press coverage describing what kinds of abortions are available in Missouri, at what locations, and with what gestational limits).

controversy and play a role in gathering more detailed information, which could be useful bridging the distance between these opposing positions.

Determining how many abortions are being performed in viability-limited states, who is being served and not, and which abortion seekers are being required to go elsewhere or to continue their pregnancies against their wishes, may help to clarify the stakes of viability limits. Comparisons with states in which amendments without temporal limits have been enacted could be illuminating, though also complicated, as “unlimited” states such as Maryland and even Michigan present different political climates for abortion than states such as Missouri and Arizona that have enacted temporally limited amendments.¹⁴⁵ The role of state governmental opposition to enacted amendment is also a factor, although critics have argued that such opposition is fomented by a time-limited amendment’s acknowledgment of a state interest in the well-being of the fetus.¹⁴⁶ A useful basis for comparison might be the number and demographics of those served in states like Maryland, as compared with similarly progressive states that have enacted state constitutional viability limits, such as California or New York. The present moment, when few states are organizing actively for ballot amendments, may be an opportune moment, when the polarization exacerbated by ballot campaigns¹⁴⁷ has eased enough to enable participants to digest and discuss new information.¹⁴⁸

145. For general assessment of the different reproductive environments in these states, see SARAH R. COLLINS, DAVID C. RADLEY, LAURIE C. ZEPHYRIN, ARNAV SHAH, 2024 STATE SCORECARD ON WOMEN’S HEALTH AND REPRODUCTIVE CARE, COMMONWEALTH FUND (July 18, 2024), <https://www.commonwealthfund.org/publications/scorecard/2024/jul/2024-state-scorecard-womens-health-and-reproductive-care> [<https://perma.cc/R4HN-JDHW>] (assessing all states on reproductive health indices, including health outcomes, healthcare quality and access and more, and ranking Maryland twelfth, Michigan eighteenth, Missouri fourth and Arizona forty-fourth).

146. See Munz, *supra* note 119.

147. I’m grateful to Professor Michelle Oberman for this observation about the polarizing effects of ballot amendment campaigns.

148. There may also be a role for closer analysis of polling results in this period between elections. Although such analysis may be more oriented toward the ballot-related tasks of determining what members of the public currently believe, and gauging receptivity to different forms of amendment language, some pollsters have also highlighted the ways in which opinions shift not only with the framing of questions but with the information to which subjects have been exposed. Polling firm Perry Udem found that while 71% of those questioned initially say that abortion should be illegal in the third trimester, the views of this 71% fluxed under further questioning. Jessica Valenti, *New Poll: Americans Support Abortion Throughout Pregnancy*, SUBSTACK: ABORTION, EVERY DAY (June 18, 2024), <https://jessica.substack.com/p/new-poll-americans-support-abortion> [<https://perma.cc/PCK2-N7HN>]. Asked whether abortion should be regulated by law or decisions should be made by a patient and doctor, 40% (of ostensible third-trimester opponents) say it should not be regulated by law; and 40% say it should be “available throughout pregnancy because of complex circumstances.” *Id.* 58% stated that “people should be able to make their own decisions on abortion throughout a pregnancy without government interference.” *Id.* Such evidence might point to forms of framing or public education that would be valuable, in reducing the perceived need for viability limits as a means of ensuring public support.

CONCLUSION

The equivocal trajectory and limited future of ballot amendments, and the advent of the Trump regime, suggest that hopes for a “fast” democratic change, through discrete institutional adjustments, are unlikely to be sufficient. Constructing broader support for a slower and more comprehensive program of reproductive change, amidst persisting tensions among pro-abortion groups, promises to be a challenge. Those tensions arise not simply from diverging views on state constitutional amendments, but from decades of disagreement over a *Roe* regime that was defended with laser focus by many reproductive rights advocates, even as it excluded many of those most impacted not simply by escalating state restriction, but by limits in *Roe* and abortion funding decisions themselves. The experience of or restriction of voice in the process of agenda setting, has fostered deep distrust among proponents of “slow” democracy or reproductive justice¹⁴⁹ who understand the task as far larger than what *Roe* or its reinstatement could accomplish. But one lesson that might be drawn from the past three years—and more specifically, from the successful if imperiled work of abortion funds, navigators, and others who have tried to “reduce harm” in this chaotic environment¹⁵⁰—is that commitment to practical, common projects can foster trust among participants with different life experiences and advocacy backgrounds.¹⁵¹ Specific efforts at collaboration, that resist the most threatening excesses of the Trump administration and highlight the connections between restrictions on abortion access and a wider range of reproductive inequalities harming those at the reproductive margins, may provide the first steps on that path.

149. The response of one Missouri organization to the ballot campaign is frank about the basis for such mistrust:

For years, many Black and Indigenous reproductive organizers and activists have worked alongside white feminist[s] in order to secure the rights that we had collectively been denied. However, when Black women raised their issues for support, largely white, middle class women and those with privilege in the reproductive rights movement were not receptive to [their] concerns The realities of racism, discrimination, poverty and queermisia that their Black and Brown counterparts continued to endure remained ignored. . . . It has long since become clear to Black organizers that our non-Black peers lack the level of commitment required to fight for the issues that are most pressing to us and our communities.

Reale Justice Network, *supra* note 30. “Queermisia” can be defined as “an aversion, hatred or mistrust of people who are, or appear to be, any sexual identity other than heterosexual.” *Defining Queermisia*, LOY. MARYMOUNT UNIV. (Nov. 5, 2024, 10:24 AM), <https://libguides.lmu.edu/c.php?g=1154343&p=8462046> [<https://perma.cc/P9U6-7YFE>].

150. The tireless efforts of such activists have been described as a primary reason why abortions have actually increased slightly since the restrictions enacted in the wake of *Dobbs*. See #WECOUNT REPORT, *supra* note 71.

151. This kind of mutual respect and trust among activists with different race, class, and professional backgrounds has been one of the interesting findings of interviews that I have done with those doing “damage reduction” work of this type, particularly in the face of post-*Dobbs* restrictions.