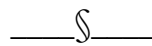




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A Queer Constitutional History of Loss:
Mayes v. Texas (1974), Privacy, and the Struggle for the Right
to Be Trans in Public in the 1970s

Scott De Orio

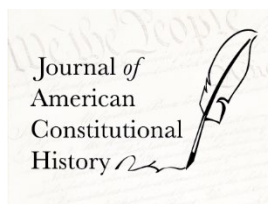
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A Queer Constitutional History of Loss: *Mayes v. Texas* (1974), Privacy, and the Struggle for the Right to Be Trans in Public in the 1970s

*Scott De Orio**

Abstract

In the period of the 1960s through 2015, the U.S. Supreme Court issued a set of canonical, key decisions expanding the constitutional doctrines of sexual liberty and privacy, equality, and substantive due process for women and sexual and gender minorities. The Court interpreted these principles to protect contraceptive use, abortion, interracial marriage, the private consumption of pornography, the old common-law crime of sodomy, and marriage between people of the same sex. This article argues for the importance in the constitutional history of sexual and gender regulation not only of cases that the Supreme Court decided in favor of the women and sexual/gender minority litigants, but also the importance of cases these litigants lost, and even ones the Court declined to hear. One such case was *Mayes v. Texas* (1974), in which the U.S. Supreme Court denied *certiorari* in a challenge to the constitutionality of the city of Houston's criminal law against crossdressing. A close examination of the *Mayes* case illuminates important aspects of queer constitutional history and the history of grassroots efforts to expand privacy and substantive due process doctrine. First, it reveals one of the ways in which trans people were subject to formal, legal discrimination in the past (laws against crossdressing), and, in the Court's refusal to hear the case, demonstrates the high bar trans litigants had to overcome to adjudicate their rights.

* Scott De Orio is an independent scholar and political and legal historian whose work focuses on the regulation and criminalization of LGBTQ+ people in the twentieth-century United States. The author would like to thank Anne Gray Fischer, Marie-Amélie George, and Felicia Kornbluh for their incisive feedback on drafts of this article.

This is especially important because the Supreme Court has recently denied that any such discrimination has ever existed. Second, *Mayes v. Texas* shows the boundaries of the Supreme Court’s privacy and substantive due process doctrine. The Justices’ decision to decline *certiorari* was not just a loss for trans-rights activists. It also meant that the right to privacy never extended to transgender expression. Finally, the article illuminates trans activism at the local and state levels as an important venue of legal contestation and constitutional claims-making.

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In the period of the 1960s through 2015, the U.S. Supreme Court issued a set of canonical, key decisions expanding the constitutional doctrines of sexual liberty and privacy, equality, and substantive due process for women and sexual and gender minorities.¹ In *Griswold v. Connecticut* (1965), the Court found state-

¹ Substantive due process is the principle rooted in the Fourteenth Amendment that the U.S. Constitution guarantees certain fundamental rights not explicitly enumerated with which the state may not interfere. In *Lochner v. New York* (1905), the Supreme Court drew on the concept of substantive due process to assert that a law restricting the working hours of bakers was an unconstitutional infringement upon individuals’ right to work and to enter into economic contracts. *Lochner v. New York*, 198 U.S. 45 (1905), <https://supreme.justia.com/cases/federal/us/198/45/>. In the 1960s and 1970s, the Court developed an overlapping doctrine of the right to privacy that reinvigorated substantive due process doctrine, this time in matters of gender and sexuality. In his concurring opinion in *Dobbs v. Jackson Women’s Health Organization* (2022), Justice Thomas called upon the Court to reevaluate the many decisions rooted in substantive due process. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022) (Thomas, C., concurring), https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf. On the history of these legal doctrines, see Nathan S. Chapman and Kenji Yoshino, “The Fourteenth Amendment Due Process Clause,” National Constitution Center, accessed August 6, 2025, <https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701>. On the history of the right to

level bars to the purchasing and use of contraceptives by married couples unconstitutional because they interfered with the fundamental right to marry and punctured a “zone of privacy” around intimate heterosexual relations that the Justices found in the “penumbras” of a range of constitutional provisions.² The Court argued similarly in extending a bar to state proscriptions on contraception for unmarried couples and persons in *Eisenstadt v. Baird* (1971).³ It held unanimously in *Loving v. Virginia* (1967) that state statutes forbidding interracial marriage ran afoul of both the equal protection and due process clauses of the Fourteenth Amendment.⁴ It decriminalized the private consumption of pornography in *Stanley v. Georgia* (1969), finding that Georgia’s law against possessing “obscene” material violated the First Amendment’s guarantee to freedom of expression as well as the right to privacy articulated in *Griswold*.⁵ It built upon *Griswold* and *Eisenstadt* to find most state regulation of abortion unconstitutional in *Roe v. Wade* (1973).⁶ More recently in *Lawrence v. Texas* (2003), the Court decriminalized “sodomy” (anal and oral sex, whether homosexual or heterosexual) between consenting adults in private, and found state statutes that forbade marriage for same-sex couples as

privacy, see Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (New York: Oxford University Press, 2012), and Sarah E. Igo, *The Known Citizen: A History of Privacy in Modern America* (Cambridge, MA: Harvard University Press, 2018).

² *Griswold v. Connecticut*, 381 U.S. 479 (1965), <https://supreme.justia.com/cases/federal/us/381/479/>. On the heterosexuality of *Griswold* and the whole line of sexual-liberty cases in the 1960s through the early 1970s, see Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill: University of North Carolina Press, 2010). On the concept of the zone of privacy, see Lauren Berlant, “Live Sex Acts (Parental Advisory: Explicit Material),” *Feminist Studies* 21, no. 2 (1995): 379–404.

³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972), <https://supreme.justia.com/cases/federal/us/405/438/>.

⁴ *Loving v. Virginia*, 388 U.S. 1 (1967), <https://supreme.justia.com/cases/federal/us/388/1/#tab-opinion-1946731>. Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2010).

⁵ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969), <https://supreme.justia.com/cases/federal/us/394/557/>.

⁶ *Roe v. Wade*, 410 U.S. 113 (1973), <https://supreme.justia.com/cases/federal/us/410/113/#tab-opinion-1950137>. Felicia Kornbluh, *A Woman’s Life Is a Human Life: My Mother, Our Neighbor, and the Journey from Reproductive Rights to Reproductive Justice* (New York: Grove Press, 2024).

unconstitutional in *Obergefell v. Hodges* (2015), the ten-year anniversary of which is the occasion of this journal's special symposium.⁷

Taken together, these cases help define the boundaries and scope of the legal landscape of gender and sexual rights in America. But what about the failures—the cases to which the Supreme Court has declined to grant *certiorari* and in which it opted not to rule one way or another?⁸ What historical lessons can be learned from such cases, and what can they teach us about the constitutional history of sexual privacy and substantive due process rights, in doctrine as well as in the constitutional imaginations of social movement activists and among local political actors?

This article examines one such case: *Mayes v. Texas* (1974), in which the U.S. Supreme Court declined to hear a challenge to the constitutionality of Houston's local law against crossdressing.⁹ Toni Mayes was a transgender (“transsexual,” in the parlance of the time) woman who began the medical process of transitioning at the University of Texas Medical Branch (UTMB) on the island of Galveston near Houston—one of the first such medical programs in the country—in November 1971. But it would be two years before Mayes would be able to have gender-confirmation surgery to bring her gender presentation in line with her gender identity as a woman. In the meantime, Mayes was arrested eight times under Houston's local law against so-called crossdressing for appearing in public as a woman. To challenge her arrests, Mayes found legal representation through the American Civil Liberties Union's (ACLU) Sexual Privacy Project, a short-lived initiative funded by the Playboy

⁷ Lawrence v. Texas, 539 U.S. 558 (2003), <https://supreme.justia.com/cases/federal/us/539/558/>. *Obergefell v. Hodges*, 576 U.S. 644 (2015), <https://supreme.justia.com/cases/federal/us/576/644/>. Marie-Amélie George, *Family Matters: Queer Households and the Half-Century Struggle for Legal Recognition* (Cambridge, UK: Cambridge University Press, 2024).

⁸ The book *Courting Justice* does not make this argument explicitly but includes a focus on cases that the Supreme Court has declined. Deb Price and Joyce Murdoch, *Courting Justice: Gay Men and Lesbians v. the Supreme Court* (New York: Basic Books, 2002). On the need to pay attention to losses as opposed to wins, in the context of a case that the Supreme Court did decide, see Linda Kerber on *Goesaert v. Cleary* (1948), a case about sex-based equal protection. *Goesaert v. Cleary*, 335 U.S. 464 (1948), <https://supreme.justia.com/cases/federal/us/335/464/>. Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), 169.

⁹ *Mayes v. Texas* (Harris County, Tex. Crim. Ct., May 22, 1973), cert. denied, 416 U.S. 909 (1974).

Foundation that was in operation from 1973 to 1976.¹⁰ Marilyn Haft, the Sexual Privacy Project's lead attorney, crafted a legal strategy framing Mayes's arrests as a violation of "the constitutionally protected right of privacy," as well as of the Eighth Amendment's prohibition of cruel and unusual punishment.¹¹ Mayes lost when the Supreme Court turned down the case. But six years later, the Houston City Council repealed the crossdressing law following a federal circuit court decision, *Doe v. McConn*, which ruled that the law was an unconstitutional violation of trans people's right to privacy.¹²

An examination of the *Mayes* cases offers several important lessons that may shape how we understand queer constitutional history and the history of grassroots organizing for privacy and substantive due process rights in matters of gender and sexuality. First, the *Mayes* case, and the broader fight against Houston's crossdressing law of which it was a part, illustrates one of the ways in which trans and gender-nonconforming people have been subject to formal, legal discrimination in the past. Crossdressing laws were a technology of governance and form of carceral power that constructed trans and gender-nonconforming people as a class of people whose very presence in public space could subject them to legal harassment and criminal prosecution.¹³

¹⁰ The involvement of the Playboy Foundation in the ACLU Sexual Privacy Project underscores the expansive promise that *Roe v. Wade* held in the 1970s to open the door to the decriminalization or legalization of a broad range of sexual privacy and substantive due process rights. See Mary Ziegler, *Beyond Abortion: Roe v. Wade and the Battle for Privacy* (Cambridge, MA: Harvard University Press, 2018). It is also a reminder of how much has been lost since the Supreme Court invalidated *Roe*. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

¹¹ The rationale of the Mayes legal team's Eighth Amendment argument was that "transsexuality" was a kind of mental illness, and that it was cruel and unusual to punish people for being sick. *Mayes (Richard) v. Texas*, 416 U.S. 909 (1974). Petition. 9 Oct. 1973. *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1823–1978*, http://link.gale.com/apps/doc/DW0106968570/SCRB?u=nwulaw_main&sid=SCRB&xid=bf9ed440&pg=1.

¹² *Doe v. McConn*, 489 F. Supp. 76 (1980), <https://law.justia.com/cases/federal/district-courts/FSupp/489/76/2394247/>. Here I am using the term "trans" expansively to refer not only to people who identified as transsexual or transgender in the past but also other categories of gender-nonconforming people who were affected by the criminalization of crossdressing, including butch lesbians, "transvestites," and drag queens.

¹³ The term carceral power refers to the ways in which the effects of criminalization and policing extend beyond the walls of the space of the prison and are imbricated in

It has never been more important to recognize this point. In *United States v. Skrmetti* (2025), the U.S. Supreme Court rejected the claims of a trans patient and her family, as well as of the Biden administration, that a state-level ban on medical care for minors seeking gender confirmation constituted a violation of sex-based equal protection doctrine—although the same treatments were available for cisgender-identified minors—and therefore that such a state law need not be subject to heightened scrutiny.¹⁴ In her concurrence, authored for herself and Justice Clarence Thomas, Justice Amy Coney Barrett went beyond the sex-based equal protection analysis to argue that trans people were not a discrete and insular minority who have suffered historically from formal discrimination, and therefore did not constitute a suspect or quasi-suspect class whose disparate legal treatment should trigger heightened scrutiny.¹⁵ Justice Barrett was building on an unfortunate moment during the oral argument at 1 First Street, in which, in response to Barrett’s query, Solicitor General Elizabeth Prelogar, representing the administration, was unable to remember a single instance of past, formal discrimination against trans people.¹⁶ The opinion ignored the moment later in the argument when ACLU attorney Chase Strangio did point out specific ways in which trans people have historically been subject to legal discrimination, including by means of anti-crossdressing laws and exclusion from military service.¹⁷ An examination of the

the fabric of everyday life. Policing crossdressing is one such example of carceral power. Brett Story, *Prison Land: Mapping Carceral Power across Neoliberal America* (Minneapolis: University of Minnesota Press, 2019). On the relationship between LGBTQ+ people and the carceral state, see Scott De Orio, “Bad Queers: LGBTQ People and the Carceral State in Modern America,” *Law & Social Inquiry* 47, no. 2 (2022): 691–711, <https://doi.org/10.1017/lsi.2021.59>. On “technologies of governance” and the regulation of transgender people and expression, see Paisley Currah, *Sex Is as Sex Does: Governing Transgender Identity* (New York: NYU Press, 2022).

¹⁴ *United States v. Skrmetti*, 605 U.S. ____ (2025), https://www.supremecourt.gov/opinions/24pdf/23-477_2cp3.pdf.

¹⁵ *United States v. Skrmetti*, 605 U.S. ____ (2025) (Barrett, A., concurring). The roots of this thinking about suspect classification lie in the famous footnote #4 of *United States v. Carolene Products* 304 U.S. 152 (1938).

¹⁶ Felicia Kornbluh, “Not Only a Threat to Trans Rights,” *American Prospect*, June 20, 2025, <https://prospect.org/api/content/9d918434-4de7-11f0-9ad8-1248ae80e59d/>.

¹⁷ Refer to the audio of the oral argument in the *Skrmetti* case at 1:20:39–44 when Strangio makes this point. “Oral Argument for *United States v. Skrmetti*,” Supreme Court of the United States, December 4, 2024,

Mayes case and the broader struggle against Houston's crossdressing law substantiates Strangio's point by illuminating one legal and political battle against the scores of municipal laws that forbade crossdressing, or public, visible gender nonconformity. These laws were a form of legal discrimination to which trans and gender-nonconforming people were subject in the past. To some extent, they still are today.¹⁸ Trans people who did not "pass" and were visibly gender nonconforming were and are subject to particularly acute forms of police harassment and discrimination.

Second, *Mayes v. Texas* marks a key moment at which the Supreme Court indicated the limits and boundaries of the Court's extension of the legal doctrine of privacy.¹⁹ In *Mayes*, the Court declined to consider the place of transgender expression within the ambit of sexual and reproductive behavior the Constitution grants citizens the liberty to pursue without governmental interference. The case makes visible a "trans exception" to the rule of expanding sexual privacy and substantive due process rights in the 1960s and 1970s.²⁰ The

https://www.supremecourt.gov/oral_arguments/audio/2024/23-477. See 52:20 for the exchange between Barrett and Solicitor General Prelogar. Crossdressing laws were and are one part of a much broader legal edifice of anti-trans discrimination. Alongside the criminalization of public crossdressing and exclusion from military service, trans people have also been subjected to a range of other kinds of de jure discrimination, including the targeting of Indigenous Two Spirit people in colonial America and the nineteenth century, discriminatory anti-trans prison policies, and exclusion from public employment, the institution of marriage, immigration and parenting rights, and access to healthcare. Deborah A. Miranda, "Extermination of the Joyas: Gendercide in Spanish California," *GLQ: A Journal of Lesbian & Gay Studies* 16, no. 1-2 (2010): 253-284. Eric A. Stanley and Nat Smith, eds., *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Chico, CA: AK Press, 2011). The case *In re Marriage of Simmons* (Illinois 2003) invalidated a marriage between a trans man and a cisgender woman by arguing that it was a same-sex marriage. *In re Marriage of Simmons*, No. 98 D 13738 (Cook County, Ill., Cir. Ct., County Dep't, Dom. Rel. Div. Apr. 8, 2003).

¹⁸ On this point, see M. Gessen, "The Supreme Court Just Gave Us a Bitter Taste of What's Coming," *The New York Times*, December 6, 2024, sec. Opinion, <https://www.nytimes.com/2024/12/06/opinion/supreme-court-trans-teens.html>.

¹⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁰ See Stein, *Sexual Injustice*, on the exclusion of homosexuality from expanding privacy rights in the 1960s and 1970s. See also Felicia Kornbluh, "Queer Legal History: A Field Grows Up and Comes Out," *Law & Social Inquiry* 36, no. 2 (2011): 537-59. The concept of the gay exception is, according to Kornbluh, that of Kevin Cathcart, former executive director of Lambda Legal Defense and Education Fund. On the

Mayes case was important not only in spite of but also because its career in the federal courts ended with a denial of *certiorari* by the Supreme Court at the height of the promise of *Griswold* and *Roe*. Here, we see the Burger Court's disinterest in extending what Justice William O. Douglas in *Griswold v. Connecticut* called the "zone of privacy" beyond the cisgender and heterosexual bedroom to protect a greater diversity of forms of human freedom. The history of *Mayes v. Texas*, in other words, is a queer constitutional history of loss for the trans-rights movement and the struggle against criminalization.²¹

Finally, even as the *Mayes* case highlights the limitations of the Supreme Court, it also calls attention to the possibilities of local and state government, along with lower-level federal district courts, as productive venues for legal change, including legal change with implications for U.S. constitutional rights. On one hand, the case was a loss for trans-rights activists in the sense that the U.S. Supreme Court declined to hear it. At the same time, declining to hear the case meant that the high court had yet to rule one way or another on the question of the constitutionality of crossdressing laws, meaning local trans activists were free to continue pursuing decriminalization by other means. This they did through the Houston City Council and a federal district court case, *Doe v. McConn*. Their success in *McConn* makes clear that the Supreme Court was not the only entity responsible for making and interpreting constitutional law, and that local and state activists could have more success in lower-level federal courts.²² To emphasize the importance of local and state trans advocacy

concept of the gay exception in Supreme Court doctrine, see also Price and Murdoch, *Courting Justice*.

²¹ Here I am using the term "queer" to denote urban subcultures that facilitated forms of gay sex and gender-nonconforming expression, though the term can also be used to describe a wider range of non-normative gender and sexual expression, including "deviant" heterosexual conduct. Cathy J. Cohen, "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ: A Journal of Lesbian and Gay Studies* 3, no. 4 (1997): 437–65. For a related argument about the importance of focusing on loss in queer history in a literary context, see Heather Love, *Feeling Backward: Loss and the Politics of Queer History* (Cambridge, MA: Harvard University Press, 2009).

²² For a similar point, see legal scholar Reva Siegel on how feminist advocates achieved the implementation of the Equal Rights Amendment through advocacy at the local and state levels of government even as the ERA was never ratified at the national level. Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA," *California Law Review* 94, no. 5 (2006): 1323–1419.

is also to call attention to the diverse, broad coalitions that trans activists have formed for the decriminalization of crossdressing—gay activists, civil libertarians, city council members, police officials, doctors, Black civil rights activists, feminists, and even advocates for sexual freedom like the Playboy Foundation—that have transcended usual boundaries of who counts as an author of public policy and constitutional meaning.²³

I. THE ORIGINS OF CARCERAL POWER OVER PUBLIC GENDER NONCONFORMITY IN HOUSTON

Houston enacted its local law against crossdressing in the mid-nineteenth century as a part of a broader push to criminalize public gender nonconformity in U.S. municipalities. Between 1848 and World War I, forty-five U.S. cities established new ways of policing those subcultures through local statutes forbidding cross-dressing.²⁴ Some of those laws explicitly prohibited “wearing a dress not belonging to his or her sex,” while others were broader statutes against public “indecent” that did not mention crossdressing explicitly but in practice encompassed public gender nonconformity.²⁵ While there is little concrete evidence attesting to why cities began passing such laws, historian Susan Stryker has conjectured that it had to do with the fact that urban areas were expanding in the nineteenth century. As people moved from country to city, the anonymity afforded by big cities made it possible for many to live more openly transgender lives in a way that had not been possible in the context of the family and community surveillance of a small town.²⁶ The expansion of

²³ On coalition-building, see Max Krochmal, *Blue Texas: The Making of a Multiracial Democratic Coalition in the Civil Rights Era* (Chapel Hill: University of North Carolina Press, 2016) and Wendy L. Wall, *Inventing the “American Way”: The Politics of Consensus from the New Deal to the Civil Rights Movement* (New York: Oxford University Press, 2009). On the significance of non-traditional state actors as catalysts of legal change, see George, *Family Matters*, 21.

²⁴ Columbus, Ohio, was the first state to pass such a law in 1848. The Ohio Supreme Court declared the local ordinance unconstitutional in 1975. *City of Columbus v. Rogers*, 41 Ohio St.2d 161, 324 N.E.2d 563, 70 O.O.2d 308 (Ohio 1975), <https://case-law.vlex.com/vid/city-of-columbus-v-892181611>. Svetlana Ter-Grigoryan, “Celebrating Pride by Marking Diverse Ohio,” Ohio History Connection, June 15, 2023, <https://www.ohiohistory.org/celebrating-pride/>.

²⁵ Clare Sears, *Arresting Dress: Cross-Dressing, Law, and Fascination in Nineteenth-Century San Francisco* (Durham, NC: Duke University Press Books, 2014), 3.

²⁶ Susan Stryker, *Transgender History* (Berkeley, CA: Seal Press, 2008), 34. For a similar argument about the cities and the expansion of gay subcultures, see John D’Emilio,

policing and criminalization may have been a response to the fact that queer urban subcultures were themselves expanding.

In 1861, Houston became the eighth U.S. city to pass an anti-crossdressing ordinance. In a 1914 revised code of ordinances of the city of Houston, Section 795 prohibited “appearing in public in a state of nudity or in the dress of the other sex” as a part of a broader section of the code of ordinances regulating “public morals and decency.” The ordinance stipulated: “Any person who appears in public in a state of nudity, or who appears in public in the dress of the other sex, or in any indecent or lewd manner” had committed a misdemeanor offense carrying a fine between \$1 and \$100.²⁷ The inclusion of “nudity” in the definition of the crime, along with the language of “in any indecent or lewd manner,” reflects how early laws criminalizing public gender nonconformity were part of a broader initiative to criminalize a range of forms of public disorder, a list that also included kinds of conduct as diverse as prostitution, public gay cruising, indecent exposure, homelessness, public drunkenness and drug use, begging by disabled people, and urban pig keeping.²⁸

“Capitalism and Gay Identity,” in *Powers of Desire: The Politics of Sexuality*, ed. Ann Snitow, Christine Stansell, and Sharan Thompson (New York: Monthly Review Press, 1983), 100–113. Brandon Wolf, “Celebrating the Victory over Houston’s Cross-dressing Ordinance,” *OutSmart: Houston’s LGBTQ Magazine*, August 1, 2015, <https://www.outsmartmagazine.com/2015/08/celebrating-the-victory-over-houstons-cross-dressing-ordinance/>.

²⁷ City Council of the City of Houston, *The Revised Code of Ordinances of the City of Houston of 1914* (Houston: E.P. Phelps, 1914), <https://babel.hathitrust.org/cgi/pt?id=hvd.hx4qqa&seq=7>.

²⁸ Sears, “Problem Bodies, Public Space,” in *Arresting Dress*, 61–77. After the Civil War, Southern states passed “Black Codes” including vagrancy laws that police enforced against newly freed people of color in public whom, if they were unemployed, police would then force into hyper-exploitative work contracts. John K. Bardes, “Redefining Vagrancy: Policing Freedom and Disorder in Reconstruction New Orleans, 1862–1868,” *Journal of Southern History* 84, no. 1 (2018): 69–112, 80. In a global context, vagrancy laws were used by the British Empire to police the movements and unauthorized mobility of its colonial subjects. Christopher Roberts, “Discretion and the Rule of Law: The Significance of Vagrancy and Vagrancy-Type Laws in England, the British Empire, and the British Colonial World,” *Duke Journal of Comparative & International Law* 33 (2023): 181–251. For vagrancy as a legal catch-all in the U.S. to regulate urban behavior considered disorderly or immoral, see Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York: Oxford University Press, 2016). As Susan Schweik argues in *The*

Newspaper reports provide insight into the enforcement of Houston's anti-crossdressing law against people who engaged in gender-nonconforming expression in public in the early twentieth century. One account from the *Houston Chronicle* in 1912 reported that a person named Madge Morris was arrested by policemen Bass and Spradley on a Saturday night for "dress[ing] in male attire" in Houston's Fourth Ward. At trial at the criminal court, the officers explained to the judge that they had "noticed a rather 'dudish young fellow' ... sauntering down a street." When "he" was asked to lift 'his' hat," the newspaper account went on, "a bunch of hair revealed that 'he' was a woman." Madge Morris told the officers that "she had been attired in the garb but a 'few minutes' when arrested."²⁹ The judge found Morris guilty and levied a fine of \$12.45 for the offense, or about \$412.60 in today's dollars.

In the 1960s, new grassroots movements for lesbian and gay rights ("homophiles," as they called themselves) took shape in Texas and organized the first legal challenges to Houston's anti-crossdressing law.³⁰ Texas is not particularly well known as having been an important site of gay activism, compared with the better-known stories of gay activism in coastal cities in New York and California.³¹ But Texas's reputation as a red state belies the fact that it was also home to thriving and significant progressive and lesbian and gay rights

Ugly Laws, the policing of people with disabilities in public was motivated by business leaders who wanted to get "unsightly beggars" off the streets. Susan M. Schweik, *The Ugly Laws: Disability in Public* (New York: NYU Press, 2009). On policing prostitution, see Anne Gray Fischer, *The Streets Belong to Us: Sex, Race, and Police Power from Segregation to Gentrification* (Chapel Hill: University of North Carolina Press, 2022). Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (1985): 899–935, <https://api.law.wisc.edu/repository-pdf/uwlaw-library-repository-omekav3/original/7e8786cdae218e467485d3258781c3b24aa3dd2a.pdf>.

²⁹ "Girl Is Fined \$12.45 for Walking in Street Dressed in Man's Garb," *Houston Chronicle*, August 12, 1912, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

³⁰ The word homophile was meant to project a respectable public image by emphasizing love as opposed to sex. On the early homophile movement, see John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*, 2nd ed. (Chicago: University of Chicago Press, [1983] 1998).

³¹ For a similar argument about the importance of gay politics in Illinois and the need to move beyond and complicate a coast-centric way of narrating gay history, see Timothy Stewart-Winter, *Queer Clout: Chicago and the Rise of Gay Politics* (Philadelphia: University of Pennsylvania Press, 2016).

movements in Dallas, Houston, Austin, and other urban centers.³² One of the aims pursued by the early lesbian and gay rights movement in Texas was to challenge the enforcement of the Houston crossdressing ordinance against butch, gender-nonconforming lesbians dressed in “masculine” attire.

On June 23, 1967, the lesbian Houstonian Rita Wanstrom, affectionately known as “Poppa Bear,” helped open Houston’s first lesbian club, the Roaring Sixties, at 2305 South Shepard Drive in Houston’s historic Montrose gay neighborhood.³³ Part of the impetus for creating the club was to create a space where women could wear fly-front pants, although about a quarter of the patrons was usually male.³⁴ On August 5, 1967, less than two months after the bar had opened, officers with the Houston Police Department’s vice squad raided the Roaring Sixties and arrested between twenty-five and thirty women under the auspices of the crossdressing law for wearing fly-front pants.³⁵ As Rita Wanstrom later recalled:

They lined people up and started questioning. One woman who was asked her occupation said: “I’m a weenie peeler.” That just broke everyone up. More cops came in and they made her repeat it. It turned out that she worked in a meat factory and when the weenies came through she would peel one to make sure it was stuffed right. So they put all of the butches in the paddy wagon.³⁶

³² On grassroots progressive organizing in Texas, see Krochmal, *Blue Texas*. On the Texas campaign against sodomy law, see Wesley G. Phelps, *Before Lawrence v. Texas: The Making of a Social Movement* (Austin: University of Texas Press, 2023). I have made a similar argument elsewhere about the importance of gay-rights activism in Texas for the national struggle over sodomy laws. Scott De Orio, “The Invention of Bad Gay Sex: Texas and the Creation of a Criminal Underclass of Gay People,” *Journal of the History of Sexuality* 26, no. 1 (2017): 53–87.

³³ “Calendar,” *Nuntius*, August 1970, <http://www.houstonlgbthistory.org/nuntius.html>.

³⁴ James T. Sears, *Rebels, Rubyfruit, and Rhinestones: Queering Space in the Stonewall South* (New Brunswick, NJ: Rutgers University Press, 2001), 169.

³⁵ Dee Smathers, “Tumblebugs and T.H.E.M.,” *Upfront*, December 19, 1980, <https://www.houstonlgbthistory.org/misc-bar-raids.html>. “The Tumblebugs Form to Fight Cross-Dressing Ordinance,” *Houston LGBT History*, <http://www.houstonlgbthistory.org/banner1967.html>.

³⁶ Jim Sears, “Our Queer Southern Heritage: Remembering and Recording Tales of Gay Houston in the ‘60s and ‘70s,” *OutSmart: Houston’s LGBTQ Magazine*, August 2001, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

The arrested butch lesbian's comment provided comic relief in the face of arrest by invoking an image of castration that challenged and parodied the masculinity and dominance of the police officer. Wanstrom paid the \$25 fine (about \$240.62 in today's dollars) assessed to each of the arrested women and hired an all-girl band led by "little butch" Sandra to "pump our business back up."³⁷

After the initial raid of the Roaring Sixties, the Houston Police Department's vice squad was not done arresting lesbians and queer women for dressing in male attire. On December 29, 1967, vice officers conducted a further raid of the Roaring Sixties and arrested another twenty-five to thirty "zipper-criminals." Other similar raids resulting in the criminalization of gender-nonconforming lesbians included one at Rocky's Club in September 1967 and another at the Plantation Club on August 14, 1968.³⁸

In response to these incidents of police harassment and criminalization, some Houston gay bar owners created new rules forbidding lesbians from wearing fly-front pants and other "mannish" clothing so as to avoid police harassment.³⁹ Others, instead of turning inward and restricting the conduct and gender presentation of bar patrons, turned outward and organized the first challenges to the police practice of criminalizing lesbians for crossdressing. Rita Wanstrom co-founded an informal group called the Tumblebugs, so-named after the beetle known for hard work and persistence.⁴⁰ The Tumblebugs organized parties and benefit shows at the Roaring Sixties to raise enough money to hire the prominent trial lawyer Percy Foreman to defend the eleven arrested queer women who were summoned to stand trial. Meanwhile, members of the Promethean Society, an early gay-rights organization in Houston founded in January 1968, entered a complaint with the office of Mayor Louie Welch. Welch's administrative assistant, Dave Beckwith, "apologized for the incident and assured the Promethean Society that positive steps would be taken to assure that such acts of harassment would not happen in the future."⁴¹

³⁷ Quoted in Sears, "Our Queer Southern Heritage."

³⁸ "Police Will Refile Charges," *Houston Chronicle*, July 27, 1968, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

³⁹ Dee Smathers, "Tumblebugs and T.H.E.M." <http://www.houstonlgbthistory.org/banner1967.html>.

⁴⁰ Sears, "Our Queer Southern Heritage."

⁴¹ Ray Hill, "Special Release to the Ladder," *The Ladder*, October–November 1968, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

In court, the cases of those arrested appeared on the docket four times, but the vice officers responsible for the arrests never showed up, and Judge Raymond Judice of the Houston Municipal Court ultimately dismissed the charges.⁴² Sergeant G.S. McMenemy of the Houston Police Department's vice squad said that he "definitely intended" to refile the charges after they were dismissed by Judge Judice.⁴³ But before the police sergeant had the opportunity to do so, he was transferred to the police department's narcotics division. Rita Wanstrom commented, "They never bothered us again!"⁴⁴

In the late 1960s, early homophile activists in Texas made significant progress challenging the police enforcement of Houston's anti-crossdressing law against women wearing men's clothing in lesbian bars. But Houston's anti-crossdressing law was still on the books, and the battle against it was far from over. Soon, in the 1970s, trans activists and their progressive allies built on the activism of the Tumblebugs by launching another, better organized court challenge to the constitutionality of Houston's anti-crossdressing law.

II. CHALLENGING THE CONSTITUTIONALITY OF HOUSTON'S ANTI-CROSSDRESSING LAW IN *MAYES V. TEXAS*

Beginning in the 1950s, new social movements took shape in the United States for what was then called transsexual rights (as the more moderate wing of the movement was called) and liberation (the more radical wing). One of the central aims of both new trans movements was the repeal of local laws against crossdressing. Just as Texas is not particularly well known as having been an important site of gay rights activism, the history of trans-rights activism in Texas has been similarly obscured, particularly as compared to the better-known story of the rise of transgender activism in California.⁴⁵ But as the *Mayes v. Texas* case makes clear, Texas was home to a robust trans-rights movement,

⁴² "Who Can Tell Boys from Girls?" *Houston Chronicle*, July 26, 1968, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

⁴³ "Police Will Refile Charges."

⁴⁴ Sears, "Our Queer Southern Heritage."

⁴⁵ Stryker, *Transgender History — Screaming Queens: The Riot at Compton's Cafeteria*, directed by Susan Stryker and Victor Silverman (KQED Truly CA, 2005), <https://www.youtube.com/watch?v=G-WASW9dRBU>. For one important history of transgender activism in Texas, see Michael G. Long and Shea Tuttle, *Phyllis Frye and the Fight for Transgender Rights* (College Station, TX: Texas A&M University Press, 2022).

one of the primary aims of which was to challenge the criminalization of crossdressing.

Toni Mayes was born in 1947 and grew up in Houston.⁴⁶ In an interview, Mayes said that she had known “since early childhood” that she “wanted to be a woman”; one of her most “vivid childhood memories” was “being punished by [her] mother for wearing [her] younger sister’s panties.”⁴⁷ When she was fourteen years old, Mayes “decided [s]he was a homosexual.” She ran away from home and went to live with her cousin in California, where she “took up with a couple of male homosexuals.” When the cousin found out, they were “repulsed” and called Mayes’ mother, who summoned her child back to Houston. The experience taught Mayes, as she put it, “that homosexuals weren’t for me.”⁴⁸

After that incident, Mayes’s parents took it upon themselves to discipline and “make a real man” out of their child. They signed her up for the Navy at fifteen, but the armed forces would not take her at that young age. Mayes ultimately entered the Navy two years later when she was seventeen.⁴⁹ While a servicemember, Mayes met a woman and deserted the armed forces to be with her in Iowa. The FBI caught up with Mayes, arrested her, and sent her to a military jail in Illinois. During the ensuing investigation into Mayes’s desertion, the Navy gave Mayes a questionnaire asking her if she had ever had a “homosexual experience.” The truth, Mayes later told interviewers, was that she had not, but “I looked at it as my ticket out of the Navy,” so she answered yes and was given a dishonorable discharge for homosexuality.⁵⁰ Mayes returned to her wife in Iowa, and the two had a baby daughter in 1966 but split up shortly

⁴⁶ Monica Roberts, “Houston Trans History—Rachelle Annette ‘Toni’ Mayes,” *TransGriot*, December 26, 2016, <https://transgriot.blogspot.com/2016/12/houston-trans-history-rachelle-annette.html>. “Rachelle Annette Mayes,” *Texas Obituary Project*, <http://www.texasobituaryproject.org/110607mayes.html>.

⁴⁷ “He Will Be She in Spite of Houston,” *Advocate*, November 8, 1972, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

⁴⁸ “He Will Be She in Spite of Houston.”

⁴⁹ “He Will Be She in Spite of Houston.”

⁵⁰ On the history of gays and lesbians in the U.S. military, see, *inter alia*, Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War II*, 2nd ed. (Chapel Hill: University of North Carolina Press, [1990] 2010), and Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009).

thereafter, and the mother retained custody of the child. Subsequently, Mayes married for a second time, to another woman.

It was while Mayes was with her second wife that she began to realize that she was trans. Mayes was a licensed ham radio operator and began “telling [her] wife [she] wanted to stay up to contact other hams.”⁵¹ After her wife went to bed, Mayes would “pull out a box with women’s clothes and put them on.” The second marriage broke up after that. Around the same time, Mayes “learned for the first time from a newspaper story that transsexuals exist” and “returned to Houston and was working as a television repairman” when she “decided on sex-change surgery.”⁵²

Fortunately for Mayes, she lived next door to one of the first programs in the nation for gender-affirming medical care at the University of Texas Medical Branch on the island of Galveston. The UTMB Gender Clinic was founded in 1965 with the support of funding from Reed Erickson, a trans man and wealthy industrialist from Baton Rouge, Louisiana.⁵³ Mayes enrolled in the program in November 1971. But the clinic required patients to undergo a two-year period of “actually practicing as the opposite sex before surgery is even considered.”⁵⁴

⁵¹ “He Will Be She in Spite of Houston.”

⁵² “He Will Be She in Spite of Houston.”

⁵³ Erickson himself had undergone gender-confirmation surgery in 1963 with pioneering trans medical specialist Dr. Harry Benjamin at the Stanford Medical Center in California. Harry Benjamin, *The Transsexual Phenomenon* (New York: Julian Press, 1966). That same year, Erickson founded the Erickson Educational Foundation to fund counseling services and gender clinics, and promote gender-affirming surgery as a form of accepted medical care. The foundation funded, or helped fund, clinics at Stanford, the University of Minnesota Medical Center, Johns Hopkins, the University of Virginia, Marshall University in St. Louis, the University of Oregon, and the University of Utah. David Fagan, Skip Teauxmelou, and Nancy Ford, “30 (Plus) Years of Pride,” *OutSmart: Houston’s LGBTQ Magazine*, June 1, 2008, <http://www.outsmartmagazine.com/2008/06/30-plus-years-of-pride/>. Ada Bello, “Reed Erickson, Pioneering Transgender Activist and Philanthropist,” *outhistory.org* (blog), April 5, 2016, <https://outhistory.org/exhibits/show/erickson/essay>. As Abram Lewis shows, along with his work on trans issues, Erickson “funded New Age initiatives and research on parapsychology, hallucinogens, and animal communication.” Abram J. Lewis, “Trans Animisms,” *Angelaki* 22, no. 2 (2017): 203–15, 207.

⁵⁴ UTMB Patient Care: Gender Clinic, in the UTMB Vertical Files, MS 119, Truman G. Blocker, Jr. History of Medicine Collections, Moody Medical Library, University of Texas Medical Branch at Galveston, Texas. By 1976, the UTMB Gender Clinic was

The problem was that, while Mayes was still in the middle of the two-year waiting period before being allowed to have surgery, she was constantly being arrested under the auspices of Houston's anti-crossdressing law. After her first arrest, police held Mayes in the men's jail for nine hours. "I felt terrible," she recalled. "I had my wig torn off and there were a lot of remarks I didn't care for."⁵⁵

So Mayes hired a lawyer. In March 1972, she retained the Austin attorney Larry Sauer, who also worked on a range of other cases involving gay rights, to challenge in a municipal court the constitutionality of Houston's law against appearing in public in a state of "nudity or dress of opposite sex," arguing that it should be declared void for vagueness in violation of the Fifth (via the Fourteenth) Amendment's guarantee to due process of law at the level of state government.⁵⁶ On June 2, the Houston City Council responded proactively to the void-for-vagueness argument by revising the ordinance to make the language more precise.⁵⁷ The new ordinance specified: "It shall be unlawful for any person to appear on any public street, sidewalk, alley, or public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex," and made public nudity a separate crime.⁵⁸ The language of "disguise" is interesting and might evince a concern not only with policing people who were visibly gender nonconforming but also an anxiety about people who passed too well. In any case, now that the statute was different, Mayes had to start all over again and mount a new legal challenge.

While she was still in the process of contesting her arrests in court, Mayes attempted to obtain an identification card reflecting her gender identity, which would prevent the police from arresting her again for dressing in the clothing

under the direction of Dr. Paul Walker and had two psychiatrists, two psychologists, a urology surgeon, a gynecologic surgeon, a plastic surgeon, an internist, a pediatrician, and an endocrinologist. The clinic also treated intersex people. Elizabeth Reis, *Bodies in Doubt: An American History of Intersex* (Baltimore: Johns Hopkins University Press, 2009).

⁵⁵ "Houston Man Wants to Pose as Woman," *Pampa Daily News*, March 30, 1972, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

⁵⁶ Houston City Code Sec. 1346. Sauer was also behind a federal district court case that defeated a ban on a gay student organization at Texas A&M University in 1984. *Gay Student Services v. Texas A&M University*, 737 F.2d 1317 (1984).

⁵⁷ "Mayes Harassed by Police but Won't Leave Town," *Nuntius*, October 1972, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

⁵⁸ City of Houston Code of Ordinances Sec. 28-42.4.

of the “opposite” sex. To that end, she appeared before the Houston City Council twice in July and October of 1972, to request “a special police identification card excluding [her] from arrest for dressing like a woman.”⁵⁹ Councilman Frank Mann accused Mayes of being a publicity seeker, as opposed to being genuinely concerned about her own health and gender identity: “Go ahead and live your funny life—you can get your operation with all the publicity.” Mayes replied, “If you think I can be harassed until I leave town, you're wrong. I love Houston and I will stay.”⁶⁰ The city council solicited city health director Albert Randall to produce a report on the subject of “transvestism” to aid council members, but the council apparently never granted Mayes her request for a special identification card.

The city council episode suggests an emerging hierarchical distinction between acceptable/decriminalized and unacceptable/criminalized trans people in the criminal-legal system.⁶¹ That is to say, between trans people who “passed,” had already completed the medical and legal process of transitioning, and conformed with normative expectations of binary sex and gender presentation on one hand, and trans and gender nonconforming people who did not pass and who had not completed the process of transitioning.⁶² Presumably, if Toni Mayes had already completed the medical and legal process of transitioning, and if her gender identity matched her legally assigned sex at birth, she would not have been criminalizable under the crossdressing law. But because Mayes had not yet completed the medical process of transitioning, she was caught between a rock and a hard place: on one hand, the anti-crossdressing law forbade appearing in public when “disguising true sex”; on the other, Mayes’s doctors required her to live full-time as a women for two years before having gender-confirmation surgery, meaning there was no way that Mayes could avoid breaking the law while she was still in the waiting line, so to speak.

Mayes navigated her way through more arrests and several trials in local and state courts in Texas. On September 21, 1972, Mayes appeared in Houston’s

⁵⁹ “He Wants Her Identification Card,” *Tucson Daily Citizen*, July 13, 1972, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

⁶⁰ “City’s Report on Transvestism Almost Ready,” *Nuntius*, October 1972, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>.

⁶¹ The term criminal-legal system is similar to the more familiar term criminal-justice system, but replaces the word “justice” with “legal” in order to convey that that system does not always deliver justice.

⁶² De Orio, “Bad Queers.”

Municipal Court to stand trial for one of her arrests. She was wearing a pantsuit with a small typewritten sign pinned on it reading “my body is male,” perhaps as a way to avoid or contradict police charges that she was trying to “disguise” herself, or maybe to convey the idea that it was possible for a person to have a gender identity different from their biological sex assigned at birth.⁶³ She had already been arrested six times, but had never been brought to trial until now. The case was dismissed, but Mayes was arrested for the seventh time by two vice squad officers as she left the courthouse. She appeared once again in court on January 11, 1973, to stand trial for *that* arrest. The municipal court found her guilty. Mayes appealed her conviction before the County Criminal Court, which held a new trial.⁶⁴ That proceeding featured a similar conversation to the one that occurred before the city council about whether Mayes was a “real” woman. The police officer who had arrested Mayes testified that he had understood her to be a man when he witnessed her in women’s clothing. Meanwhile, Mayes’s endocrinologist testified that his patient could not, from a medical perspective, be properly classified as female since she had yet to complete the process of transitioning. On May 22, the county court found Mayes guilty once again and fined her \$50 (about \$362.01 in today’s dollars). On June 11, 1973, a Texas state court denied Mayes and her lawyer Larry Sauer’s motion for a new trial, meaning Mayes had no further recourse to challenge her arrests and conviction within the Texas state court system.

It was at that point that the American Civil Liberties Union became involved. In 1973, the national ACLU in New York City established its Sexual Privacy Project under the direction of attorney Marilyn Haft and with funding from the Playboy Foundation.⁶⁵ As a writer for the Los Angeles-based gay newspaper the *Advocate* explained, the aim of the new Sexual Privacy Project was “to exploit three landmark rulings”—*Griswold*, *Eisenstadt*, and *Roe*—in which the U.S. Supreme Court had said, in effect, that the government should “keep its nose out of intimate personal matters involving sex and the family.”⁶⁶

⁶³ Mayes (Richard) v. Texas, 416 U.S. 909 (1974). Petition. 9 Oct. 1973.

⁶⁴ The new trial was a trial *de novo*, a specific form of appeal available in some jurisdictions to a party not satisfied with a case’s outcome in which a higher court ignores the lower court’s decision and considers the case as if for the first time.

⁶⁵ Before assuming her new role as director of the project, Haft worked on prisoners’ rights, including publishing a 600-page sourcebook on the topic. Michele G. Hermann and Marilyn G. Haft, *Prisoners’ Rights Sourcebook: Theory, Litigation, Practice* (New York: Clark Boardman Company, Ltd., 1973). Carrie Pitzulo, *Bachelors and Bunnies: The Sexual Politics of Playboy* (Chicago: University of Chicago Press, 2011).

⁶⁶ “ACLU Launched on Major Gay Rights Project,” *Advocate*, November 21, 1973.

The aim of the ACLU's Sexual Privacy Project was to further extend and establish the right to privacy when it came to matters of gender and sexual behavior. To that end, the Sexual Privacy Project's legal docket included challenges to "sodomy" laws as they applied to anal and oral sex between consenting adults in private; challenges to the criminalization of men arrested for public gay cruising by undercover police officers; laws punishing sex work; and challenges to the criminalization of crossdressing in public as a violation of what queer theorist Lisa Duggan has called the "right to privacy in public."⁶⁷

Now that Mayes had exhausted her options for challenging her conviction for crossdressing within local- and state-level Texas courts, the ACLU helped her challenge her arrests before the U.S. Supreme Court.⁶⁸ On June 11, 1973, Marilyn Haft, Melvin Wulf of the ACLU, and Mayes's lawyer Larry Sauer, jointly submitted a petition to the U.S. Supreme Court petitioning the Court for *certiorari* in the case. The petition made three main legal arguments as to why Mayes's arrests for crossdressing had been unconstitutional. The first was that Houston's anti-crossdressing law was in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.⁶⁹ The argument in this part of the ACLU's petition to the Supreme Court was that "transsexuality" was a form of mental illness, and that it was "cruel and unusual" to punish people simply for being sick.

The second major argument by Mayes and her lawyers built upon the Court's developing jurisprudence of sexual and reproductive liberty and the "zone of privacy" established in *Griswold v. Connecticut*.⁷⁰ Houston's ordinance

⁶⁷ American Civil Liberties Union, *Sexual Privacy Project Legal Docket: Affiliate & National Litigation* (New York: American Civil Liberties Union, 1974). Illinois became the first state to decriminalize "sodomy" between consenting adults in private in 1961. Laws of Illinois 1961, page 1983, enacted July 28, 1961, effective Jan. 1, 1962. Stewart-Winter, *Queer Clout*, 43. The U.S. Supreme Court declined to hear a legal challenge to Texas's sodomy law as violation of the right to privacy in 1971. *Wade v. Buchanan*, cert. denied, 401 U.S. 989 (1971). Phelps, *Before Lawrence v. Texas*, 17–54. Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, ed. Russ Castronovo and Dana D. Nelson (Durham, NC: Duke University Press, 2002), 175–94, 181.

⁶⁸ The ACLU petitioned the Supreme Court to consider the case under 28 U.S.C. § 1257(2), a section of the U.S. Code allowing the Supreme Court to review the judgement of a state court if there existed no alternative to appeal the decision within the state court system.

⁶⁹ *Mayes (Richard) v. Texas*, 416 U.S. 909 (1974). Petition. 9 Oct. 1973.

⁷⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

criminalizing “disguising true sex,” they claimed, violated “the constitutionally protected right to privacy.” Although the Supreme Court had “recently expanded and refined the definition of the right to privacy,” it remained to be seen whether the right to privacy extended “to choice of personal appearance and sexual orientation.” “Gender identity,” the petition argued, was “a basic component of personality that is extremely difficult to change,” which the Court should therefore also establish as an area of personal conduct that merited protection under the right to privacy.⁷¹ The petition also made a more substantive due process-like argument about personal liberty. Houston’s crossdressing law not only violated the right to privacy but also more broadly the right of “autonomy,” or the right to “make certain individual decisions free from unwarranted governmental intrusion or pressure” that had recently been asserted by the Supreme Court in *Eisenstadt* and *Roe*.⁷²

The counter-petition that Texas officials submitted to the Supreme Court showed that the state viewed trans-ness through the prism of homosexuality, which, state attorneys argued, was deviant, immoral, and deserving of criminalization. The counter-petition asserted that Houston’s “disguise ordinance” protected “a valid state interest” because it safeguarded “the survival of the race by banning homosexual guises.”⁷³ In addition, the anti-crossdressing law was a constitutional use of state power because crossdressing was liable to cause a public disturbance. “An ineffective disguise may engender catcalls and slurring remarks leading to a breach of the peace.” In cases where the “disguise” *was* effective, trans people were effectively deceiving the people with whom they formed intimate relationships. “An efficient disguise could lead to trouble after an acquaintance is formed with the disguisee [*sic*] and the true sex is disclosed when the friendship becomes amorous.”⁷⁴ In other words, the state viewed transsexuality as a variant of homosexual deviance and argued that a trans person who passed too well could deceive and prey upon unsuspecting cis-heterosexual men. Alternatively, a trans person who did not pass well

⁷¹ *Mayes (Richard) v. Texas*, 416 U.S. 909 (1974). Petition. 9 Oct. 1973.

⁷² *Mayes (Richard) v. Texas*, 416 U.S. 909 (1974). Petition. 9 Oct. 1973.

⁷³ “Transvestite Laws Upheld by Court,” *Lubbock Avalanche-Journal*, April 2, 1974, <https://www.houstonlgbthistory.org/houston-cross-dressing.html>. *Mayes (Richard) v. Texas*, 416 U.S. 909 (1974). Brief in Opposition. 11 Mar. 1974. The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1823–1978, link.gale.com/apps/doc/DW0100070306/SCRB?u=nwulaw_main&sid=SCRB&xid=a9ea833d&pg=1.

⁷⁴ *Mayes (Richard) v. Texas*, 416 U.S. 909 (1974). Brief in Opposition. 11 Mar. 1974.

enough was liable to be the victim of harassment and violence, and would therefore be responsible for creating a public disturbance.

Ultimately, Mayes lost. The Supreme Court declined to grant *certiorari* to hear the case in early 1974, leaving in limbo the question of whether Houston's crossdressing law was constitutional.⁷⁵

The *Mayes* case highlighted the difficulties of creating a political coalition to fight to decriminalize public gender nonconformity. One issue was lack of funding. In 1976, the ACLU's Sexual Privacy Project shut down after just three years when its fixed-term funding from the Playboy Foundation was not renewed.⁷⁶ Another problem was uneasiness on the part of some gay-rights activists about associating gay identity with trans people. After the Supreme Court turned down the *Mayes* case, a journalist for the *Advocate* interviewed the ACLU's Melvin Wulf, Ron Gold of the National Gay Task Force, and William J. Thom, the executive director of the Lambda Legal Defense and Education Fund, about the Supreme Court's refusal to hear the *Mayes* case and asked whether they thought that would affect an upcoming challenge to New York's sodomy law.⁷⁷ Thom replied: "That's not a gay issue as a starter. The transvestite issue does not seem to be a gay issue because many transvestites seem to be straight."⁷⁸

Although she did not have her day before the Supreme Court, Toni Mayes continued to thrive in other ways and move forward with her life as a trans woman. On January 23, 1974, Mayes had gender-confirmation surgery at the University of Texas Galveston Medical Branch, "the fourth such operation

⁷⁵ *Mayes v. Texas* (Harris County, Tex. Crim. Ct., May 22, 1973), cert. denied, 416 U.S. 909 (1974).

⁷⁶ Wheeler, "What's Happening to Sexual Privacy?": Easing Access to Sexual Expression, 1960s–1970s," in *How Sex Became a Civil Liberty*, 153–177.

⁷⁷ A New York Court of Appeals decision invalidated the state law against "deviate sexual intercourse" in 1980. *The People v. Ronald Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), <https://www.leagle.com/decision/198052751ny2d4761481>.

⁷⁸ "Supreme Court Upholds Drag Ban," *Advocate*, April 24, 1974. On the historical difficulties of coalition building between lesbian and gay rights activists on one hand, and trans activists on the other, see Marie-Amélie George on what she calls the "LGBT disconnect." George asserts, "If anything, collaboration between LG and T is a historical anomaly and division a norm." Marie-Amélie George, "The LGBT Disconnect: Politics and Perils of Legal Movement Formation," *Wisconsin Law Review* 2018 (2018): 503–91, 526, <https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2018/05/George-Final.pdf>.

performed there.”⁷⁹ She wasted no time after that building a life for herself and a life of service to others. The very next month in February, she founded the Transexual Referral and Counseling Service (TRACS) “to help others in a situation similar to mine.”⁸⁰ On March 11, Mayes finally had “her name and sex legally changed ... by a judge.”⁸¹ That December, she was granted guardianship by the Harris County Juvenile Court of a sixteen-year-old trans girl “who says [s]he wants a transsexual operation.”⁸² And she went on to work as a “Houston sales manager for a national company,” and enrolled part-time at the University of Houston to earn a BA degree in business administration.⁸³

The trans-rights movement, both in Texas and nationally, had come a long way and grown a great deal through the experience of litigating *Mayes v. Texas*. The case was made possible by and helped solidify and consolidate new political coalitions that trans-rights activists formed with progressive allies, such as attorneys from the ACLU, who had more political capital than did the trans movement alone. What was more, the press surrounding the *Mayes* case introduced trans rights and crossdressing-law repeal as civil rights issues in mainstream political discourse. But trans-rights activists and their progressive allies had yet to defeat the Houston law.

III. THE FALL OF HOUSTON’S ANTI-CROSSDRESSING LAW

In 1980, trans-rights activists finally achieved the toppling of the Houston anti-crossdressing law. First, they won a key ruling against the law in the federal district court case *Doe v. McConn*.⁸⁴ Then, in the wake of that decision, activist Phyllis Frye finally achieved the goal she had long been pursuing of persuading the Houston City Council to repeal the ordinance.

In *McConn*, seven “fully diagnosed transsexuals,” all of whom were at various stages in the medical process of transitioning, filed a lawsuit in federal

⁷⁹ “Sex Change ‘Wonderful,’” *Big Spring Herald*, March 13, 1974, <http://www.texasobituaryproject.org/110607mayes.html>.

⁸⁰ “Your Opinion,” *Contact*, October 23, 1974, <http://www.texasobituaryproject.org/110607mayes.html>.

⁸¹ “Sex Change ‘Wonderful.’”

⁸² “Houston Transsexual Granted Guardianship,” *Contact*, February 5, 1975, <http://www.texasobituaryproject.org/110607mayes.html>.

⁸³ “Whatever Happened to ... Toni Mayes After He Became Ann Mayes?” *Houston Post*, April 1, 1978, <http://www.texasobituaryproject.org/110607mayes.html>.

⁸⁴ *Doe v. McConn*, 489 F. Supp. 76 (1980).

district court for the Southern District of Texas challenging the constitutionality of the Houston law as a violation of their right to personal privacy.⁸⁵ The seven trans plaintiffs were joined by an eighth plaintiff, “Maxwell B.,” who was the psychiatrist responsible for overseeing the transition process of some of the trans plaintiffs. The Doe plaintiffs filed their lawsuit anonymously, since the plaintiffs had been arrested and prosecuted under the anti-crossdressing law in the past, and they sought to insulate themselves from any future “possible harassment” and prosecution.⁸⁶ For that reason, the court record contains little evidence about them.

In his decision released on July 6, 1980, U.S. federal District Judge Norman Black agreed with the anonymous plaintiffs that Houston’s crossdressing law was an unconstitutional violation of the right to privacy. In his decision, Black noted how invasive the enforcement of the law was into the lives of trans people, since, in order to determine “whether or not a person is dressing as that of the opposite sex,” the law required the arrested person “to disrobe” at the police station after being arrested. And the harm done to trans people by the law was not simply hypothetical, since the ordinance had been “regularly enforced,” with fifty-three people having been arrested in 1977 for crossdressing.⁸⁷

Drawing on state supreme court decisions and *Roe v. Wade*, and echoing many of the arguments made by Toni Mayes’s legal team, Judge Black argued that Houston’s crossdressing law violated fundamental, constitutionally protected privacy and substantive due process rights to personal autonomy. To further substantiate his argument that the crossdressing law violated the Due Process Clause of the U.S. Constitution, Judge Black cited *Roe* in which, he wrote, “the Supreme Court has recognized a constitutionally derived right to control one’s body.”⁸⁸ He also cited a key sentence asserting the fundamental right to privacy and personal autonomy from the 1978 Illinois Supreme Court case *Chicago v. Wallace Wilson*, which had invalidated Chicago’s municipal ordinance against crossdressing. Black wrote: “The notion that the state can regulate one’s personal appearance, nonconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with ‘values of privacy, self-

⁸⁵ Doe v. McConn, 489 F. Supp. 76 (1980).

⁸⁶ Doe v. McConn, 489 F. Supp. 76 (1980).

⁸⁷ Doe v. McConn, 489 F. Supp. 76 (1980).

⁸⁸ Roe v. Wade, 410 U.S. 113 (1973).

identity, autonomy, and personal integrity that ... the Constitution was designed to protect.”⁸⁹

Judge Black limited his ruling to trans people who were actively seeking sex-reassignment surgery, setting up a hierarchy between trans people who “passed” and ones who did not, a distinction that was also visible in *Mayer v. Texas*.⁹⁰ The specific problem with the law, he wrote, was that there was “no exception or defense under the ordinance for transsexuals, including those under a doctor’s care.”⁹¹ In that way, the ruling instantiated a ranking system hierarchizing gender-conforming trans people, whose conduct did warrant decriminalization, and ones whose did not, based on whether they were seeking gender-affirming care to bring their bodies into line with their lived genders.

Parallel to the *McConn* decision, transgender-rights activist Phyllis Frye worked to persuade the Houston City Council to repeal the local law. Frye was an Army veteran and attorney who earned a joint JD/MBA at the University of Houston; decades later, she would be appointed the first openly transgender judge in the United States.⁹² Frye understood the importance of repealing the law on a personal level, since she had herself once been arrested by campus police for crossdressing when she was a student at the University of Houston, although she was soon released and saw the charges dropped.⁹³

In the late 1970s, Frye launched a campaign to lobby for the law’s repeal. She secured a meeting with Fred Bangston, the head of the Houston Police Department’s vice squad, who told her that trans women were actually gay men trying to coerce other men into sex. “We arrest people like you all the time, and I don’t understand what you’re so upset about, because it’s obvious to me that people like you who cross-dress get arrested and thrown in the tank with a bunch of other men so you can have sex with them.”⁹⁴ The fact that Frye pursued the meeting with Bangston at all demonstrated considerable bravery

⁸⁹ *Doe v. McConn* citing *The City of Chicago v. Wallace Wilson, et al.*, 75 Ill. 2d 525, 27 Ill. Dec. 458, 389 N.E.2d 522 (1978).

⁹⁰ Marie-Amélie George has described this type of argument as a “transnormative” legal strategy. George, “LGBT Disconnect,” 583.

⁹¹ *Doe v. McConn*, 489 F. Supp. 76 (1980). Long and Tuttle, *Phyllis Frye*, 90.

⁹² Joe Forward, “Phyllis Frye: Grandmother of the Transgender Rights Movement,” International Association of LGBTQ+ Judges, August 22, 2019, <https://lgbtqjudges.org/phyllis-frye-the-grandmother-of-the-transgender-rights-movement/>.

⁹³ Long and Tuttle, *Phyllis Frye*, 32.

⁹⁴ Long and Tuttle, *Phyllis Frye*, 64.

on her part, since she risked being arrested herself for crossdressing in the process.

Frye went on to broaden the political coalition for repeal that she was building to include liberal city council members, religious leaders, and Black civil rights activists. Undeterred by the ungenerous response from the police department's vice squad, Frye continued lobbying to repeal the local crossdressing ordinance by sending letters to Houston Mayor Jim McConn (the same McConn as in the name of the federal district court challenge), along with all of the members of the city council.⁹⁵ She received one positive response from liberal councilmember Johnny Goyen, who told her that he had been "upset and angered by the vice squad's treatment" of Toni Mayes.⁹⁶ Frye also found a friend in Ernest McGowan, a Black veteran, United Methodist minister, and U.S. postal worker who had been elected recently to the council.⁹⁷

Finally, the coalition that Frye had built achieved the repeal of the crossdressing law at a city council meeting on August 12, 1980. That day, Mayor Jim McConn was absent, and Frye's friend Johnny Goyen acted as mayor *pro tempore*. Goyen called for a vote on repealing the law while two opponents were talking on the phone and not paying attention, meaning they did not participate in the vote and, in accordance with council rules, were recorded as voting "yes" to repeal.⁹⁸ The Houston City Council thus reinforced the *McConn* decision by voting nine to one to repeal the ordinance.⁹⁹

The repeal of Houston's law against crossdressing was a major, albeit partial, victory against the branch of the carceral state concerned with controlling gender crimes. It reinforced the success of *Doe v. McConn*, where trans-rights activists persuaded a federal district court to declare that the enforcement of Houston's anti-crossdressing law was an unconstitutional violation of the right to privacy and substantive due process. The court ruling represented an important victory in the battle against Houston's law and a high-water mark nationally in recognizing a U.S. constitutional right to be trans in public— even if that right could only be exercised in a single federal district.

⁹⁵ Long and Tuttle, *Phyllis Frye*, 59.

⁹⁶ Long and Tuttle, *Phyllis Frye*.

⁹⁷ Long and Tuttle, *Phyllis Frye*, 88–89.

⁹⁸ Long and Tuttle, *Phyllis Frye*, 90.

⁹⁹ "Cross-dressing Law Struck Down," *This Week in Texas*, August 22–28, 1980, <https://www.houstonlgbthistory.org/Houston80s/TWT/1980/80-082280.pdf>.

IV. CONCLUSION

Since the 1960s, the U.S. Supreme Court has made a series of key decisions establishing new privacy and substantive due process rights for women and gender and sexual minorities in ways that cut across usual identity categories, such as woman, Black, and gay.¹⁰⁰ The history of privacy and substantive due process rights is usually narrated from the perspective of those cases the Supreme Court decided and that advocates for gender and sexual rights won. But it is also crucial to pay attention to losses, and even cases the Court turned down and to which it declined to grant *cert*. That is what I have done in this article through an examination of *Mayes v. Texas*, in the process rendering visible three important lessons about the history of anti-trans discrimination, transgender rights, and the governance of trans people.

As the *Mayes* case shows, crossdressing criminalization was one kind of formal, legal discrimination experienced by trans and gender-nonconforming people in the past that constructed transgender expression as a crime and stigmatized trans and gender-nonconforming people as a category of criminal subject to police and legal harassment. This remains an unresolved issue. Since the 1960s, transgender-rights activists and their progressive allies have won the repeal of most local anti-crossdressing laws.¹⁰¹ But their victory has not been total: Some localities still maintain ordinances criminalizing crossdressing in public, including ones in Walnut, California (in the eastern part of Los Angeles County), and National City, California (part of San Diego County).¹⁰² Aside

¹⁰⁰ For a similar point about how transgender expression cuts across identity categories, see Susan Stryker, “Transgender Feminism: Queering the Woman Question,” in *Feminist Frontiers*, 9th ed., ed. Verta Taylor, Nancy Whittier, and Lila J. Rupp (New York: McGraw-Hill, 2012), 63–69.

¹⁰¹ Kate Redburn, “Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86,” *Law and History Review* 40, no. 4 (2022): 679–723, <https://doi.org/10.1017/S0738248022000384>.

¹⁰² It is not clear how many local anti-crossdressing laws there still are in the United States. Answering that question would be a fruitful and important topic for future research. Samantha Greene, “Strange State Laws: Things You Didn’t Know Were Illegal in California,” Sevens Legal Criminal Lawyers, March 10, 2017, <https://www.sevenslegal.com/criminal-attorney/strange-state-laws-illegal-california/587/>. Gustavo Solis, “Did You Know Cross-Dressing Is Outlawed in National City?,” *San Diego Union-Tribune*, October 8, 2020, <https://www.sandiegouniontribune.com/2020/10/08/did-you-know-cross-dressing-is-outlawed-in-national-city/>. Lafourche Parish, Louisiana, passed a local anti-crossdressing law in 2007. Katie LaCompte, “New Law Bans Saggy Pants,

from anti-crossdressing laws, police departments also have other laws at their disposal with which to criminalize public gender nonconformity, including statutes against public lewdness and loitering for prostitution.¹⁰³ In Texas, it is unclear which, if any, city or town has a local ordinance against crossdressing, but state lawmakers have recently attempted to criminalize being trans in public by other means, including a drag ban prohibiting drag queens from performing in public or in front of children, along with a so-called bathroom bill currently being advanced in the Texas legislature criminalizing trans and gender-nonconforming people who use the public restroom corresponding to their gender identity.¹⁰⁴ Even as the criminalization of transgender expression in public remains, many government officials have failed to recognize it. Although it was not the majority decision in the case, Justice Barrett's concurrence in *United States v. Skrametti* (2025) indicates that at least two Justices on the current Supreme Court do not view trans people as a suspect or quasi-suspect class who deserve particular constitutional consideration.¹⁰⁵

The *Mayes* case also highlights the limits of Supreme Court thinking and jurisprudence when it came to expanding privacy and substantive due process

Crossdressing,” *Nicholls Worth* (blog), accessed December 9, 2024, <https://thenichollsworth.com/101375/uncategorized/new-law-bans-saggy-pants-crossdressing/>.

¹⁰³ Ginia Bellafante, “Poor, Transgender and Dressed for Arrest,” *The New York Times*, September 30, 2016, sec. New York, <https://www.nytimes.com/2016/10/02/nyregion/poor-transgender-and-dressed-for-arrest.html>. Bobby Hodgson, “A Trans Woman Was Charged With ‘False Personation’ for Giving the NYPD Her Real Name,” NYCLU: ACLU of New York, January 24, 2019, <https://www.nyclu.org/commentary/trans-woman-was-charged-false-personation-giving-nypd-her-real-name>. New York State repealed its loitering with intent to commit prostitution law, referred to colloquially as its “walking while trans” law, in 2021. Jo Yurcaba, “New York Repeals ‘Walking While Trans’ Law after Years of Activism,” *NBC News*, February 4, 2021, <https://www.nbcnews.com/feature/nbc-out/new-york-repeals-walking-while-trans-law-after-years-activism-n1256736>.

¹⁰⁴ Samantha Riedel, “Texas’s Anti-Drag Law Has Been Ruled Unconstitutional,” *them*, September 27, 2023, <https://www.them.us/story/texas-drag-ban-ruled-unconstitutional>. Ayden Runnels, “Texas House Majority Signs on to New Bill Restricting the Use of Bathrooms in Public Buildings by Transgender People,” *Texas Tribune*, March 5, 2025, <https://www.texastribune.org/2025/03/05/texas-house-bathroom-bill-transgender/>.

¹⁰⁵ *United States v. Skrametti*, 605 U.S. ____ (2025) (Barrett, A., concurring).

rights for women and gender and sexual minorities in the 1970s. The case shows that the issue of the right to be trans in public was present in debates over the meaning of privacy and substantive due process rights at the moment in the 1970s when these doctrines were at their most expansive. In *Mayes*, we see the potential scope of sexual and gender-based law reform from the perspectives of advocates outside the courts, and the limits the Supreme Court majority placed on its doctrine even immediately after *Roe v. Wade*. *Mayes v. Texas* makes visible a trans exception to the rule of expanding privacy and substantive due process rights through Supreme Court decisions.

The *Mayes* case shows the centrality and power of local and state trans advocacy as engines of legal change and incubators of new constitutional meanings. It also illuminates the salience of local and state governments, along with lower federal courts, as sites of constitutional contestation. Although Toni Mayes lost at the Supreme Court, her case was an important stepping stone along the way to *Doe v. McConn*, the federal circuit court case that invalidated Houston's anti-crossdressing law, and the repeal of the law by the Houston city council the same year. From that perspective, local and state trans activists accomplished a great deal. In addition to invalidating the crossdressing law itself, the *McConn* case has contributed to the expansion of trans rights in the years and decades since it was decided. Subsequent court cases, in jurisdictions outside of Texas, have cited *McConn* in their attempts to open up other rights for trans people besides the right to be trans in public. One of those involved the right to informational privacy, meaning the right for trans court plaintiffs to use a pseudonym and anonymize their names in the court record to protect themselves from legal or social harassment.¹⁰⁶

Given the state of the Supreme Court today, it is vitally important to be cognizant of the fact that the Supreme Court is not the only entity that makes meaning of the U.S. Constitution. Indeed, local and state government and lower-level federal courts are also crucial. In *Dobbs v. Jackson Women's Health Clinic* (2022), the case that overturned *Roe v. Wade*'s guarantee of a fundamental right to have an abortion, the Court's majority made clear that it did not think much of privacy and substantive due process rights in general. Although Justice Alito's opinion for the majority insisted on the specificity of abortion and

¹⁰⁶ Wendy Rosenberger, "Anonymity in Civil Litigation: The Doe Plaintiff," *Notre Dame Law Review* 57, no. 3 (1982): 580–597, <https://scholarship.law.nd.edu/ndlr/vol57/iss3/6/>. See, e.g., *Doe v. Blue Cross & Blue Shield of Rhode Island*, 794 F.Supp. 72 (1992), a case in which a "transsexual" plaintiff sued their health insurance company under a pseudonym seeking to recoup expenses related to gender-affirming medical care.

claimed that the Court was not repealing other major precedents as it undid *Roe*, the concurrence by Justice Thomas signaled that he, at least, would be willing to reconsider many of the gender and sexual rights that the Supreme Court previously found in the text of the Constitution and the shadows it cast.¹⁰⁷ In the wake of *Dobbs* and *Skrimetti*, it seems very unlikely that the current high court will decriminalize public crossdressing on the basis of a fundamental right to privacy or substantive due process.¹⁰⁸ In future struggles, trans-rights advocates will have to seek other venues and other legal arguments in and with which to challenge the criminalization of being trans in public. The *Mayes* case, and the broader struggle against Houston's crossdressing law of which that case was a part, are important reminders of the salience of local and state advocacy as avenues for legal change outside of the Supreme Court.



¹⁰⁷ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

¹⁰⁸ Felicia Kornbluh, "History Teaches... (Un) Happy Dobbs Day," *History Teaches...*, June 24, 2025, <https://feliciakornbluh.substack.com/p/history-teaches-un-happy-dobbs-day>.