

[Intro Music]

Dan Jackson: Let's touch on a white, hot nerve, coursing through American politics today: bodily autonomy. It seems like a day doesn't go by when you don't hear about how a state passed a new sweeping abortion law, how an abortion-rights group has challenged the new law in court or how another state has weighed in what transition treatments can be offered to transgender children. At the core of all this, a question about how much say an individual has over their own body, whether they can express their gender identity, whether they can get pregnant when they want to or whether society has a say in what you do. I'm Dan Jackson and I'm your host for this episode of Sidebar, a podcast by Courthouse News. Oftentimes this call for bodily autonomy has been distilled down to the rallying cry "My body, my choice." For this segment, San Diego-based reporter Bianca Bruno explores that idea and then looks to Texas to learn what happened in the aftermath of that state's attempt to label trans-affirming care for minors as child abuse.

Protester: My body, my choice. There's a brighter future ahead. Our children will correct this mistake that is made to us.

Protester 2: It's not right and we deserve to have medical freedom in America, especially. I think from here on out, every citizen here should have a choice.

Protester 3: I'm pro-choice. Our whole life is about choice. We live in a free country to choose what we want to do and what we choose to do.

BB: No, that's not a crowd of pro-choice feminists. It's a crowd of Los Angeles residents protesting California's public health and vaccine mandates during the Covid-19 pandemic. Once a battle cry for women seeking bodily autonomy, my body, my choice has been co-opted by those seeking to defy public health orders the past two years. Meanwhile, state lawmakers have made consequential decisions impacting Americans' ability to make personal healthcare decisions, which are a matter of life and death. While protesters challenging Covid-19 mandates are concerned with whether being required to get a jab or wear a piece of cloth over their mouth infringes on their rights, others' family health care decisions are being decided by the state.

News Clip: But in late February 2022, following an opinion by Texas Attorney General Ken Paxton, Governor Greg Abbott ordered the Texas Department of Family and Protective Services, or DFPS, to investigate parents who support their trans kids' gender affirming care for quote child abuse. The concern is that these children could be separated from their parents.

Laura Briggs: It's not entirely clear to me how much the Republican Party cares about trans kids. The goal is to create a winning issue for the upcoming midterm elections. My name is Laura Briggs and I'm in the Department of Women, Gender, Sexuality Studies at the University of Massachusetts in Amherst. I work on the history of reproductive politics, including the history of Child Protective Services, adoption and foster care. They're hoping that if they criminalize parents who offer their kids puberty blockers in relationship to pediatricians and pediatric gender chronologists who identify this as a kid who will benefit from treatment for what some people call gender dysphoria or other people just say as being a trans kid then they can whip people up.

BB: Briggs said there's a decades-long history of Republican scapegoating LGBTQ people as a campaign platform.

LB: In the 1980s, we saw the Republican Party of Reagan really target gay folks and gender-nonconforming people.

Reporter During 1982 Press Briefing: Does the president have any reaction to the announcement of the Center for Disease Control in Atlanta that AIDS is now an epidemic with over 600 cases?

Then-White House Press Secretary Larry Speakes: What's AIDS?

Reporter: Over a third of them have died. It's known as gay plague. (Laughter.) No, it is. I mean it's a pretty serious thing. One in every three people that get this have died. And I wonder if the president is aware of it?

LS: I don't have it. Do you? (Laughter.)

Reporter: You don't have it? Well, I'm relieved to hear that.

LB: And if we think all the way back to the 1970s to the Anita Bryant campaigns in Florida. It's just the conjunction of LGBT people and children that enabled her to mobilize a lot of people to oppose a basic employment and housing nondiscrimination bill in Miami-Dade County.

Anita Bryant: Uh, because if you don't flaunt it who's going to know you're homosexual or are not, you see, what they wanted to do was to flaunt it and to not lose their jobs because of it.

BB: Fast forward to today.

LB: It seems to be that they can make people fearful that any proximity between gender-nonconforming people and gay folks is equivalent to sexual abuse.

BB: Briggs said it's also a backlash to the public reckoning to hold adults accountable who abused their power in the workplace.

LB: They're really riffing off the MeToo movement, which has targeted both parties in the sense that both parties have had people who abuse their power, but the Republicans seem to have particularly taken it in the teeth. And so, they want to turn that concern that we have about sexual abuse of children and sexual abuse of people who have less power, employees, and turn it into a gay people are doing this, or trans people are doing this. This targeting of the parents of trans kids seeking medical treatment, that's new, but what's not new is using Child Protective Services as a political tool.

John Oliver: Family separation. It was part of his zero-tolerance policy where parents crossing the border were locked up, prosecuted and had their children taken away.

LB: We saw the Trump administration put kids in cages at the border targeting refugees. Before that, we've seen the wildly disproportionate use of CPS against Black and Latinx families, immigrant families. And really that started in the 1960s. Child Protective Services was born out of the civil rights movement and school desegregation. And the federal government started paying to take kids from their moms as a strategy to terrorize a Black community in rebellion in Louisiana that was demanding decent schools for these kids. They also did it in the North and the West, targeting native kids at the height of the American

Indian Movement. We remember that statistic that in the 1970s, one in three native children was in out-of-home care. We've seen these tools used over and over again to terrorize communities that they just thought were wrong. Now it's the LGBT community. Then it was Black and native communities.

BB: But the practicality of carrying out CPS investigations of parents of trans kids for receiving gender-affirming care is already being put to the test. CPS workers in Texas are pushing back.

CPS Worker: I thought this would be the job that I would have until I retire. I love my job.

News Reporter: Until the directive from the governor had Davis investigating the family of a trans child for abuse.

CPS Worker: But at that point I couldn't morally continue.

BB: Stephen Paulsen, the West Texas reporter for Courthouse News, talked to several CPS workers who have quit over the executive order.

Stephen Paulsen: This order has required these state officials to treat them as though they were, what would be more typically considered a form of child abuse. So, things like not feeding your kid, beating your kid, the CPS workers I've talked to have been really troubled by not only the fact that they're having to investigate these families they say are not abusing their kids, and that a lot of times are very loving, caring families, but also just the way that it's been carried out. For all three of the people that were willing to talk on the record, you know, it was something that bothered them.

BB: One of the CPS workers who quit was a trans man himself.

SP: You know, obviously he saw himself to some degree in this family that was being investigated.

BB: The CPS workers told Paulsen they were advised not to use their discretion in deciding which investigations should be prioritized.

SP: As with most investigative agencies, allegations will come in, they look into them and then sort of decide how much of a concern they're sort of actually is that there's a real crime sort of behind these allegations. Typically, workers at the agency would be able to classify an allegation or a case as priority nine, which basically means they don't need to go and basically like visit the house and stuff that there isn't kind of enough credence to the allegations, but with these cases, they have not been able to do that, is again what I'm hearing from these workers.

BB: An injunction in the case has paused any new CPS investigations from being opened, but at least nine investigations were opened prior to this day, and the cases have not been closed, creating other obstacles for Texas parents of trans kids.

SP: There's plenty of cases where even without a finding of wrongdoing, there can be real problems with having a child abuse investigation opened into you as a parent. If you have basically any job where you're working with kids; it could put that in jeopardy. If you have a government job where you require some special form of clearance, it could put that in jeopardy. And so, you know, sort of leaving aside all of the stress and worry that obviously comes with the state sort of investigating you and opening up the

possibility that they might try to take your kids away, I mean, there are real possible real ramifications for the parents with their employment.

BB: And Texas directing CPS workers to prioritize investigating parents of trans kids over legitimate child abuse cases has broken an already overburdened agency.

SP: These people that I spoke to said that even before this order, they already felt like they had too many cases. They're being asked to work shifts that were way too long. One thing they said was that it was, it wasn't just that they were having to do these investigations that they didn't believe in and didn't think they were right. But every time they have to, you know, do one of these cases, it is time away from, you know, an investigation into, you know, of a report of a kid being malnourished or showing up to school with marks or making some kind of an outcry about, about sexual abuse.

LB: To me, I think is pretty indisputable. You know, the, the more you're asking these workers to handle cases that don't have anything to do with, with those things, the more that they're not able to kind of focus their whole attention on things that I think a lot of people would argue matter more.

BB: Courts in states like Texas and Florida have limited resources. While CPS workers are not allowed to deprioritize investigations into parents of trans kids, the courts may. Here's Briggs again.

LB: In those Southern states where there's a relatively small state budget because low taxes and few benefits, it's going to be we've got smaller foster care systems, more shaky foster care systems. One of the things that has sparked the movement in Texas is the prevalence of kids spending nights in people's offices because there simply aren't enough foster homes for them or emergency shelters or group homes. What's going to win here? The judges' dislike of placing kids unnecessarily in foster care when the foster care system is already under tremendous strain? Or judges who are horrified by queerness in all its forms, but particularly in genderqueer kids?

BB: The focus on prioritizing investigations into parents of trans kids requires CPS workers to play doctor, something those who quit said they were unwilling to do.

SP: These are conversations that are sort of going on between a kid and their family and their doctors. And then even on a bigger level like medical associations who have spent a lot of time sort of looking into all of these issues. That was where a lot of these CPS workers were coming from as well. They were saying, hey, we're, you know, we're trained in investigating and handling child abuse. And you're now asking us to basically interfere with this doctor-patient relationship and make some sort of assessment to sort of go against what a doctor is saying about a particular patient. They were just like, this is not our wheelhouse at all. Um, and it's none of our business.

BB: Unlike other marginalized groups who've been subject to a politicized CPS, Briggs said the families speaking out against Texas Governor Greg Abbott's executive order have resources Black and Native families didn't.

LB: Are white communities better equipped to fight the abuse of a foster care system, white middle-class communities? Presumably they are if they're able to hire lawyers and go to the wall on this.

BB: But families challenging the investigations will still face a fight.

LB: There's a presumption of a fair bit of homophobia on the part of the judiciary that's going to make it hard to fight to keep trans kids with their parents. I think at the end of the day, the most important question is how many lawyers are willing to fight these cases all the way.

News Clip: In 1974, a small group of lesbians in Seattle, Washington, responded to this need for legal support for lesbians facing child custody disputes.

LB: How willing are people to organize on behalf of parents who have trans kids. You know, in the 70s, when lesbian moms were losing their kids in divorces all the time, people organized and organized and organized in defense committees, lesbian moms defense committee, and other groups like that.

BB: And Paulson said families are doing exactly that.

SP: I also had a lot of really interesting conversations with the lawyer that is representing one of the families that's being investigated. He has been circulating to civil rights groups and also to other lawyers this form letter that basically kids can take with them to school, to, you know, sports practice, whatever, that basically is sort of intended as a stop guard to sort of prevent a CPS worker from just, you know, showing up at a school, pulling a kid aside, interviewing them.

BB: The attorney's client is a kindergartner. To emphasize the importance of the letter, he compared it to a childhood favorite.

Captain America Theme Song: When Captain America throws his mighty shield...

SP: He was having to explain to this kid, basically the importance of this letter and was having to invoke Captain America and his shield as sort of an analogy. This is a kid where like, you sort of have to put things in terms of a superhero for them to like even really grasp what's going on and I think it really speaks to kind of what a bizarre situation has been going on in Texas.

[Music Break]

DJ: It's safe to say that this will not be the last time we'll report these stories on the intersection of bodily autonomy and Texas' laws and legal system, nor has it been the first. Indeed, you can get caught up on the Lone Star state legislation dealing with transgender kids' participation in youth sports and the state's near-total ban on abortion through past episodes of Sidebar. But now, the development surrounding transgender care and abortion are moving fast. Some of it could come to a head in a couple of weeks when the U.S. Supreme court is expected to drop a ruling in a case that directly challenges the court's 1973 landmark decision in *Roe v. Wade*, the decision that legalized abortion nationwide. Some court watchers fear that the upcoming decision will erode or even obliterate *Roe* and change the abortion debate in a fundamental way. For how that ruling could alter the nation's abortion laws, here's Bianca.

Billie Eilish: Hey. I am so (beep) sick and tired of old men. Men in general. Sorry, but old ones especially. Shut the (beep) up about our bodies! Oh my god! Shut the (beep) up!

Chants: My body, my choice...

BB: The chant my body, my choice has been the rallying cry for pro-choice advocates for decades. But even though the Supreme Court found in 1973 women and childbearing people have the constitutionally protected right to choose whether to keep or terminate a pregnancy through abortion, it hasn't stopped states from chipping away at legal precedent.

News Clip: This morning, Texas is taking center stage in the debate over abortion rights passing a law potentially impacting millions of women.

News Clip: It is now law in the Lone Star state.

News Clip: Idaho is now the first state to pass a bill modeled after the Texas law banning abortions after six weeks of pregnancy, the Idaho bill would allow potential...

Louise Melling: That very sad story, right, is that it's been happening almost since the day *Roe v. Wade* was decided. Hi, my name's Louise Melling. I use the pronouns she, her, hers. I am a deputy legal director of the national office of the ACLU, and I'm also the head of its Ruth Bader Ginsburg Center of Liberty. And that center includes the ACLU's legal work on LGBT rights as well as reproductive rights. We are seeing the continued vociferous attacks on abortion, attacks that have a whole new meaning now that there's a case before the Supreme Court, in which the Supreme Court may well in June issue a decision that reverses and strips our federal constitutional protection for abortion. And those aren't the only attacks that we're seeing. We're also seeing attacks on history, like the right in schools to talk about and give a full history, the right to talk about like, who we are and to have our conversations in school reflect the diversity of people. We're seeing attacks on voting rights. So, in many ways, this really feels like a part of the threat to democracy.

BB: Melling is talking about *Dobbs v. Jackson Women's Health Organization*. A challenge brought by Mississippi Department of Health State Officer Thomas Dobbs seeking to uphold the state's Gestational Age Act, which prohibits abortions after 15 weeks. The state law had been shut down at every turn before the December court hearing before the 6-3 conservative supermajority Supreme Court. A federal judge even called attempts to uphold the law a waste of taxpayer dollars, but that didn't stop the Supreme Court from taking up the case to decide a single issue: the constitutionality of prohibiting elective abortions before a fetus is viable. Melling said the challenge is decades in the making.

LM: The federal Constitution sets up floor in the United States Supreme Court decisions or the dispositive decisions on what the federal Constitution means, but the Supreme Court hasn't yet addressed every single issue.

BB: First came laws seeking to delay abortion procedures from being performed.

News Clip: Today a judge ruled women looking to get an abortion must wait 24 hours after an initial doctor's visit before getting the procedure, saying it falls in line with other wait time requirements.

LM: The states would pass rules requiring mandatory delay two trips for people seeking abortion so that you would have to drive, get yourself to the provider and hear mandated counseling too, that would encourage you to continue the pregnancy. And then you would have to return on another day for the actual procedure. The states would pass measures like that 'cause the Supreme Court hadn't yet spoken on those issues.

BB: When the Supreme Court didn't find those laws posed what's considered to be an undue burden on constitutional rights, anti-abortion legislators were emboldened.

LM: The states recently have been doing fairly audacious things like passing a ban on abortion at six weeks, passing a ban on abortion at 12 weeks, passing a ban on abortion at 15 weeks, passing bans that say if the court strikes six, then 12, if they strike that, then 15, that 18, then 20 and the states are doing that knowing that the lower courts are going to strike those restrictions because they violate clear Supreme Court precedent, but they're testing because they want one of those cases to go up there. They wanted one of those cases, ultimately at some point to go to the Supreme Court so the Supreme Court would consider the question.

BB: Case in point, Texas' 2021 law, which outlaws abortions after six weeks, which is before most people even know they're pregnant. The Supreme Court last year declined to pause or block the law through preliminary injunction while it made its way through state court. It was the green light other states looking to severely restrict abortions were looking for. Idaho was first in line. Idaho passed what's being called the first copycat law modeled after Texas's six-week abortion ban. Courthouse News reporter Carson McCullough has been covering the story from Boise.

Carson McCullough: This is not necessarily the first time that the Legislature has touched on something like this. Last year Idaho actually signed what they call a trigger law that was set to essentially ban abortions in the state in the event that *Roe v. Wade* was overturned in the Supreme Court.

BB: Fast forward a year.

CM: I suppose, sort of after seeing how things played out in Texas, when they also passed this similar law, the Legislature essentially said well, now we're going to take it one step further and we're going to pass a law that just outright bans them after six weeks.

BB: Like the Texas abortion ban, Idaho's new law deputizes residents to sue providers they believe have performed an abortion past six weeks gestation.

CM: There's one major difference when it comes down to who can file a lawsuit. And that main difference is that in Texas, essentially any private citizen can bring a lawsuit against an abortion provider whereas under the Idaho bill only a close family member can file a lawsuit, such as grandparents, brothers, sisters, aunts, uncles, that type of thing. And only they are allowed to levy a lawsuit if they can prove that familial relationship.

BB: It's that portion of the law, much like the law in Texas, that is being challenged in the courts by groups who support abortion rights, including Planned Parenthood and the ACLU. Idaho Governor Brad Little even recognized the law he signed would likely be struck down.

CM: I'm aware of a letter that he sent to the lieutenant governor of the state that essentially laid out his reasoning for signing it. And he said in this letter that he supports the underlying policy goal of the law, but essentially said he is fairly confident it's not going to actually survive any legal challenges. His exact words were that he feared the enforcement mechanism of the bill would in short order be proven, his words, unconstitutional and unwise. I don't know entirely what it says about the state of our current system that we have leaders who are signing laws with one hand and writing that law's eulogy with the other.

BB: And Idaho's law went even a step further than Texas.

CM: There are exceptions in the law in the event of rape, incest, like some other laws have had. But interestingly, when it comes to filing a lawsuit, while the rapist cannot file a lawsuit in the event of an abortion, the family members of said rapist can.

BB: McCullough said it comes down to a game of politics.

CM: He can have all the reservations and doubts that he wants but being a Republican in a very red state during a time when he's looking to run for reelection, I mean, the pushback he would have received from his party would have been, would have been just overwhelming, I think.

[Music Break]

BB: While Idaho's abortion ban was set to go into effect April 22nd, the state Supreme court paused the law while it waits for legal briefs to be filed by the state and Planned Parenthood, who filed suit a week after Little signed bill. As the abortion rates get challenged state by state, what does this mean for other constitutionally protected rights?

Kimberly Mutcherson: The right to abortion is rooted in a right to privacy or rooted in what we call substantive due process, which is if you're a law nerd, that's the way that you would describe it, which essentially means that there are certain rights that the Supreme Court has articulated that are not necessarily specifically found in the Constitution.

KM: Kimberly Mutcherson, I am the dean and a professor of law at Rutgers Law School in Camden, New Jersey. My main area of expertise is reproductive justice, and I focus on abortion, assisted reproduction decision-making for pregnant women and family decision-making.

BB: Mutcherson said anti-abortion activists, legislators and scholars have zeroed in on the fact that the Constitution doesn't mention the word abortion as a legal argument, claiming the right to choose isn't protected.

KM: The word family doesn't appear in the Constitution, the word woman doesn't appear in the Constitution, the word privacy doesn't appear in the Constitution, so that certainly can't be the standard by which we decide which rights exist and which do not.

BB: And many of the rights the Supreme Court has found are constitutionally protected are not actually spelled out in the document.

KM: The right to terminate a pregnancy flows from the right to privacy, the right to the care and custody of your minor children flows from the right to privacy, the right to access contraception flows from the right to privacy and the 14th Amendment, the right to marry the person of your choice, irrespective of race or irrespective of their gender, flows from the right to privacy.

BB: But constitutional originalists, as they're called, say courts are bound by its text and cannot go beyond it to interpret how the Constitution might protect other rights. It's a question that's come up specifically during recent Supreme Court confirmation hearings.

Senator Chuck Grassley: Uh, I think the case that most people are thinking about right now in the case that every nominee gets asked about, *Roe v. Wade*, can you tell me whether *Roe* was decided correctly?

Neil Gorsuch: Senator again, I would tell you that *Roe v. Wade*, decided in 1973, as a precedent United States Supreme court, it has been reaffirmed.

Senator Dianne Feinstein: What would you say your position today is on a woman's right to choose.

Brett Kavanaugh: It is an important precedent of the Supreme Court. By it I mean, *Roe v. Wade* and *Planned Parenthood v. Casey*, been reaffirmed many times. *Casey* is precedent on precedent, which itself is an important factor to remember.

Senator Amy Klobuchar: Is *Roe* a super precedent?

Amy Coney Barrett: As Richard Fallon from Harvard said, *Roe* is not a super precedent because calls for its overruling have never ceased, but that doesn't mean that *Roe* should be overruled.

DF: Do you agree with Justice Scalia's view that *Roe* can and should be overturned by the Supreme Court?

ACB: That's a case that's litigated. It could, you know, its contours could come up again. In fact, do come up.

DF: Do you agree with Justice Kavanaugh that *Roe v. Wade* is settled as a precedent? And will you, like Justice Barrett, commit to obey all the rules of *stare decisis* in cases related to the issue of abortion?

Ketanji Brown Jackson: Thank you, senator. I do agree with both Justice Kavanaugh and Justice Barrett on this issue. *Roe* and *Casey* are the settled law of the Supreme Court concerning the right to terminate a woman's pregnancy.

KM: Are you a person who believes that the Constitution is a living document and that it is a document that needs to be understood and interpreted based on the times in which we find ourselves? Right? I mean, imagine if we decided that the Constitution couldn't apply to the internet and so therefore free speech didn't exist on the internet because that didn't exist when the Constitution. We would recognize the foolishness of taking that position.

BB: The issue of substantive due process was raised by Justice Sotomayor during the Dobbs hearing this past December.

Sonia Sotomayor: The sponsors of this bill, the House in Mississippi said we're doing it because we have new justices. The newest ban that Mississippi has put in place, the six-week ban the Senate sponsor said we're doing it because we have new justices on the Supreme Court. Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts? I don't see how it is possible. It's what *Casey* talked about when it talked about watershed decisions, some of them, *Brown v. Board of Education*, it mentioned, and this one have such an entrenched set of expectations in our society. This is what the court decided, this is what we will follow.

KM: And the Mississippi SG said, oh no, no, no. All of those rights are clearly established. There's nothing to be worried about there. You know, nothing would change if this court decided to overrule *Roe v. Wade*. But if you look at the amicus briefs in that case, including an amicus brief from Mississippi Right to Life, they very clearly draw the line between *Roe v. Wade* and cases like *Obergefell*, right, which created marriage equality in this country. Cases like *Griswold v. Connecticut*, which said that married couples could access contraception, or *Eisenstadt v. Baird*, which said that single people could access contraception. Those lines are being drawn very, very clearly. And it is incredibly naive for people to think this is all just about abortion and then once *Roe v. Wade* falls, everything will be fine and everything else will stay exactly the same. *Roe v. Wade* falling is just one domino in a very, very long train of dominoes that are intended to roll back a huge slew of rights.

BB: Abortion is the Trojan horse to dismantle these other rights, some of which have been decided just in the past decade.

KM: So as these blocks start to fall starting with abortion, that's not where it stops, right. Abortion is just the starting point and then we get to see things like what we're seeing now with telling parents that they can't provide gender-affirming care to their trans children, which is literally putting those children's lives at risk, which is just sort of horrifying to imagine. And yet that's where we are.

BB: To ensure the right to choose, Mutcherson said states can't rely on federal courts to protect *Roe v. Wade*.

KM: States like New Jersey, we just recently saw Connecticut stepping up. California has done the same thing. And I think other states will fall in line where they're acting on a state level to protect abortion rights because they see the writing on the wall and that *Roe v. Wade* is going to go away.

BB: Most people don't realize their states have their own constitution and those documents can be the stopgap as rights are dismantled at the federal level.

KM: State constitutions can be much more rights-protective than the federal Constitution in certain states. And so, you know, really thinking about all right, if the federal courts are not going to provide the level of protection to marginalized communities that we would hope for that has been the case in the past, then let's see what we can do on the state level. Let's look at our state constitution and let's figure out if there's something protected within those spaces.

[Music Break]

DJ: From the highest court to the state courts, Courthouse News will be reporting on what happens next in the abortion debate, trans health care and litigation wrestling with questions surrounding bodily autonomy. Thank you to our reporters, Stephen Paulsen and Carson McCullough. You can read more of their reporting at our website, [courthousenews.com](http://courthousenews.com), and learn the latest developments by following us on Twitter @CourthouseNews. Finally, thank you for listening. We'd love to hear your thoughts and story ideas. DM us on Twitter @sidebarCNS. And if you want to give us a boost, leave a review on Spotify or Apple Podcasts. And join us next time as I head to the art gallery and history museum to look at ongoing fights to return looted art and cultural artifacts to the rightful owners. Admission is free and it will be far from dusty.

[Outro Music]

