

INFORMATIONAL PRIVACY AFTER *DOBBS*

Carmel Shachar and Carleen Zubrzycki

INTRODUCTION	2
I. MEDICAL PRIVACY IN THE POST- <i>DOBBS</i> LITIGATION LANDSCAPE	8
II. THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY IN THE SUPREME COURT	11
A. <i>Informational Privacy: Whalen and its Progeny</i>	12
1. <i>Whalen v. Roe: (Somewhat) Establishing the Right to Informational Privacy</i>	12
2. <i>Nixon v. Administrator of General Services: Confirming the Right to Informational Privacy</i>	16
3. <i>NASA v. Nelson: Assuming, Without Deciding, But Likely Confirming</i>	17
4. <i>Dobbs v. Jackson Women’s Health Organization: Preserving Room for the Right to Informational Privacy</i>	19
B. <i>Fourth Amendment Jurisprudence: The Gravitational Pull of a Freestanding Informational Privacy Right</i>	20
III. THE RIGHT TO INFORMATIONAL PRIVACY IN THE LOWER COURTS.....	25
A. <i>Protecting Intimate Medical, Sexual, Safety, and Abortion-Related Information</i>	26
B. <i>Procedural Contexts: Not Your Typical Constitutional Right</i>	35
C. <i>Balancing in the Shadow of Dobbs?</i>	41
V. WHERE TO GO FROM HERE.....	43
A. <i>The Sideline is Not an Option: Lower Courts’ Role in the Further Development of the Right to Informational Privacy</i>	43
B. <i>Abortion Medical Records: Exceptional Privacy Stakes, Unexceptional Medical Care</i>	46
CONCLUSION	49

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Dobbs v. Jackson Women’s Health Organization radically revised the constitutional “right to privacy,” declaring that such a right does not protect the decision to have an abortion. Less appreciated is that it expressly left intact the constitutional right to “informational privacy.” In so doing, Dobbs became the next in a line of cases establishing constitutional protections for privacy alongside, and distinct from, both the substantive due process caselaw on intimate decision-making and the Fourth Amendment. This right to informational privacy has deep roots in our legal order, notwithstanding its vaguer history at the Supreme Court. It appears in the jurisprudence of all but one federal circuit as well as most state courts, and in an array of doctrinal settings, reflecting its intuitive cultural and normative force.

This Article explores the surprisingly robust constitutional right to informational privacy post-Dobbs, and in particular its implications for abortion-related medical records—a particularly potent source of potential evidence, and deep privacy concerns, in a post-Dobbs world. Whatever else Dobbs is, it is also an invitation to take this value seriously—and for scholars and advocates to press the development of an “informational privacy” jurisprudence that survives, and to some extent counteracts, the erosion of decisional privacy.

INTRODUCTION

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*¹ has widely been taken to spell doom for the constitutional “right to privacy.” The decision not only eliminated the longstanding right to abortion, but also called into question the ongoing viability of the rest of the Court’s privacy-based substantive due process doctrine, including protections for everything from contraception to parental discretion to gay marriage.²

But there is another important—and underexplored—strand to the Supreme Court’s right-to-privacy jurisprudence, which *Dobbs* expressly left untouched: the right to *informational*, rather than *decisional*, privacy. The *Dobbs* majority opinion critiqued the *Roe v. Wade* decision in part because it “conflated two very different meanings of the term [privacy]: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference.”³ The latter, the Court

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1. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).
2. *See id.* at 2319, 2331.
3. *Id.* at 2267; cf. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2285.

suggested, is at risk after *Dobbs* (and was eliminated in the abortion context), but the former remains viable.⁴ In making this distinction, the Court cited to *Whalen v. Roe*, a 1977 decision establishing due process limits on legally mandated disclosures of private information.⁵ It is telling that even Justice Alito, writing for the *Dobbs* majority, drew rhetorical force from the idea that some form of privacy *is* a constitutional value.⁶ The Court could have discarded the “right to privacy” outright. But it did not. Instead, Justice Alito felt moved to distinguish the two senses of privacy, and to clarify that *Roe*—and thus *Dobbs*—only implicates one.⁷

It turns out the right to informational privacy has penetrated throughout our legal order with significant and ongoing effects. Yet it has been paid relatively little attention by legal scholars, perhaps because, especially at the Supreme Court level, its trajectory has been murkier than that of more widely recognized civil rights.⁸ But the norms it instantiates have rippled across doctrinal areas and have particular urgency in the abortion context today.

This Article tells the story of the underappreciated and surprising life of the constitutional right to informational privacy—including, in particular, in the context of protecting abortion-related medical information.⁹ In citing to *Whalen*,

4. *Dobbs*, 142 S. Ct. at 2267–68.

5. *See id.* at 2267; *Whalen v. Roe*, 429 U.S. 589 (1977).

6. *See Dobbs*, 142 S. Ct. at 2267.

7. *Id.*

8. When scholars do engage with the *Whalen* line of cases, it is frequently simply to note that, because the Supreme Court has not struck anything down under *Whalen*, the informational privacy right it stands for is weak and should not be relied upon. *See, e.g., Aziz Z. Huq, Constitutional Rights in the Machine Learning State*, 105 CORNELL L. REV. 1875, 1927–28 (2020).

9. To date, there is one note that considers the right to informational privacy in relation to abortion but in the context of arguing that the leaked *Dobbs* opinion is flawed rather than exploring how this right can be used in a post-*Roe* world. *See* Nancy C. Marcus, *Yes, Alito, There Is a Right to Privacy: Why the Leaked Dobbs Opinion Is Doctrinally Unsound*, 13 CONLAWNOW 101, 101–14 (2022). Otherwise, the scholarship that addresses the right to informational privacy is limited and tends to be only rarely applied to medical records and almost never to abortion. *See, e.g.,* Lauren Newman, *Keep Your Friends Close and Your Medical Records Closer: Defining the Extent to Which a Constitutional Right to Informational Privacy Protects Medical Records*, 32 J.L. & HEALTH 1, 19 (2019) (arguing that the right to informational privacy should be more aggressively applied to medical records); Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 NEV. L.J. 135, 182–86 (2018) (arguing that the right to informational privacy is often overlooked but legally sound); Caleb A. Seeley, *Once More unto the Breach: The Constitutional Right to Informational Privacy and the Privacy Act*, 91 N.Y.U. L. REV. 1355, 1356–57 (2016) (arguing that the right to informational privacy should be used as a remedy in the event of data breaches); Wade A. Schilling, *You Want to Know What? NASA v. Nelson and the Constitutional Right to Informational Privacy in an Ever-Changing World*, 82 UMKC L. REV. 823, 823–46 (2014) (exploring the history and arguing for the necessity of a right to informational privacy); Christina P. Moniodis, *Moving from Nixon to NASA: Privacy's Second Strand—A Right to Informational Privacy*, 15 YALE J.L. & TECH. 139 (2012) (exploring three Supreme Court informational privacy cases but not addressing abortion); Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 958 (2012) (arguing that informational privacy is less a right and more a concept); Mark A. Rothstein, *Currents in Contemporary Bioethics*, 39 J.L. MED. & ETHICS 280 (2011) (discussing two court of appeals cases applying the right to informational privacy to medical records); Russell T. Gorkin, *The Constitutional Right to Informational Privacy: NASA v. Nelson*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2010) (discussing the then-new *NASA v. Nelson* case as reinvigorating the right to informational privacy); Jessica C. Wilson, *Protecting Privacy Absent a Constitutional Right: A Plausible Solution to Safeguarding Medical Records*,

the *Dobbs* majority invoked the seminal case stating that the latter kind of privacy is entitled to constitutional protection.¹⁰ After *Whalen*, the Supreme Court revisited the right to informational privacy in *Nixon v. Administrator of General Services*¹¹ and *NASA v. Nelson*¹²—and now, again, in *Dobbs*. Although the views of the current Supreme Court majority toward that longstanding protection may be less than totally clear, the courts of appeals have largely taken the Supreme Court at its word and developed caselaw percolating through a range of areas detailing the contours of that right.¹³ In most, if not all, circuits (and under the plain language of the Supreme Court’s on-point precedent), there are serious arguments—or binding caselaw—that abortion medical records are constitutionally protected.¹⁴ For the most part, this privacy right has not had the kind of separate legal existence that has been achieved by most other substantive due process rights.¹⁵ Rather, it exists in the interstices of litigation, rearing its head in discovery disputes and procedural balancing tests.¹⁶ But despite that interstitial existence, the right to informational privacy has surprising force. Every court of appeals save one has affirmed the right’s existence, and it has had an important role in protecting litigants’ most sensitive information from disclosure, including but certainly not exclusively in the abortion context.¹⁷ And importantly, even in cases involving abortion, these informational protections exist independent of the former decisional protections offered by *Roe v. Wade*.¹⁸

While *Dobbs* (and *Roe* before it) focused on decisional privacy, Alito was wrong to suggest that informational privacy could not have “any possible relevance to the abortion issue.”¹⁹ Decisional and informational privacy cannot be separated so cleanly. As a practical matter, gutting the right to obtain

85 WASH. U. L. REV. 653 (2007) (applying the right to informational privacy to medical records in general); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479 (1990) (celebrating the emerging right to informational privacy and placing it within the context of Justice Brandeis’s work). Some scholarship on medical data privacy mentions the right to informational privacy in passing but focuses more on Fourth Amendment jurisprudence. See Ryan Knox, *Fourth Amendment Protections of Health Information After Carpenter v. United States: The Devil’s in The Database*, 45 AM. J.L. & MED. 331 (2019) (arguing that the Fourth Amendment may provide additional protections for health information in medical databases). Much of this literature is focused on genetic data and not abortion records. See Alexis Smith, *Keep Your Family Close and Your DNA Even Closer: Protecting DNA Privacy Expectations after Carpenter v. United States*, 72 RUTGERS U. L. REV. 605 (2020); Natalie Ram, *Genetic Privacy After Carpenter*, 105 VA. L. REV. 1357 (2019).

10. *Dobbs*, 142 S. Ct. at 2267–68.

11. *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425 (1977).

12. *Nat’l Aero. and Space Admin. v. Nelson (NASA)*, 562 U.S. 134 (2011).

13. See *Leading Cases*, 125 HARV. L. REV. 231, 237–41 (2011).

14. See *id.* at 237.

15. See *id.* at 238.

16. See *id.* at 237–38.

17. See *id.* at 237.

18. See *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2267 (2022).

19. *Dobbs*, 142 S. Ct. at 2267.

abortion endangers the privacy of an enormous amount of personal, medical, sexual, and reproductive information.²⁰ That is why in the aftermath of *Dobbs*, legal experts²¹ and popular press²² alike began immediately decrying the death of privacy protections for reproductive data of all sorts, ranging from data indicating their digital fingerprints from daily life (e.g., location data, Google searches, and so on),²³ more directly medical information (period trackers and such),²⁴ and medical records themselves.²⁵ Anti-abortion forces can and will try

20. Wendy A. Bach & Nicolas Terry, *How Dobbs Threatens Health Privacy*, HARV. L.: BILL OF HEALTH (Jan. 10, 2023), <https://blog.petrieflom.law.harvard.edu/2023/01/10/how-dobbs-threatens-health-privacy/#:~:text=Post%2DDobbs%2C%20the%20fear%20is,t%20take%20a%20pregnancy%20test.> [<https://perma.cc/B83R-MD84>].

21. See, e.g., Valerie Montague et al., *Data Privacy in the Post-Roe Era*, 38 J. COMP. & BENEFITS 11 (2022); Ellen Wright Clayton et al., *Dobbs and the Future of Health Data Privacy for Patients and Healthcare Organizations*, 30 J. AM. MED. INFORMATICS ASS'N 155 (Oct. 4, 2022), <https://doi.org/10.1093/jamia/ocac155> [<https://perma.cc/Q649-UZJT>]; Anilya Krishnan et al., *Digital Privacy in the Post-Dobbs Landscape*, REGUL. REVIEW (Aug. 27, 2022), <https://scholarship.law.upenn.edu/regreview-satsseminar/7> [<https://perma.cc/5V57-USUX>]; Anya Prince, *Reproductive Health Surveillance*, 64 B.C. L. REV. 1077 (2023); Kayte Spector-Bagdady & Michelle M. Mello, *Protecting the Privacy of Reproductive Health Information After the Fall of Roe v Wade*, 3 JAMA HEALTH FORUM (June 30, 2022), <https://jamanetwork.com/journals/jama-health-forum/full-article/2794032> [<https://perma.cc/T2Q9-NGG6>]; Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J.F. 31 (2022).

22. See Jay Edelson, *Post-Dobbs, Your Private Data Will Be Used Against You*, BLOOMBERG LAW (Sep. 22, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/post-dobbs-your-private-data-will-be-used-against-you>; Jack Gillum, *Post-Dobbs America Is a Digital Privacy Nightmare*, BLOOMBERG (Aug. 4, 2022, 3:00 AM), <https://www.bloomberg.com/news/articles/2022-08-04/period-tracking-apps-among-common-post-dobbs-privacy-risks>; Margaret Harding McGill & Ashley Gold, *The Future of Privacy Rights in a Post-Roe World*, AXIOS (June 29, 2022), <https://www.axios.com/2022/06/29/privacy-right-roe-v-wade-dobbs-v-jackson-online-data>; Allison Grande, *Dobbs Ruling Lays Bare Data Privacy Protection Gaps*, LAW360 (June 29, 2022, 10:12 PM), <https://www.law360.com/articles/1507152/dobbs-ruling-lays-bare-data-privacy-protection-gaps>; A.W. Ohlheiser & Hana Kiro, *Big Tech Remains Silent on Questions About Data Privacy in a Post-Roe US*, MIT TECH. REV. (June 28, 2022), <https://www.technologyreview.com/2022/06/28/1055044/big-tech-data-privacy-supreme-court-dobbs-abortion/> [<https://perma.cc/R2JV-VNKG>]; Sara Morrison, *The End of Roe Could Finally Convince Americans to Care More About Privacy*, VOX (July 21, 2022, 8:30 AM), <https://www.vox.com/recode/23271323/roe-dobbs-abortion-data-privacy> [<https://perma.cc/ZC4R-8SPX>]; Editorial Board, *After the Abortion Ruling, Digital Privacy is More Important Than Ever*, WASH. POST (July 4, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/07/04/abortion-ruling-digital-privacy-important/>.

23. Alejandra Caraballo, *Tech Companies Are Not Ready for a Post-Roe Era*, WIRED (May 4, 2022, 1:11 PM), <https://www.wired.com/story/tech-companies-not-ready-post-roe-era/> [<https://perma.cc/6SLT-DXQ3>]; Edelson, *supra* note 22; Gillum, *supra* note 22; Grande, *supra* note 22.

24. Katherine Dugan, *When it Comes to Period Trackers, Concerns Span Ideological Divides*, WASH. POST (Aug. 10, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/08/10/when-it-comes-period-trackers-concerns-span-ideological-divides/>; Vittoria Elliott, *Fertility and Period Apps Can Be Weaponized in a Post-Roe World*, WIRED (June 7, 2022, 7:00 AM), <https://www.wired.com/story/fertility-data-weaponized/> [<https://perma.cc/26EX-ZU5P>]; Catherine M. Klapperich, *How the Dobbs Decision Changed My Research on Reproductive Health Technology*, STAT (June 30, 2022), <https://www.statnews.com/2022/06/30/dobbs-decision-changing-research-reproductive-health-technology/> [<https://perma.cc/B7V5-B4JP>]; Sara Morrison, *Should I Delete My Period App? And Other Post-Roe Privacy Questions.*, VOX (July 6, 2022, 12:50 PM), <https://www.vox.com/recode/2022/7/6/23196809/period-apps-roe-dobbs-data-privacy-abortion> [<https://perma.cc/FXD5-KYUJ>].

25. Zubrzycki, *supra* note 21; Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, but Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines> [<https://perma.cc/NS6F-GGJV>].

to use all of these sources against individuals who seek abortions, and the current state of privacy law is woefully deficient. Moreover, at the federal level, there are no statutes or regulations that definitely protect medical records from disclosure in the course of litigation. And the Health Insurance Portability and Accountability Act (HIPAA)²⁶—famously misunderstood—provides little meaningful protection because of its exceptions for law enforcement purposes and legal proceedings.²⁷ Although as of this writing, HHS is in the process of amending HIPAA to reduce the size of those gaps, it is far from clear that those amendments will be finalized, airtight, or upheld in subsequent litigation.²⁸ And while others, including perhaps most prominently Danielle Citron, have compellingly argued that we direly need statutory protection for intimate data,²⁹ no such legislation appears to be on the immediate horizon.

In short, *Dobbs*'s decisional privacy holding creates a perilous environment for the informational privacy of anyone who can become pregnant, which means that the doctrinal story of the right to informational privacy matters today more than ever before. Abortion-related medical records and health data present a paradigm case for its application. More broadly, focusing on *Dobbs*'s informational privacy ramifications highlights the deep relationship between informational privacy and decisional privacy. Though it is of course possible and frequently useful to disentangle privacy's different senses, the fact that justices and judges have long grounded substantive due process rights involving intimate affairs like abortion and contraception in the rhetoric of "privacy" is not just a result of some conceptual lack of clarity about the term's meanings.³⁰ Rather, it reflects the double-helix of privacy's two senses. Eliminating a substantive due process right to decisional privacy necessarily corrodes informational privacy; strengthening informational privacy strengthens decisional privacy.³¹ Absent a meaningful informational privacy right, opening the floodgates to persecution for intimate sexual, family, medical, and reproductive decisions denigrates core informational privacy.

The Article proceeds as follows. Part I briefly describes the current landscape of abortion-related litigation and the many ways that deeply private information is potentially at risk post-*Dobbs*. We focus on abortion-related

26. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 100 Stat. 2548 (1996).

27. See generally Carmel Shachar, *HIPAA, Privacy, and Reproductive Rights in a Post-Roe Era*, 328 JAMA 417 (2022).

28. HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506 (April 17, 2023) (to be codified at 45 C.F.R. pts. 160 and 164).

29. See Danielle Keats Citron, *Intimate Privacy in a Post-Roe World*, 75 FLA. L. REV. (forthcoming Nov. 2023).

30. See generally *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022) (protecting the right to abortion under the Constitution's right to privacy), and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting the right to contraceptives under the Constitution's right to privacy).

31. Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1116 (2006).

medical records as a particularly stark case study of private information that—absent some kind of legal protection like what we describe below—could be used by government actors and private vigilantes alike against those who seek (or are suspected of seeking) abortions. (As a practical matter, given the commonality of miscarriage and medical similarities, these dynamics should be of direct concern to anyone who could become pregnant, not just those who have had or believe they would have an elective abortion.)

With that backdrop framing the problem, Part II explicates the Supreme Court's informational privacy jurisprudence. At face value, it establishes limited constitutional protections for personal information (separate and apart from the Fourth Amendment). *Dobbs* confirms the ongoing viability of those protections. A jurisprudence of informational privacy also appears to be operating in the backdrop of Fourth Amendment doctrine, where the Court implicitly seems to give medical privacy exceptional treatment and talks about certain substantive areas of personal privacy in ways that suggest independent protection. Moreover, recent developments in Fourth Amendment jurisprudence related to data privacy suggest that some of the jurisprudential principles that historically limited *Whalen's* practical reach may be ripe for reconsideration.

Part III then explains the story of how the Supreme Court's sparse informational privacy jurisprudence has been developed and operationalized in the lower courts. Parts of this story are straightforward: The courts of appeals have taken the Supreme Court at its word, and all but one have held that informational privacy is to some extent protected by the Constitution. Many state high courts have held the same. Other parts of the story are more complex: Rather than existing as a free-form right that is the subject of independent litigation, informational privacy issues tend to arise in procedural contexts like discovery disputes and enforcement balancing tests. The tendrils of informational privacy have thus penetrated a range of doctrinal areas.

Part IV offers some tentative ways forward. State and lower federal courts play an integral role in the development of both constitutional doctrine and the norms surrounding privacy, including but not limited to when it comes to abortion. Courts that deal with informational privacy issues related to abortion will be confronting an area of enormous doctrinal change in a time of rapid technological change. This is not a moment to retreat from the informational privacy protections that have made their way into the law; it is a time to reinvigorate and embolden them, recognizing that law's approach to these questions will not just reflect social expectations but also shape our expectations and the ways we deal with the social world when it comes to exceedingly intimate details of our lives. The heightened political and personal stakes of abortion, coupled with the medical, sexual, and reproductive issues that plague abortion privacy, render it an especially important focal point for this rejuvenation—but the implications, of course, stretch far more broadly and are

ever more important in the current age where vast amounts of intimate information are potentially widely available.

I. MEDICAL PRIVACY IN THE POST-*DOBBYS* LITIGATION LANDSCAPE

Abortion is now illegal in nearly all cases in a significant chunk of the country. And when abortion is illegal—and thus the subject of sanctioned civil litigation or law enforcement investigations—for the most part, existing statutory protections will be woefully deficient to protect it. This Part briefly summarizes the lay of the land of abortion jurisprudence and explains why protections such as HIPAA and the Fourth Amendment provide remarkably scant protection for intimate data surrounding abortion. While the focus is on abortion to provide context for the discussion below, the basic point generalizes—when deeply personal data is relevant to legal proceedings, commonly invoked sources of legal privacy protection leave serious gaps. In short, in the absence of legal protection for informational privacy, exceedingly personal information can be made available when it is potentially relevant to unlawful activity.

Most abortions are now illegal in at least fifteen states, and abortions are restricted beyond the standards set in *Roe v. Wade* in at least seven more states.³² The prohibitions vary in scope, as well as in their enforcement mechanisms. Some are criminal, and others, like Texas's infamous S.B. 8,³³ authorize fellow citizens to effectively function as abortion bounty-hunters.³⁴ At present, they generally focus on those who perform or aid in the performance of an abortion, meaning that doctors, friends, or family members who do things like drive their loved ones to a clinic are at more direct risk than are those who seek abortions themselves.³⁵ But that is by no means certain to remain true. For instance, several scholars have recently speculated that the proliferation of medication abortion, which is managed much more substantially by individuals seeking abortions and may be obtained from hard-to-prosecute, out-of-state entities, will lead anti-abortion advocates and legislators to turn their sights on abortion-seekers themselves.³⁶

32. See, e.g., N.Y. Times, *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Sept. 15, 2023, 11:00 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

33. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

34. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/Y2M7-GQ6J>].

35. *Id.*

36. David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 24–27) (SSRN); Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2024) (manuscript at 13–15) (SSRN); see also *id.* at 18–38 (taxonomizing statutes and arguing, among other things, while the predominant narrative is that current laws do not permit the prosecution of women for self-managed abortion, the laws themselves do not seem to clearly prohibit such prosecutions).

To date, there have been few (if any) post-*Dobbs* actual prosecutions or civil actions related to abortion. This seems likely to be the result of at least three factors: (1) the brute effectiveness of anti-abortion laws that prescribe penalties ranging from revocation of licensure to life in prison for performing an abortion;³⁷ (2) the increased prevalence of medication abortions, as well as efforts by out-of-state and even out-of-country advocates to aid in-state abortions;³⁸ and (3) strategic decision-making from anti-abortion advocates worried about sympathetic cases making their way through the court system.³⁹ But that is not to say that such cases will not come.

Litigation is on the horizon: as of this writing, for instance, Texas courts are actively considering a handful of cases in which litigants are seeking pre-complaint discovery (under a unique state procedure) in order to lodge complaints under S.B. 8.⁴⁰ And as even that example illustrates, the legal status of abortion does not only affect ongoing litigation, it also affects what information may be available to law enforcement or (in some states) would-be litigants during pre-litigation investigatory phases.

When litigation does arise, informational issues are poised to be front and center. Others have sounded the alarm about the digital breadcrumbs that can provide enormous amounts of information about people's daily lives.⁴¹ There is a robust market in personal data ranging from Google searches to location histories, which can be mined by law enforcement or those who would assist them to find evidence suggestive of illegal abortions. In this Article, we focus on a specific subset of data that is generally assumed to be far better shielded: medical records. The information contained in modern electronic health and medical records maintained by the healthcare system is expansive; it can range from information on a patient's religion, loneliness, and access to social support, to their sexual history, substance use history, and genetic information.⁴² When the information deals directly with medical care that is contested or illegal in some places, it may be extremely potent evidence in efforts to widely limit that care. Even beyond evidentiary uses, the very risk of

37. Megan Messerly & Alice Miranda Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022, 4:30 AM), <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572> [https://perma.cc/53N2-SV8A].

38. Cohen, *supra* note 36.

39. Jamie Corley, *Curbing Abortion Pills Is a Political Dead-End for the GOP*, POLITICO (July 25, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/07/25/gop-abortion-pills-00107900> [https://perma.cc/J9GX-VAM3].

40. See Kim Roberts, *Texas Resident Seeks to Depose Offshore Abortion Provider About Violating Texas Heartbeat Act*, TEXAN (Nov. 28, 2022), https://thetexan.news/texas-resident-seeks-to-depose-offshore-abortion-provider-about-violating-texas-heartbeat-act/?utm_source=substack&utm_medium=email [https://perma.cc/DTL6-5TS6].

41. Caraballo, *supra* note 23.

42. *What Is a Medical Chart?*, PRAC. FUSION, <https://www.practicefusion.com/medical-charts/#:~:text=Medical%20charts%20contain%20documentation%20regarding,results%2C%20treatments%2C%20and%20more.> [https://perma.cc/2K99-C7EY].

disclosure of medical records can be used as a threatening sword against both patients and providers.

There is also reason to expect an array of regulatory enforcement efforts intended to stymy or harass providers of legal abortions, including via dragnet-style requests for medical records. The facts of *Planned Parenthood of Indiana v. Carter* are illustrative.⁴³ In 2006, the Indiana Medicaid Fraud Control Unit asserted that it was entitled to all medical records of seventy-three minor patients to assess whether Planned Parenthood was complying with an abuse reporting statute.⁴⁴ One judge, noting the paucity of record evidence, questioned whether the investigation was even based on a complaint (as would have been required under the governing scheme), and “wonder[ed] *if* such a complaint was made, was the impetus of the complaint a valid concern regarding protecting children, or some other agenda?”⁴⁵ Judge Barnes further noted that there was “not a whit, not an iota, and not a scintilla of evidence in the record that . . . [Planned Parenthood] ha[d] failed to report suspected abuse”—to the contrary, there was evidence that they *did* take their reporting requirements seriously.⁴⁶

Just months post-*Dobbs*, a different Indiana regulatory agency seems to be at it again. Days after *Dobbs* was decided, an Indiana obstetrician–gynecologist made national headlines for providing an abortion to a ten-year-old girl who had to travel from Ohio to receive the procedure.⁴⁷ A few months later, the Consumer Protection Division of the state Attorney General’s office opened a series of investigations into the provider, allegedly as part of an investigation in response to consumer complaints made by people who had read news reports about the procedure.⁴⁸ The Attorney General issued subpoenas requesting the entirety of the child’s medical records, among other things.⁴⁹ The provider sued for declaratory and injunctive relief to protect the records and enjoin the investigation on the grounds that it violates numerous statutory restrictions (including, for instance, that such investigations are only permitted after an assessment that the complaint is meritorious, and require confidentiality protections that the Attorney General’s office has repeatedly violated).⁵⁰ Once

43. See, e.g., *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853 (Ind. Ct. App. 2006).

44. *Id.* at 862.

45. *Id.* at 883.

46. *Id.* at 884.

47. Kim Bellware, *Doctor Says She Shouldn't Have to Turn Over Patient's Abortion Records*, WASH. POST (Nov. 19, 2022, 9:27 PM), <https://www.washingtonpost.com/politics/2022/11/19/caitlin-bernard-rokita-lawsuit/>.

48. *But see* Complaint for Declaratory Judgment and Injunctive Relief at 10, *Bernard v. Rokita*, No. 49C01-2211-MI-038101 (Marion Super. Ct. dismissed Dec. 12, 2022), https://www.documentcloud.org/documents/23261374-2022-11-03-bernard_caldwell-complaint-final-1?responsive=1&title=1 [<https://perma.cc/HTV7-E6XX>] (noting that the consumer complaints were “submitted by individuals who lack any connection with Plaintiffs, their patients, or, in many instances, the State of Indiana”).

49. Bellware, *supra* note 47.

50. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 48, at 2–4.

again, a patient's exceedingly sensitive personal information—in this case, that of a ten-year-old—was treated as weaponry in a politicized battle.⁵¹

In short, the procedural form and substantive allegations may vary, but the informational privacy concerns are weighty across the board. In some circumstances, the prospect of government access to abortion records in the context of criminal prosecution may be especially alarming—but the civil side may be just as bad, seeing as laws like S.B. 8 invite the prospect of bounty-hunting neighbors, advocates, or ex-boyfriends using litigation not only to penalize (and reap financial rewards from) abortions, but also to obtain access to private medical information. Dystopian scenarios are easily imagined.

The most front-of-mind potential avenues for protecting these records are weak and uncertain, as both authors have described elsewhere.⁵² For instance, HIPAA provides very scant protection against the use of medical records in litigation or for law enforcement purposes. And, frankly, even where there is a HIPAA violation—say, by a vigilante medical worker—there is no obvious form of enforcement or protection that actually helps the patient or a provider against whom the leaked information is used. Federal courts have declined to create a common-law rule of federal evidence protecting doctor–patient privilege. And, although the story regarding medical records is complicated, the Fourth Amendment at most requires a warrant before permitting law enforcement access to records. Unsurprisingly, against this uncertain backdrop, calls for statutory or even constitutional reform to better protect informational privacy are legion and important.

But while reform is warranted to bolster and shore up an informational privacy right, it turns out that that there is already a core of an informational privacy right percolating throughout the lower courts, *sub silentio*. This Article seeks to surface that underappreciated doctrinal story. It turns out that when deeply personal records (especially medical records) are at stake, courts have often found ways to protect them, especially in the abortion context. Those judicial protections turn more or less explicitly on a constitutional right to informational privacy. The next Part turns to that story.

II. THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY IN THE SUPREME COURT

In *Dobbs*, drawing on a widely cited distinction from *Whalen v. Roe*,⁵³ the Supreme Court distinguished between “privacy” as a term for substantive protections of behavior, and “privacy” as relates to the control and disclosure

51. The complaint notes that the provider filed a detailed abortion report—which has already been made public—as required by Indiana’s reporting statute, undermining the Attorney General’s assertion that she had failed to make such a report. *Id.* at 9.

52. Shachar, *supra* note 27, at 418.

53. *Whalen v. Roe*, 429 U.S. 589 (1977).

of intimate information.⁵⁴ It rejected the argument that the former notion of privacy is a source of serious protection for abortion but left intact precedent suggesting that the latter form of privacy may still be protected.⁵⁵ This Part explicates the current constitutional right to informational privacy. It focuses, first and primarily, on *Whalen* and its progeny, which—albeit somewhat hesitantly—describe a constitutional right to privacy grounded in the Fifth and Fourteenth Amendments. It then turns to pieces of Fourth Amendment jurisprudence that are suggestive of a right to privacy (especially in the medical context) that extends beyond the traditional bounds of the search and seizure doctrine. Though the Court has been unwilling to unequivocally endorse the right's existence in recent years, the intuition that some core of informational privacy is constitutionally protected nevertheless seems to exert a powerful pull on the Court's rhetoric and reasoning.

A. Informational Privacy: *Whalen* and its Progeny

At the Supreme Court level, the conventional wisdom is that the constitutional right to informational privacy does not have a particularly robust history. The right was hypothesized by the Supreme Court in two cases during the 1970s and then neither fully confirmed nor denied in a follow-up case decades later. This likely explains the little attention that scholars have paid to the right and its potential power today in a post-*Dobbs* world. But *Whalen* and its progeny deserve a closer reading, especially with the trail of crumbs left by Justice Alito in the most recent right to informational privacy case before *Dobbs*—*NASA v. Nelson*⁵⁶—and in his treatment of informational privacy in *Dobbs* itself.

1. *Whalen v. Roe: (Somewhat) Establishing the Right to Informational Privacy*

The Supreme Court first articulated a constitutional right to informational privacy in *Whalen v. Roe*.⁵⁷ *Whalen* is also perhaps the constitutional right to informational privacy's highwater mark, providing a more expansive justification for this right than subsequent cases. Additionally, the *Whalen* Court, when first articulating the right to informational privacy, placed it within the weighty tradition of *Olmstead v. United States*.⁵⁸ and Fourth Amendment law. This suggests that while the caselaw directly focused on the right to informational privacy is slender, it is part of a broader, well-accepted tradition within the

54. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022).

55. *Id.*

56. *Nat'l Aero. & Space Admin. v. Nelson (NASA)*, 562 U.S. 134 (2011).

57. *Whalen*, 429 U.S. at 599.

58. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

Court's jurisprudence. It also suggests that, just as Fourth Amendment jurisprudence is often driven by cultural context and norms around privacy expectations, so too should the right to informational privacy be guided by cultural expectations around data privacy.

In *Whalen*, physicians and patients challenged a New York statute requiring physicians to report all prescriptions for Schedule II drugs to the state, including names and other identifying information, and requiring the state to collect and store this information.⁵⁹ The information required was very detailed, including name, address, age, prescriptions and dosage, and prescribing physicians.⁶⁰ The governing law and attendant regulations, however, prohibited disclosure of the identity of the patients.⁶¹

Many of the concerns cited by the *Whalen* plaintiffs are similar to the concerns articulated by providers and patients regarding abortion records. Namely, the *Whalen* plaintiffs were concerned that sharing this information would have a chilling effect on patients' willingness to seek medical treatment, undermining the ability of physicians and patients to collaborate on vital matters of health care.⁶² Another concern articulated was that this information, if publicly shared, could harm patients' reputations.⁶³

The Southern District of New York agreed with the plaintiffs, enjoining the statute as a violation of their constitutional privacy rights.⁶⁴ The U.S. Supreme Court agreed with the *Whalen* plaintiffs that the patients had a right to privacy, stemming from the "liberty interest" prong of the Fourteenth Amendment.⁶⁵ The Court sought to distinguish between types of privacy, noting that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."⁶⁶ This distinction is notable in the abortion litigation context because *Roe* and subsequent cases could be interpreted as an "interest in independence in making certain kinds of important decisions."⁶⁷ *Dobbs* makes it clear that the Court no longer considers the ability to make a choice about abortion as part of the interest in making important decisions. On the other hand, disclosure of medical records related to abortion stems from the "interest in avoiding disclosure of personal matters."⁶⁸

59. *Whalen*, 429 U.S. at 593–95.

60. *Id.*

61. *Id.*

62. *Id.* at 600.

63. *Id.*

64. *Roe v. Ingraham*, 403 F. Supp. 931, 931 (S.D.N.Y. 1975), *rev'd*, 429 U.S. at 589.

65. *Whalen*, 429 U.S. at 603–04.

66. *Id.* at 598–600 (footnotes omitted).

67. *Id.* at 599–600.

68. *Id.* at 599.

Nevertheless, *Whalen* does not present an absolute privacy shield for those trying to escape disclosure to the government. First, the Court reasoned that the New York statute did not violate any sort of right to privacy because the disclosures required were not “meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care.”⁶⁹ Because unpleasant disclosures to physicians and other medical personnel are part and parcel of receiving medical care, “[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.”⁷⁰ The Court’s analysis indicates that the right to informational privacy—if it exists—is highly contextual, with existing norms governing what privacy individuals can expect.⁷¹

Second, the *Whalen* Court has often been characterized as hesitant to commit to a right to informational privacy. For example, the Court was not altogether precise in locating this right within the Constitution. The *Whalen* opinion arguably grounds its reasoning within the Fifth and Fourteenth Amendments.⁷² Some of the haziness is likely attributable to the Court’s conclusion that the New York statute was permissible because it was designed to avoid disclosure of the information collected.⁷³ Nevertheless, the *Whalen* Court makes it clear that it did not invent the right to informational privacy whole cloth. It notes that the duty to avoid unwarranted disclosures “arguably has its roots in the Constitution”⁷⁴ To support its proposition that an individual has an interest in avoiding disclosure of personal information, the *Whalen* Court cites to Justice Brandeis’s famous dissent in *Olmstead v. United States*, along with one other dissent and two majority opinions, including *Griswold v. Connecticut* and *Stanley v. Georgia*.⁷⁵ Each of these cases demonstrates that the Court was comfortable that some sort of right to informational privacy already existed, although perhaps not so clearly labeled as in *Whalen*.

Justice Brandeis’s *Olmstead* dissent conceptualizes the Fourth Amendment as conferring “the right to be let alone”⁷⁶ By relying on the *Olmstead* dissent, the *Whalen* Court perhaps creates a bridge between the right to informational privacy and Fourth Amendment jurisprudence. For example, *Katz v. United States*, which overruled the *Olmstead* majority opinion to conclude that the Fourth Amendment protected telephone conversations, relied upon a

69. *Id.* at 602.

70. *Id.*

71. Moniodis, *supra* note 9, at 146.

72. *Id.* at 152.

73. *Whalen*, 429 U.S. at 605.

74. *Id.*

75. *Id.* at 599 n.25.

76. *Olmstead v. United States*, 277 U.S. 438, 478 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

“reasonable expectation of privacy” test for determining whether Fourth Amendment protections come into play.⁷⁷ This test is the same one that virtually all federal courts use to determine if the right to informational privacy applies to the fact pattern presented.⁷⁸

Interestingly, the *Whalen* Court also cited *Stanley v. Georgia* to support the interest in avoiding personal disclosure. *Stanley v. Georgia* is not a Fourth Amendment case, but rather a First Amendment case, that struck down a statute outlawing possession of obscene materials.⁷⁹ But the *Stanley* Court referenced Brandeis’s “right to be let alone” to support the proposition that the First Amendment protects an individual’s right to receive, possess, and read information and materials in his or her home, no matter the content.⁸⁰ Or as Justice Marshall put it, writing for the majority, the principle at issue in *Stanley* was, at bottom, the “[appellant’s] right to be free from state inquiry into the contents of his library.”⁸¹ Likewise, the *Whalen* Court uses *Griswold* for the proposition that “[t]he First Amendment has a penumbra where privacy is protected from governmental intrusion.”⁸² The use of *Stanley* and *Griswold* in *Whalen* further ties the “right to be let alone” to the interest in avoiding personal disclosure and, therefore, the right to informational privacy.⁸³

A final note regarding *Whalen*: Its rationale perhaps has only increased in gravitational pull as computer science and data architecture have increased in sophistication and the digital panopticon becomes ever more of a reality. The *Whalen* Court articulated a significant need and respect for privacy protections that would shield an individual’s information coupled with an unease about the development of computers and informational technology.⁸⁴ Justice Stevens, writing for the Court, reflected its hesitancy to establish a right to informational privacy due to a growing worry about the impact of an increasingly digitized society, noting:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York’s statutory scheme, and its implementing administrative

77. *Katz*, 389 U.S. at 352–53.

78. Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 NEV. L.J. 135, 167 (2018).

79. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

80. *Id.* at 564–65.

81. *Id.* at 565.

82. *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)).

83. Pittman, *supra* note 78, at 153.

84. *Whalen*, 429 U.S. at 605.

procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.⁸⁵

Justice Brennan expressed similar sentiments in his concurring opinion, writing "I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology."⁸⁶ Reflecting that unease, many privacy scholars have tied use and access to information to power, enslavement, and oppression.⁸⁷ And certainly, computing power has grown significantly since the 1970s. *Whalen* is a decision that considers factors such as type of disclosure, context, and norms.⁸⁸ Both Justices Stevens and Brennan seem to argue that cultural context and technological factors matter when it comes to applying the right to informational privacy. As we better understand the disruptive power of informational surveillance, future justices may feel compelled to further apply, refine, and articulate the right to informational privacy, in the medical context or elsewhere.

2. *Nixon v. Administrator of General Services: Confirming the Right to Informational Privacy*

Decided only a few months after *Whalen*, *Nixon v. Administrator of General Services* further suggests there is a right to informational privacy.⁸⁹ However, *Nixon* does little to clarify or solidify the right to informational privacy beyond confirming that it likely exists and that it could apply to information merely being collected and not disclosed. *Nixon* draws upon a different enough analysis than *Whalen* to leave some ambiguity regarding the source of the right to informational privacy and the correct analysis to undertake when invoking this right.

After Nixon left office, his replacement, President Ford, signed the Presidential Recordings and Materials Act.⁹⁰ This statute required the General Services Administrator to process and screen President Nixon's papers and recordings to determine public access to each of these documents.⁹¹ Because Nixon's private materials were mixed in with more official documents, it was inevitable that the General Services Administrator and the archivist team would screen and view some private documents.

85. *Id.*

86. *Id.* at 607 (Brennan, J., concurring).

87. See Harlan Cleveland, *Government is Information (But Not Vice Versa)*, 46 PUB. ADMIN. REV. 605, 605 (1986); Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 476 (1995).

88. Moniodis, *supra* note 9, at 164.

89. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

90. *Id.* at 429.

91. *Id.*

Nixon objected, and the District Court for the District of Columbia concluded that he had a valid privacy interest claim but that the review's privacy intrusion had "adequate justification."⁹² The Supreme Court agreed, citing *Whalen* as support for the proposition that a key element of privacy is "the individual interest in avoiding disclosure of personal matters."⁹³ Just as in *Whalen*, the Court employed a balancing test, weighing the invasion of privacy against the public interest.⁹⁴ Ultimately, because there was a very low likelihood that the private materials would be publicly disseminated, the Court upheld the Presidential Recordings and Materials Act.⁹⁵ Again, the determination that the statute in question did not violate the right to informational privacy meant the Court could sidestep fully confirming that this right does indeed exist. But the fact that the Court engaged with *Whalen* suggests a de facto confirmation of this right within constitutional jurisprudence.

Nixon is perhaps most relevant for our purposes for the proposition that the right to informational privacy covers not only dissemination but also collection of data.⁹⁶ In *Nixon*, there was no threat that private materials would be disclosed to the general public because, by design, the General Services Administrator would return all private documents after review. But nevertheless, the Court acknowledged that supplying these private documents for governmental review was enough to create an invasion of privacy.⁹⁷ This is in keeping with the fact pattern of abortion litigation and prosecution, in which medical records may be collected with no intent to publicly disseminate these records.

3. *NASA v. Nelson: Assuming, Without Deciding, But Likely Confirming*

After *Whalen* and *Nixon*, the Court remained silent on the right to informational privacy for three decades. When they finally revisited the issue in *NASA v. Nelson*, the Court expressed some skepticism about the existence of the right to informational privacy and provided no further clarity as to its source or the correct analysis to use it.⁹⁸ Nevertheless, *NASA* was a return to *Whalen*'s more holistic analysis of the basis and test for the right to informational privacy.⁹⁹ And it was confirmation that a more modern composition of the Court still found the right to informational privacy compelling enough to apply.

92. *Nixon v. Adm'r of Gen. Servs.*, 408 F. Supp. 321, 328–29 (D.D.C. 1976).

93. *Nixon*, 433 U.S. at 457 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

94. Moniodis, *supra* note 9, at 147–48.

95. *Nixon*, 433 U.S. at 484.

96. Schilling, *supra* note 9, at 828.

97. Gorkin, *supra* note 9, at 7.

98. *See Nat'l Aero. & Space Admin. v. Nelson (NASA)*, 562 U.S. 134 (2011).

99. Moniodis, *supra* note 9, at 164.

In *NASA*, employees of the Jet Propulsion Lab operated by the California Institute of Technology were subject to a new Department of Commerce directive, requiring the employees to undergo a standard federal background check.¹⁰⁰ This background check, the National Agency Check with Inquiries, was fairly detailed, including not only biographical and demographical data, but also personal and professional references, whether the individual had “used, possessed, supplied, or manufactured illegal drugs” in the last year, and information regarding any treatment or counseling for substance use.¹⁰¹ The process also included a questionnaire sent to former landlords and a suitability matrix that included factors such as “carnal knowledge.”¹⁰² The information gathered in this process was governed by the Privacy Act, which limited disclosure of the information without the individual’s consent to only certain instances and gave individuals a right to access the information and request amendments.¹⁰³

While the Ninth Circuit granted the plaintiffs a preliminary injunction against the background checks, the Supreme Court reversed on the grounds that the government’s interest in gathering this information was reasonable, and that the Privacy Act’s protections were sufficient.¹⁰⁴ The Court explicitly harkened back to *Whalen* and *Nixon*, noting that “[i]n two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy ‘interest in avoiding disclosure of personal matters.’”¹⁰⁵ However, the Court refused to clarify the existence (or non-existence) of a right to informational privacy. Justice Alito, writing for the Court, instead stated, “We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”¹⁰⁶ This narrow interpretation, acknowledging a right to informational privacy only for the purpose of this case, has caused a great deal of angst and confusion as to whether this right actually exists. But by invoking *Whalen*, Justice Alito implicitly adopts Justice Stevens’s analysis that between *Olmstead*, *Griswold*, and *Stanley*, there is a tradition of respecting informational privacy located within the mosaic of constitutional rights.

The *NASA* opinion is similar to the *Whalen* decision in two important regards.¹⁰⁷ First, in both cases, the Court avoided declaring an unequivocal right to informational privacy because it determined that the demand for information would not have violated that right (should that right exist). For example, the

100. *NASA*, 562 U.S. at 139–40.

101. *Id.* at 141.

102. *Id.* at 141–43, 143 n.5.

103. *Id.* at 142.

104. *Id.* at 159.

105. *Id.* at 138 (first citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); and then citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977)).

106. *Id.*

107. See Moniodis, *supra* note 9, at 164.

NASA Court sidestepped deciding whether the right to informational privacy truly exists by noting that the facts of the case, including the safeguards against disclosure and the reasonable need for this data, suggest that any right to informational privacy was not violated.¹⁰⁸ Because the background checks were permissible, the Court found the ability to remain in the gray area. *NASA* and *Whalen* are also similar in that there is no explicit balancing test applied, only a loose exploration of relevant facts. But by engaging in this exploration to see if the governmental request for information violated the right to informational privacy, the Court is essentially confirming that such a right exists because if this right did not exist, why would the analysis be necessary? Ultimately, *NASA* should be read as confirmation that the right to informational privacy exists and is not a fad from the 1970s.

The bottom line is that, as it currently stands, three cases strongly suggest that some sort of right to informational privacy exists, separate from the right to privacy when making individual decisions. Unfortunately, each of these cases failed to fully confirm the existence of that right, sidestepping such a determination by concluding that if such a right exists, it was not violated on the facts of the particular cases. Nevertheless, as discussed below, these three cases form the seeds from which many lower court cases confirm a right to informational privacy, often in the context of medical records.

4. Dobbs v. Jackson Women’s Health Organization: *Preserving Room for the Right to Informational Privacy*

Perhaps counterintuitively, *Dobbs* is the most recent entry in the *Whalen*, *Nixon*, and *NASA* tradition. Read against the above backdrop, it bolsters the existence of an informational privacy right. Even as the Court undertook a seismic reduction in the overall “right to privacy” by eliminating decisional abortion privacy, Justice Alito took great pains to engage with the right to informational privacy, distinguish it from the right to decisional privacy that *Dobbs* overruled, and to preserve the *Whalen* tradition. That Justice Alito was the author of both *NASA* and *Dobbs*, the two most recent cases to engage with the right to informational privacy and to confirm its modern existence in some form, only confirms that *Dobbs* engages with this line of jurisprudence.

In *Dobbs*, Justice Alito criticizes the *Roe v. Wade* Court for misunderstanding the constitutional “right of personal privacy.”¹⁰⁹ He argues that *Roe* “conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference.”¹¹⁰ He then cites *Whalen* in support of the

108. See *NASA*, 562 U.S. at 138.

109. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2267 (2022) (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973), *overruled by Dobbs*, 142 S. Ct. at 2285).

110. *Id.*

“right to shield information from disclosure” before critiquing the cases the *Roe* Court used to apply the right to decisional privacy to abortion as being “obviously very, very far afield.”¹¹¹ Justice Alito goes out of his way in *Dobbs* to distinguish between the different meanings of the “right to privacy” and to explicitly differentiate the right to informational privacy and *Whalen* from the problematic and misguided (in his view) application of decisional privacy in *Roe*. It would have been completely possible to write the *Dobbs* decision without the explicit carve out for the right to informational privacy. Therefore, this reference (coupled with Justice Alito’s history as the author of the *NASA* opinion) should be taken as confirmation that the right to informational privacy is looked on by the modern Supreme Court with some favor.

Furthermore, Justice Alito argues the Due Process Clause of the Fourteenth Amendment only applies to rights that are “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”¹¹² As discussed above, the constitutional elements that result in the right to informational privacy are still a little ambiguous, but it is often supposed that the “correct formula” is the Fourth Amendment in conjunction with the liberty interest found in either the Fourteenth and Fifth Amendment, or both.¹¹³ While the *Dobbs* Court determined that the “right to abortion” was not part of that deeply rooted history and tradition,¹¹⁴ the right to shield information from disclosure is affirmed as part of our legal tradition each time the Fourth Amendment successfully limits the government’s ability to seek information about ourselves.¹¹⁵ It is also a deeply rooted part of our legal history, with Justice Brandeis’s widely cited *Olmstead* dissent and his related article, *The Right to Privacy*,¹¹⁶ which was hailed by Roscoe Pound as having done “nothing less than add[ing] a chapter to our law.”¹¹⁷ This again suggests that, properly framed, the Court would not find the right to informational privacy as applied to medical records to be offensive or outside the legal tradition.

B. *Fourth Amendment Jurisprudence: The Gravitational Pull of a Freestanding Informational Privacy Right*

Whalen describes a right grounded in the Fifth or Fourteenth Amendments. But there are important strands in the Supreme Court’s Fourth Amendment jurisprudence that also suggest an idea of constitutionally protected

111. *Id.* at 2267–68.

112. *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

113. Pittman, *supra* note 78, at 166–67.

114. *Dobbs*, 142 S. Ct. at 2242–43.

115. *See id.* at 2237, 2267.

116. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 193–220 (1890).

117. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979) (quoting ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 70 (1946)).

informational privacy that hovers in the background of search and seizure doctrine. When the Court confronts law enforcement practices that bear on especially sensitive forms of information—especially medical information—it has engaged in two maneuvers that imply the existence of something *beyond* generally applicable Fourth Amendment principles. The first maneuver is to wield existing doctrinal categories, such as probable cause and the warrant requirement, more expansively in the context of medical privacy than it typically does elsewhere. The second maneuver, which emerged in a 2016 case called *Birchfield*,¹¹⁸ is to suggest that Fourth Amendment protections are insufficient, by category, to vindicate certain kinds of privacy interests in medical information.

Start with the first maneuver: wielding doctrinal categories more expansively in the context of medical information than elsewhere. The clearest example is *Ferguson v. City of Charleston*, in which the Court performed jurisprudential backflips to classify the transfer of medical information from hospitals to law enforcement as “unreasonable searches”—even though, under normal Fourth Amendment precepts, the transfers should not have been “searches” at all.¹¹⁹ At issue in *Ferguson* was a local policy under which physicians tested pregnant patients and reported the results to the police if the tests were positive for cocaine.¹²⁰ The Supreme Court held that this practice violated the Fourth Amendment.¹²¹ That result may sound natural and obviously correct to the uninitiated—of course the police shouldn’t be able to use medical tests handed over by your doctors without reasonable suspicion against you! But, as others have argued, *Ferguson* presented a very thorny case, at least under a straightforward Fourth Amendment analysis.

To reach the result it did, the *Ferguson* Court had to finesse two points of doctrine that, not surprisingly, provoked apoplectic reactions in dissent.¹²² The first and most fundamental problem is that the Fourth Amendment prohibits only unreasonable “searches” or “seizures.”¹²³ It generally does *not* apply to decisions by third parties to hand information over to the police, because such cases do not involve “searches” or “seizures.” The Court first held that the urine test was itself a “search” due to the entanglement of the state hospital and the police.¹²⁴ Enter the second difficulty: even assuming the urine transfers *were* searches, the Court’s “special needs” cases customarily allow warrantless drug-

118. *Birchfield v. North Dakota*, 579 U.S. 438, 438–42 (2016).

119. *See Ferguson v. City of Charleston*, 532 U.S. 67, 67–69 (2001).

120. *Id.* at 67.

121. *Id.* at 67–68.

122. Justice Scalia was characteristically apoplectic on this point, stressing the conceptual difficulties in deciding whether the moment of urine collection, the test, or the transfer of information was the “search”; the majority brushed off these concerns on the basis that it has elsewhere, without discussion, treated urine tests as searches. *See Ferguson*, 532 U.S. at 68.

123. U.S. CONST. amend. IV.

124. *Ferguson*, 532 U.S. at 76.

testing in more trivial settings, like spot checks for student athletes.¹²⁵ The Court ultimately distinguished *Ferguson* from other “special needs” cases on the basis of the sheer level of law enforcement entanglement present and its conclusion that the “primary purpose” of these drug tests was law enforcement purposes.¹²⁶ The Court also stressed, however, the unique nature of the medical setting, explaining that “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.”¹²⁷

The latter theme—that medical information warrants more Fourth Amendment solicitude than other privacy interests—has resurfaced in a number of important cases since *Ferguson*, many involving new surveillance technology. For example, in a 2014 case holding that no exceptions to the warrant requirement attach to searches of cell phone data, the Court stressed that “certain types of data” contained on phones are “qualitatively different” than the records at stake in cases involving traditional records.¹²⁸ The Court continued: “An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.”¹²⁹ Similarly, in *Carpenter v. United States*,¹³⁰ which held that cell-site location data was protected by the Fourth Amendment even though it was possessed by third parties, both Justice Sotomayor’s majority opinion and Justice Gorsuch’s dissent invoked medical information as a quintessentially sensitive sort of information.¹³¹ Justice Sotomayor, in holding that cell-site information reveals uniquely private information, noted that cell phones follow their owners “into . . . doctor’s offices.”¹³² Justice Gorsuch, in calling for the complete overhaul of Fourth Amendment jurisprudence regarding the third-party doctrine, criticized that doctrine on the ground that it arguably would mean that “the Constitution does nothing to limit investigators from searching records you’ve entrusted to your bank, accountant, and maybe even your doctor.”¹³³

125. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995).

126. This was a rather dubious basis for distinguishing the case from other special needs drug test cases.

127. *Ferguson*, 532 U.S. at 78.

128. *Riley v. California*, 573 U.S. 373, 395 (2014).

129. *Id.* at 395–96.

130. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018). Ryan Knox has persuasively argued that *Carpenter*’s reasoning can be more broadly read to provide substantial Fourth Amendment protection for health information. See Ryan Knox, *Fourth Amendment Protections of Health Information After Carpenter v. United States: The Devil’s in the Database*, 45 AM. J.L. & MED. 331, 345–53 (2019).

131. See generally *Carpenter*, 138 S. Ct. at 2206.

132. *Id.* at 2218.

133. *Id.* at 2261, 2263 (Gorsuch, J., dissenting).

This brings us to the Court's second maneuver in relation to medical information: implying that Fourth Amendment protections, even at their maximum, may not suffice to accommodate the privacy interests at stake.

The starkest example is *Birchfield v. North Dakota*, which held that although the Fourth Amendment permits warrantless breathalyzer tests for drunk driving, it does not permit warrantless blood draws for the same purpose.¹³⁴ In reaching that holding, the Court emphasized the uniquely physically invasive nature of blood draws, as well as the experience of anxiety that may be invoked by law enforcement possessing a sample from which other significant, intimate information can be extracted down the road.¹³⁵

The invocation of “anxiety” as a cognizable Fourth Amendment interest represents a significant departure from prior Fourth Amendment jurisprudence. Historically, courts have taken it as axiomatic that government actors follow the rules and that an individual's fear of future misuses of information—in other words, the fear that state officials might simply flout the rules—is irrelevant to the Fourth Amendment analysis.¹³⁶ As Kiel Brennan-Marquez and Stephen Henderson have argued elsewhere, *Birchfield* radically departs from this axiom; it explicitly entertains the possibility that state officials may *not* follow the (Fourth Amendment) rules, implying that other constitutional principles—a different set of informational privacy rights—may be necessary to vindicate the interests at issue in DNA information.¹³⁷

The same theme emerges, moreover, in cases involving DNA privacy where *no* violation is found. In the course of reaching that (unprotective) conclusion, the Court has nevertheless been clear about the risks posed by future use and misuse of genetic information and the heightened privacy interests that follow.¹³⁸ All of this, in fact, echoes the logic of *Whalen* itself. In *Whalen*, the Court declined to hold that the presumed right to informational privacy was violated in part because there were controls on future government uses of the collected data.¹³⁹ Therefore, the Court concluded, the mere disclosure or knowledge that such a database existed was not enough to invoke

134. *Birchfield v. North Dakota*, 579 U.S. 438, 438–42 (2016).

135. *Id.* at 474–76.

136. Kiel Brennan-Marquez & Stephen E. Henderson, *Fourth Amendment Anxiety*, 55 AM. CRIM. L. REV. 1, 9 (2018).

137. *Id.* at 13.

138. For example, in *Maryland v. King*, the Court upheld the reasonableness and constitutionality of a DNA swab test; it stressed that the case would likely have come out differently if the DNA portions and database used were more revealing of personal medical information. 569 U.S. 435, 446 (2013). Central to the Court's holding was its conclusion that “[t]he argument that the testing at issue in this case reveals any private medical information at all is open to dispute,” and the Court took pains to stress that future scientific developments could have “Fourth Amendment consequences” and that testing that revealed information besides the mere identity of a suspect would provide additional privacy concerns. *Id.* at 464. Again and again, Justices show themselves as especially concerned with intrusions into the medical space and the medical record.

139. *Whalen v. Roe*, 429 U.S. 589, 600–04 (1977).

the right to informational privacy.¹⁴⁰ By expounding the idea that “anxiety” should play a role in assessing the privacy interests at stake in certain categories of information and informational disclosure violations, *Birchfield* provides a basis for expanding and strengthening the practical effect of *Whalen*. It provides a foothold, clearly in the Fourth Amendment context but potentially more broadly, for increasing the constitutional weight given to informational privacy interests on the individual’s side of the ledger.

* * *

This Article distinguishes between the *Whalen* line of informational privacy cases and traditional Fourth Amendment cases focused on privacy, discussed above. Some have called that distinction into doubt: In *NASA*, for instance, Justice Scalia wrote separately to call into doubt the informational privacy line of cases, suggesting that *Whalen* was wrongly decided and that *Nixon* should be understood instead as a straightforward Fourth Amendment case.¹⁴¹ *Whalen*, Scalia asserted, is very messy and relies only on a First Amendment case protecting the private possession of obscenity and the “deservedly infamous dictum” in *Griswold v. Connecticut*.¹⁴² *Nixon*, by contrast, utilized “straightforward Fourth Amendment analysis” after initially invoking *Whalen*.¹⁴³ At least one commentator understands *Nixon* as a Fourth Amendment decision.¹⁴⁴ Justice Thomas also concurred and was likewise clear that “the Constitution does not protect a right to informational privacy.”¹⁴⁵ Foreshadowing *Dobbs* perhaps, Justice Thomas rejected the Due Process Clause as the source of unenumerated rights and noted that he could not find a right to privacy in the Bill of Rights or anywhere else in the Constitution.¹⁴⁶ But importantly, these opinions did not carry the day.

Some of the Court’s majority opinions likewise blur the distinction. For instance, the *Ferguson* Court noted that “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without

140. *Id.*

141. *Nat’l Aero. and Space Admin. v. Nelson (NASA)*, 562 U.S. 134, 161–62 (2011) (Scalia, J., concurring). Justice Scalia noted that “[a] federal constitutional right to ‘informational privacy’ does not exist.” *Id.* at 160. Scalia critiqued the Court’s process of first assuming a constitutional right, believing it would lead to confusion in the lower courts. *Id.* at 162–64, 167. Likewise, he thought that by keeping the standards for this potential right vague, the Court was again sowing confusion in the circuit courts of appeals. *Id.* at 166–68. Scalia argued that the reason *Whalen* and *Nixon* “are not entitled to *stare decisis* effect is that neither opinion supplied a coherent reason why a constitutional right to informational privacy might exist.” *Id.* at 164.

142. *Id.*

143. *Id.*

144. Moniodis, *supra* note 9, at 157.

145. *NASA*, 562 U.S. at 169 (Thomas, J., concurring).

146. *Id.*

her consent,¹⁴⁷ but then relied on *Whalen*, explaining that “we have previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care.”¹⁴⁸ And in *Nixon*, the Court began and ended its privacy analysis by relying on *Whalen*, but also cited to classic Fourth Amendment cases for high-level principles about the idea that the Constitution provides protections for privacy.¹⁴⁹

For present purposes, it may not much matter if future courts conclude that a substantive right to informational privacy is conceptually better grounded in the Due Process Clause or in an expanded vision of the Fourth Amendment.¹⁵⁰ The key point still stands: *Dobbs* calls decisional privacy into question but expressly leaves intact a longstanding norm of informational privacy that crosses doctrinal boundaries. Whether cases like *Ferguson* are better understood as *Whalen* cases, or *Whalen* and its progeny should be recast as Fourth Amendment cases, or the two lines of cases are conceptually distinct, the bottom line is that the Court takes informational privacy very seriously—and, as discussed below, lower courts have heeded that call for decades.

III. THE RIGHT TO INFORMATIONAL PRIVACY IN THE LOWER COURTS

While there is an ambiguous note in the Supreme Court’s right to informational privacy jurisprudence, the same cannot be said for the approach taken in lower courts. Both federal courts of appeals and state courts have generally taken the Supreme Court at its word, holding that there is a constitutionally protected *Whalen*-style privacy interest and invoking that interest to invalidate overly intrusive laws and discovery requests.¹⁵¹ It turns out, moreover, that courts already apply this informational privacy right to protect sensitive abortion-related information. A number of courts have recognized that abortion-related records, which include information about medical, sexual, reproductive, and safety-related information, are a paradigmatic case for constitutional protection.

147. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

148. *Id.* at 78 n.14.

149. *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 457–59 (1977).

150. The spate of data privacy issues that the Court has addressed in the last several decades were litigated and decided as expansive Fourth Amendment cases, but they are in some ways a strange fit for traditional Fourth Amendment analysis. The Court’s willingness to find constitutional violations suggests its substantive appreciation of a privacy norm.

151. See Pittman, *supra* note 78, at 167.

A. Protecting Intimate Medical, Sexual, Safety, and Abortion-Related Information

With the sole exception of the D.C. Circuit,¹⁵² every circuit has recognized a constitutional right to informational privacy based on *Whalen* and *Nixon*.¹⁵³ States, too, widely recognize constitutionally protected informational privacy rights. In many states, an analogous right is grounded in the state's own constitution, rendering the right to informational privacy under the federal Constitution superfluous.¹⁵⁴ But the courts in about half of the states have recognized that under *Whalen* and its progeny, the federal Constitution provides substantive protection for informational privacy.¹⁵⁵

152. See *Am. Fed'n of Gov't. Emps v. Dep't. of Hous. & Urb. Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997).

153. See *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 182–83 (1st Cir. 1997); *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994); *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Zaffuto v. City of Hammond*, 308 F.3d 485, 489 (5th Cir. 2002); *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 945 (6th Cir. 2004); *Denius v. Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 (2022); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006); *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991).

154. *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431, 2012 WL 2685183, at *1 (Alaska Super. Ct. Mar. 12, 2012); *Pettus v. Cole*, 57 Cal. Rptr. 2d 46, 70–71 (Ct. App. 1996); *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987); *Brende v. Hara*, 153 P.3d 1109, 1115 (Haw. 2007); *State J.-Reg. v. U. of Ill. Springfield*, 994 N.E.2d 705, 715 (Ill. App. Ct. 2013); *Yeoman v. Ky. Health Pol'y Bd.*, 983 S.W.2d 459, 474 (1998); *Mont. Shooting Sports Ass'n v. State*, 224 P.3d 1240, 1244 (Mont. 2010); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1146 (Pa. 2017); *Wash. Pub. Emps. Ass'n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 450 P.3d 601, 611–12 (Wash. 2019).

155. See *Middlebrooks v. State Bd. of Health*, 710 So. 2d 891, 892 (Ala. 1998) (finding that HIV and AIDS patients' informational privacy interest in nondisclosure of their names and addresses was overcome by the state's interest in controlling infectious disease); *McCambridge v. City of Little Rock*, 766 S.W.2d 909, 913–15 (Ark. 1989) (stating that, despite the informational privacy rights of parties named in sensitive evidence found at the scene of a murder–suicide, the state's interest in solving crime required disclosure of the evidence to the court); *Martinelli v. Dist. Court in and for City and Cty. of Denver*, 612 P.2d 1083, 1091 (Colo. 1980) (directing the lower court to determine whether the sharing of police officers' personnel files would violate their informational privacy rights); *State v. Russo*, 790 A.2d 1132, 1147 (Conn. 2002) (finding that, despite the existence of an informational privacy right, there is no reasonable expectation of privacy in prescriptions for controlled substances); *Chidester v. Needles*, 353 N.W.2d 849, 854 (Iowa 1984) (holding that patients' right of privacy must yield to state's interest in well-founded criminal charges and fair administration of criminal justice); *Cowles Pub. Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs*, 159 P.3d 896, 902 (Idaho 2007) (explaining that, despite the existence of an informational privacy right, employees had no reasonable expectation of privacy in emails sent on a server monitored by employer); *In re Paternity of K.D.*, 929 N.E.2d 863, 870 (Ind. Ct. App. 2010) (recognizing a child's constitutional right to informational privacy and weighing it against her mother's right to freedom of speech); *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 376 (Kan. 2006) (staying production of abortion medical records in related criminal cases, citing patient informational privacy rights); *State v. Skinner*, 10 So. 3d 1212, 1218 (La. 2009) (finding a reasonable expectation of privacy in one's medical and prescription records such that a warrant was required for an investigative search of said records); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 971 A.2d 975, 988 (Md. Ct. Spec. App. 2009) (holding that a sex offender registry does not violate the constitutional right to privacy); *Commonwealth v. Fuller*, 667 N.E.2d 847, 854 (Mass. 1996), *abrogated by* *Commonwealth v. Dwyer*, 859 N.E.2d 400, 417 (Mass. 2006) (balancing complainant's privacy concerns against a defendant's need for exculpatory information to determine when a judge should undertake an in camera review of privileged records); *Swickard v. Wayne Cnty. Med. Exam'r*, 459 N.W.2d 92, 94–95 (Mich. Ct. App. 1990) (holding that the public's right to know the details surrounding the death of a public official outweighed decedent's family's privacy); *Matter of Agerter*, 353 N.W.2d 908, 913 (Minn. 1984) (finding that a judge's right to informational

The lower courts vary in their approaches to (1) identifying what information is covered and (2) balancing protected privacy interests against asserted state interests. As to the first issue, what information is protected, several circuits have held that the right extends to all personal information that has a legitimate expectation of privacy.¹⁵⁶ Others take a more restrictive approach. In the First and Sixth Circuits, informational privacy protections apply only to information that implicates “a fundamental right or one implicit in the concept of ordered liberty”¹⁵⁷ (though at least the First Circuit allows that the right *may* extend to “profligate disclosure of medical, financial, and other intimately personal data”).¹⁵⁸ The Eighth Circuit’s approach is somewhere in between: it long held that only information that implicates “the most intimate aspects of human affairs” merits protection,¹⁵⁹ though it has recently called into question whether the right to informational privacy exists at all.¹⁶⁰

privacy protected his sexual history from disclosure in a disciplinary action, but the state’s interest in judicial integrity required disclosure of the judge’s alcohol abuse); *State ex rel. Daly v. Info. Tech. Servs. Agency of City of St. Louis*, 417 S.W.3d 804, 812 (Mo. Ct. App. 2013) (holding that city employees’ pay records for accrued sick time, vacation time, and compensatory time are not open records to protect workers from disclosure of records to which they have a right of privacy); *Application of Martin*, 447 A.2d 1290, 1302 (N.J. 1982) (applying the court’s balancing test to resolve a conflict between governmental needs for information and an individual’s right of confidentiality); *Smith v. City of Artesia*, 772 P.2d 373, 375–76 (N.M. Ct. App. 1989) (holding that the right of privacy does not extend to recognize a privacy interest in another person); *DiPalma v. Phelan*, 179 A.D.2d 1009, 1010 (N.Y. App. Div. 1992) (finding that neither caselaw nor statute clearly establishes that a sex crime victim’s right to privacy is violated by the disclosure of her identity); *ACT-UP Triangle v. Comm’n for Health Servs. of N.C.*, 483 S.E.2d 388, 396 (N.C. 1997) (holding that elimination of anonymous testing by local health departments in favor of confidential testing did not violate constitutional privacy rights); *Stone v. Stow*, 593 N.E.2d 294, 298–99 (Ohio 1992) (holding that a statute authorizing police officers engaged in a specific investigation involving designated persons or drugs to inspect prescription records of pharmacies did not violate any constitutionally protected privacy right of physicians or their patients); *Patten v. State*, 359 P.3d 469, 476–77 (Or. Ct. App. 2015) (holding that the questions in a risk assessment questionnaire did not violate any right to informational privacy); *Pontbriand v. Sundlun*, 699 A.2d 856, 870 (R.I. 1997) (holding that the contents of banking records do not implicate a fundamental right clearly tied to a specific constitutional privacy right); *McNiel v. Cooper*, 241 S.W.3d 886, 895 (Tenn. Ct. App. 2007) (recognizing that, despite the existence of an informational privacy right, the state’s interest in regulating the practice of medicine required a physician to turn over medical records without patient consent as part of a state licensing inspection); *Tarrant Cnty. Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 679 (Tex.App.—Fort Worth 1987, no writ) (holding that an order compelling relator to identify blood donors is not an impermissible violation of their rights to privacy); *Peninsula Counseling Ctr. v. Rahm*, 719 P.2d 926, 934–36 (Wash. 1986) (holding that the government did not violate the constitutional right to privacy by requiring disclosure of more information than was reasonably necessary to meet a valid governmental interest); *Stipetich v. Grosshans*, 612 N.W.2d 346, 355 (Wis. Ct. App. 2000) (recognizing the constitutional right to privacy but affirming the grant of summary judgment on the basis of qualified immunity).

156. See, e.g., *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995); *Malleus v. George*, 641 F.3d 560 (3d Cir. 2011); *Chasensky v. Walker*, 740 F.3d 1088, 1095–97 (7th Cir. 2014); *Doe*, 15 F.3d at 270; *Walls*, 895 F.2d at 192; *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005); *Burns v. Warden, USP Beaumont*, 482 F. App’x 414, 415–17 (11th Cir. 2012).

157. *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998).

158. See also *Vega-Rodriguez*, 110 F.3d at 183.

159. *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (quoting *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988)).

160. See *Dillard v. O’Kelley*, 961 F.3d 1048, 1054–55 (8th Cir. 2020) (en banc) (holding that the right is not “clearly established” and strongly suggesting that the Supreme Court’s decisions in *Nelson* should be read to indicate that *Whalen* did not establish such a right).

As to the second issue, the circuits likewise vary when it comes to the details of how to balance the states' interests with the individual's constitutionally protected privacy interests. Some circuits, such as the Fourth,¹⁶¹ Sixth,¹⁶² and Tenth,¹⁶³ apply strict scrutiny for potential violations of the right to informational privacy. Others have adopted a more expansive approach.¹⁶⁴ Several courts,¹⁶⁵ for instance, have adopted the balancing test articulated by the Third Circuit in *United States v. Westinghouse*,¹⁶⁶ which provides for a weighing of specified factors.¹⁶⁷ The Eighth Circuit once again stands alone, requiring that the disclosure be "a shocking degradation or an egregious humiliation . . . or a flagrant breach of a pledge of confidentiality . . ."¹⁶⁸ In applying these various standards, both state¹⁶⁹ and federal¹⁷⁰ courts—like the Supreme Court before them—frequently conclude that information is constitutionally protected but that the state's interests ultimately justify disclosure.¹⁷¹

That said, unlike the Supreme Court, state and lower courts have on many occasions applied the right to informational privacy to penalize or prohibit invasions of personal privacy.¹⁷² This is especially true in contexts that implicate information including medical or sexual information or that have implications for personal safety.

In *Matter of Agerter*, for instance, the Supreme Court of Minnesota quashed a subpoena on the ground that it violated informational privacy interests under *Whalen*.¹⁷³ The court considered a challenge brought by a judge who, in the course of a judicial ethics hearing before an administrative board, asserted that

161. See *Walls*, 895 F.2d at 192.

162. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998).

163. *Anderson v. Blake*, 469 F.3d 910, 915 (10th Cir. 2006).

164. The Ninth Circuit, for instance, has explained that "burdens on informational privacy that the state justifies via public health or other such interests are assessed under a specific, detailed test that balances informational privacy and governmental interests," and that this test "replaces any strict scrutiny test." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 545 (9th Cir. 2004), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 (2022).

165. See *Tucson Woman's Clinic*, 379 F.3d at 551; *Nat'l Treasury Emps. Union v. U.S. Dep't of the Treasury*, 25 F.3d 237, 244 (5th Cir. 1994); *Walls*, 895 F.2d at 194; *Denius v. Dunlap*, 209 F.3d 944, 956 n.7 (7th Cir. 2000).

166. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

167. The *Westinghouse* test considers a variety of factors, including: the nature of the records; the potential harm of any disclosure; whether any safeguards against unauthorized disclosure exist; the reason for needing the information in question; and if there is a recognizable public interest, especially articulated in any statute or public policy, for access to this information. *Westinghouse*, 638 F.2d at 578.

168. *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993).

169. See, e.g., *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 379 (Kan. 2006) (staying production of abortion medical records in related criminal cases, citing patient informational privacy rights).

170. See, e.g., *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1140 (3d Cir. 1995).

171. *Gorkin*, *supra* note 9, at 6–7.

172. See *Matter of Agerter*, 353 N.W.2d 908, 915 (Minn. 1984); *Haw. Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1052 (D. Haw. 1979).

173. *Matter of Agerter*, 353 N.W.2d at 915.

subpoenas asking him to provide information about his alcohol consumption and sexual conduct violated his right to informational privacy under *Whalen*.¹⁷⁴ The state supreme court concluded that while the inquiries into judge's alcohol use were fair game, the subpoenas related to his sexual behavior were not.¹⁷⁵ The judge could not be required to answer invasive inquiries into his sexual affairs because the allegations that he was having an affair, while sufficient to justify the board's preliminary investigation, were insufficient to justify such a privacy invasion, given that "[o]ne's private sex life concerns 'the most intimate of human activities and relationships.'"¹⁷⁶ Though the court recognized that the interest in judicial integrity asserted by the state is a weighty state interest, it did not stop its inquiry at that level of generality; instead, it focused on both the substantive seriousness and plausibility of the asserted judicial ethics violation.¹⁷⁷

Similarly, in *Hawaii Psychiatric Society v. Ariyoshi*, the District Court of Hawaii granted preliminary injunctive relief to mental health providers who were required to make their patients' records accessible to a Medicaid Fraud Unit.¹⁷⁸ Distinguishing *Whalen* (which involved records that included names, ages, addresses, and certain prescriptions only), the court found that the psychiatric records in question included such personal information that "[t]he possibility that those records could be disclosed to anyone, whether it be state officials or the public, is sufficient to constitute an intrusion into the right of privacy warranting scrutiny under the compelling state interest standard."¹⁷⁹ The district court did struggle to find the right test to use to evaluate the right to informational privacy claims, finally concluding:

Although the Supreme Court has not offered particularly explicit guidance, this court believes that the appropriate test under the confidentiality strand of the privacy right, the test implicitly used by the Supreme Court in *Whalen* and *Nixon*, is to balance the state interests served by a regulation against the intrusion into an individual's privacy.¹⁸⁰

Applying this test, the court concluded that there was a high probability that the plaintiffs would succeed on their claims and that their right to informational privacy (in this case referred to as "the right to avoid unjustified disclosure of personal information") would prevail.¹⁸¹

Even courts that have adopted restrictive understandings of the constitutional right to informational privacy have found violations. Two

174. *Id.* at 910.

175. *Id.* at 915.

176. *Id.* (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

177. *Id.* at 815.

178. *Haw. Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1052 (D. Haw. 1979).

179. *Id.* at 1041.

180. *Id.* at 1043.

181. *Id.* at 1045.

published cases in which the Sixth Circuit has found violations of the right to informational privacy are exemplary. In one, confidential and intimate details of a rape were disclosed for no good reason.¹⁸² The court stressed that due to the nature of sexual violence and common sociological responses to it, releasing this information would subject the victim to public scrutiny and humiliation related to her sexual choices and that sexual choices and sexuality are intimate decisions “which define significant portions of our personhood.”¹⁸³ In the other, the personnel files of undercover police officers were shared with counsel for alleged drug conspirators, and the court concluded that the officers had a constitutionally protected interest in the privacy of the information given its relationship to their ability to preserve their lives, their personal security, their bodily integrity, and the safety of their families.¹⁸⁴

As noted above, certain categories of information are widely held to be protected. First, medical information—especially intimate medical information—is widely held to justify a heightened expectation of privacy.¹⁸⁵ This is unsurprising, given that in *Whalen* itself the Supreme Court held that medical records were protected by the constitutional right to privacy before concluding that the specific statutory scheme at issue was constitutional.¹⁸⁶ To be clear, this is not a categorical rule. For instance, while the Sixth Circuit (which applies the most stringent standard regarding what information is covered) allows that medical records may be protected, it has also held that in many specific situations, medical records do not sufficiently implicate an interest sufficiently “inherent in the concept of ordered liberty” to merit protection.¹⁸⁷ But by and large, courts agree that medical information is protected.

Second, information related to “sexuality and choices about sex” regularly triggers constitutional protection.¹⁸⁸ Physicians have successfully invoked the

182. *Bloch v. Ribar*, 156 F.3d 673, 681–82 (6th Cir. 1998).

183. *Id.* at 685–86.

184. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062–63 (6th Cir. 1998).

185. See *Schacter v. Whalen*, 581 F.2d 35, 37 (2d Cir. 1978); *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995); *Denius v. Dunlap*, 209 F.3d 944, 955–56 (7th Cir. 2000); *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004), *abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2285 (2022); *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005).

186. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

187. *Compare* *Lee v. City of Columbus*, 636 F.3d 245, 261 (6th Cir. 2011) (“However, under our interpretation of privacy rights, we have not yet confronted circumstances involving the disclosure of medical records that, in our view, are tantamount to the breach of a ‘fundamental liberty interest’ under the Constitution.”), *with* *Moore v. Prevo*, 379 F. App’x 425, 428 (6th Cir. 2010) (“We join our sister circuits in finding that, as a matter of law, inmates have a Fourteenth Amendment privacy interest in guarding against disclosure of sensitive medical information from other inmates subject to legitimate penological interests.”) (footnote omitted).

188. See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (collecting cases); see also *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (“It is difficult to imagine a more private matter than one’s sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity. . . . We can, therefore, readily conclude that Wayman’s sexual orientation was an intimate aspect of his personality entitled to privacy protection under *Whalen*.”) (footnote omitted). *But see*

right to informational privacy on behalf of their patients to quash subpoenas for patients' medical records in other contexts where sexuality or sexual decision-making is at stake, including, for instance, when HIV records are at play.¹⁸⁹

Perhaps most strikingly, several federal district courts—including in the restrictive Sixth Circuit—have held that state policies that effectively required transgendered people to reveal their transgender status by prohibiting amendments to certificates unconstitutionally violated a Fourteenth Amendment right to informational privacy.¹⁹⁰ For example, in *Powell v. Schriver*, the Second Circuit concluded that an incarcerated transwoman had a right to confidentiality regarding her trans status.¹⁹¹ The Second Circuit (using outdated and incorrect language) noted, “[l]ike HIV status . . . transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.”¹⁹² In *Powell*, the Second Circuit emphasized that when the medical information was likely to provoke anger in others, there was a heightened claim to a right to confidentiality.¹⁹³ In this era of increasingly politicized medical care, the dangers of disclosure are all too real for those pursuing gender-affirming care and those seeking abortion and other reproductive care.

Third, even in especially restrictive jurisdictions, courts have been willing to find information protected when it implicates an individual’s bodily safety or security or that of their family.¹⁹⁴ The Sixth Circuit has held that the interest in preserving one’s life has a constitutional dimension and therefore, the release of information that endangers that interest is constitutionally suspect.¹⁹⁵

Against this backdrop, it is perhaps unsurprising that multiple courts have applied the right to informational privacy to protect abortion-related medical records from disclosure. Even under relatively narrow conceptions of the right

Wyatt v. Fletcher, 718 F.3d 496, 509–10 (5th Cir. 2013) (holding that a minor high school student did not have a protected privacy interest infringed upon by disclosure of the student’s sexuality to their mother).

189. See Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases*, 34 VILL. L. REV. 871, 899–900 (1989).

190. See, e.g., *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp. 3d 327, 333 (D.P.R. 2018) (“By permitting plaintiffs to change the name on their birth certificate, while prohibiting the change to their gender markers, the Commonwealth forces them to disclose their transgender status in violation of their constitutional right to informational privacy.”); *Ray v. Himes*, No. 2:18-cv-272, 2019 WL 11791719 (S.D. Ohio Sept. 12, 2019) (similar).

191. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (“We conclude that the reasoning that supports the holding in *Doe* compels the conclusion that the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism.”).

192. *Id.*

193. *Id.*

194. See, e.g., *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069–70 (6th Cir. 1998).

195. *Id.* at 1064 (holding that the city’s release of information about undercover officers violated a constitutional right to informational privacy).

to informational privacy, there are solid arguments that abortion records are constitutionally protected.¹⁹⁶

To date, courts in at least two circuits, as well as several states, have specifically held that abortion-related medical records are protected by a constitutional right to informational privacy.¹⁹⁷ The Ninth Circuit has held that both abortion-related medical records and abortion-related judicial records are protected.¹⁹⁸ In *Tucson Woman's Clinic v. Eden*, the Ninth Circuit held that a statutory requirement to submit fetal ultrasound prints and unredacted medical records to the Arizona Department of Health Services violated patients' right to informational privacy.¹⁹⁹ This case built upon *Planned Parenthood of Southern Arizona v. Lawall*, an earlier Ninth Circuit case holding that Arizona's parental consent statute, which authorized government employees to access records related to minors' judicial bypass of parental consent requirements for abortions, did not violate the minor's constitutional rights to informational privacy—but only because it was sufficiently narrowly tailored to protect the undisputed privacy interest in the medical records, which the court stressed was of a constitutional dimension.²⁰⁰ In holding that the medical records were protected, the *Tucson Woman's Clinic* court expressly grounded its holding in a Fourteenth Amendment right to informational privacy, concluding that the right to informational privacy is distinct from a Fourth Amendment right to be free from unreasonable searches and seizures.²⁰¹ The court evaluated the privacy intrusion under a balancing test that considered various factors related to the character of the information, risks posed by disclosures, safeguards against disclosure, and public interest.²⁰²

The court also made clear that the right to informational privacy can be violated even if information is made available only to government employees.²⁰³ It explained that “[i]f information that a woman has had an abortion is made available to all DHS employees, the fact that they are government employees is

196. To our knowledge, no courts have held that there is *no* constitutional protection for abortion-related medical records.

197. See *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551–53 (9th Cir. 2004), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 (2022); *Planned Parenthood Sw. Ohio Region v. Hodges*, No. 1:15-cv-00568, 2019 WL 1439669 at *5–6 (S.D. Ohio Mar. 31, 2019); *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 377 (Kan. 2006).

198. *Tucson Woman's Clinic*, 379 F.3d at 553; *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789–90 (9th Cir. 2002).

199. *Tucson Woman's Clinic*, 379 F.3d at 552–53. Specifically, the court considered (1) the type of information requested, (2) the potential for harm in any subsequent non-consensual disclosure, (3) the adequacy of safeguards to prevent unauthorized disclosure, (4) the degree of need for access, and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. *Id.* at 551.

200. *Planned Parenthood of S. Ariz.*, 307 F.3d at 790.

201. *Tucson Woman's Clinic*, 379 F.3d at 551–54.

202. *Id.*

203. *Id.* at 551–52.

no solace to the numerous neighbors, relatives, and friends of DHS employees, as well as to the employees themselves.”²⁰⁴

A district court in the Sixth Circuit has likewise held that the right to informational privacy protects abortion records. In *Planned Parenthood Southwest Ohio Region v. Hodges*,²⁰⁵ an Ohio district court concluded that abortion-related medical records satisfy the Sixth Circuit’s criteria.²⁰⁶ In that case, the district court denied the defendant’s motion to compel the production of individual patient medical files (with identifying information redacted).²⁰⁷ The defendant, the Ohio Department of Health,²⁰⁸ requested those records in response to a challenge to the constitutionality of several Ohio laws regulating facilities that provided abortions, arguing that patient files were necessary to provide the most detailed and direct evidence of what happened during abortion complications.²⁰⁹ The district court nevertheless declined to enforce the discovery request.²¹⁰ The crux of the court’s reasoning was that the discovery request had to be denied because to compel production would violate the constitutionally protected privacy interests of third-party medical patients.²¹¹

The court reached this result under Sixth Circuit precedent recognizing informational privacy only “where the individual privacy interest is of constitutional dimension.”²¹² When that right is implicated, courts cannot enforce subpoenas or require information to be produced until it balances the government’s interest in disseminating the information against the individual’s interest in keeping it private.²¹³ The Sixth Circuit has held that the interests at stake implicate a fundamental right (1) where the release of information could lead to bodily harm and (2) where the information is of a “sexual, personal, and humiliating nature.”²¹⁴

Importantly, the district court concluded that abortion medical records have “constitutional dimension[s]” sufficient to satisfy this test *without relying on a substantive right to abortion itself*.²¹⁵ Instead, it concluded that abortion-related medical records relate to aspects of life that are “fundamental” or “implicit in

204. *Id.* at 552.

205. *Planned Parenthood Sw. Ohio Region v. Hodges*, No. 1:15-cv-00568, 2019 WL 1439669 at *5–6 (S.D. Ohio Mar. 31, 2019).

206. *Id.*

207. *Id.*

208. Formally, the suit was brought against the director of the Department of Health in his official capacity. *Id.* at *1.

209. *Id.*

210. *Id.* at *7.

211. *Id.* at *5–6.

212. *Id.* at *5 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998)).

213. *Id.*

214. *Id.* (first citing *Kallstrom*, 136 F.3d at 1064; and then citing *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998)).

215. *Id.* at *5–6.

the concept of ordered liberty”²¹⁶ because the information contained within such records is “of a sexual, personal, and humiliating nature in that . . . [such records] necessarily include details regarding the patients’ sexuality and sexual choices”²¹⁷—not because they implicate abortion itself.

State courts have also used the right to informational privacy to block production of abortion-related medical records. In *Alpha Medical Clinic v. Anderson*, the Kansas Supreme Court blocked its state attorney general’s investigation of two abortion clinics on the grounds that the overly broad subpoenas violated patients’ right to informational privacy.²¹⁸ Two medical clinics filed a petition to quash the Kansas Attorney General’s subpoena of ninety patient files.²¹⁹ The Kansas Supreme Court cited *Whalen* along with three Tenth Circuit cases to support the contention that there is a federal “right to maintain the privacy of certain information.”²²⁰ The Kansas Supreme Court also noted the “federal constitutional right to obtain confidential health care” as both being “perhaps related” to the right to maintain the privacy of certain information and being “recognized explicitly by at least the Sixth Circuit.”²²¹ The court then performed a balancing analysis, weighing the patients’ right to informational privacy against the state’s interest in enforcing its statutes criminalizing abortion and child abuse.²²² Ultimately, they concluded that the patients’ files must be redacted of patient-identifying information and also reviewed initially in camera by a lawyer and physician appointed by the court to determine if further redaction is needed.²²³ *Alpha Medical Clinic* is illustrative of how courts across the country find the right to informational privacy to be an uncontroversial part of the federal constitutional landscape.

216. *Id.* at *5.

217. *Id.*

218. See generally *Alpha Med. Clinic v. Anderson*, 128 P.3d 364 (Kan. 2006).

219. *Id.* at 369–70.

220. *Id.* at 376 (first citing *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977); then citing *Eastwood v. Dep’t of Corr. of Okla.*, 846 F.2d 627, 631 (10th Cir. 1988); then citing *A.L.A. v. W. Valley City*, 26 F.3d 989, 990 (10th Cir. 1994); and then citing *Aid for Women v. Foulston*, 441 F.3d 1101, 1121 (10th Cir. 2006)).

221. *Id.* (first citing *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir. 1987); then citing *In re Zuniga*, 714 F.2d 632, 642 (6th Cir. 1983), cert. denied *Zuniga v. United States*, 464 U.S. 983 (1983); and then citing *Mann v. U. of Cincinnati*, 824 F. Supp. 1190, 1199 (S.D. Ohio 1993)). The court also noted that other federal courts have “echoed the Sixth Circuit position.” *Id.* at 376–77 (first citing *Inmates of N.Y. State with Hum. Immune Deficiency Virus v. Cuomo*, No. 90-CV-252, 1991 WL 16032 (N.D.N.Y. Feb. 7, 1991); then citing *Rodriguez v. Coughlin*, No. CIV-87-1557E, 1989 WL 59607 (W.D.N.Y. June 5, 1989); then citing *Doe v. Meachum*, 126 F.R.D. 452 (D. Conn. 1989); then citing *Plowman v. U.S. Dep’t of Army*, 698 F. Supp. 627, 633 n.22 (E.D. Va. 1988); then citing *Doe v. Coughlin*, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988); then citing *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff’d* 899 F.2d 17 (7th Cir. 1990); and then citing *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)).

222. *Id.* at 376–77.

223. *Id.* at 379.

B. *Procedural Contexts: Not Your Typical Constitutional Right*

Procedurally, the right to informational privacy frequently arises differently than classic civil rights (including the right to decisional privacy substantive due process cases). It tends to be litigated and discussed not as the main focus of a distinct lawsuit or pursuant to well-trodden paths of constitutional litigation, such as Section 1983 lawsuits or suppression proceedings in the Fourth Amendment context. Rather, it frequently arises in the interstices of cases, in discovery disputes and enforcement proceedings that may never even be the subject of final, appealable judicial decisions. The practical impact of the right to privacy jurisprudence may thus be easily underestimated and hard to accurately measure.

In a number of the cases that form the core binding precedent at the circuit court level, the informational privacy right was litigated more traditionally, as the key subject matter of a lawsuit. Take, for example, two key Sixth Circuit opinions: *Bloch v. Ribar*, in which the Sixth Circuit held that publicizing the details of a rape violated the victim's constitutional right to informational privacy in the context of a lawsuit brought under 42 U.S.C. § 1983,²²⁴ and *J.P. v. DeSanti*, in which the court held that a statutory regime involving the widespread sharing of juvenile "social histories" did not unconstitutionally burden an informational privacy right.²²⁵ In both of these cases, the alleged privacy violation was the crux of a cause of action brought under Section 1983.

In other cases—and in the context of abortion medical records, discussed more below—the practical import of a privacy right is often less directly the subject matter of the overarching litigation. Rather, courts and litigants invoke informational privacy rights in the context of discovery disputes and subpoena enforcement efforts during other litigation. Several examples of such cases are discussed below.²²⁶ Thus, the right to informational privacy as a practical matter has been developed substantially in contexts such as balancing tests under various Federal Rules of Civil Procedure. This may partially explain why the jurisprudence identifying constitutionally significant informational privacy interests tends to fly under the radar.

In litigation, privacy for abortion medical records has generally been vindicated, not through civil rights litigation or separate causes of actions, but rather in the interstices of litigation, via wonky discovery disputes and evidentiary rulings that tend to not even lead to reported decisions. Even without relying on a constitutional right to informational privacy, a number of courts have invoked the powerful societal norms around medical and sexual

224. *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998).

225. *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981).

226. See, e.g., *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530, at *2 (S.D.N.Y. Mar. 18, 2004); *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004); *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft*, No. C 03-4872, 2004 U.S. Dist. LEXIS 3383, at *1 (N.D. Cal. Mar. 5, 2004).

privacy in an array of procedural settings to prevent medical records from being exposed in litigation. Several courts have stressed the lived reality of the injury caused by exposure of the excruciatingly intimate, obviously private, and politically loaded information that can be in such records. In various balancing tests under the Federal Rules of Civil Procedure, courts have accounted for these realities both under the constitutionally protected right and simply because of a deep appreciation for the extent of the harms exposing those records can cause.

A number of courts have declined to enforce subpoenas for abortion-related medical records—even de-identified ones and even where those records would be relevant to the question at hand—pursuant to their discretion under the Federal Rules of Civil Procedure. In so declining, those courts have stressed the extraordinarily invasive nature of such requests; the extraordinarily private information that they contain; and the realistic fear, anxiety, and danger that release of those records could pose for the women whose records are at issue.

A quick primer on some of the relevant Federal Rules is in order, for those readers who are not intimately familiar with the mechanics of the discovery phase of litigation. Rule 26, which sets forth general discovery requirements, describes the general “Scope and Limits” of discovery as follows:

(1) *Scope in General.* Unless otherwise limited by court order . . . : Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, *and whether the burden or expense of the proposed discovery outweighs its likely benefit.*²²⁷

Rule 26 further defines a number of situations where the court *must* limit discovery, such as if it is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”²²⁸ And crucially, it also grants courts the discretionary authority, upon a finding of good cause, to issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”²²⁹ That order can include, among other things, forbidding the disclosure or discovery altogether.²³⁰

These Rule 26 discovery provisions work in tandem with the rules for enforcing discovery requests and quashing subpoenas, most importantly Rule 45. Rule 45 includes an independent basis for limiting discovery as a practical matter—courts are required to quash subpoenas that subject persons to an

227. FED. R. CIV. P. 26(b)(1) (emphasis added).

228. *Id.* at 26(b)(2)(C)(i).

229. *Id.* at 26(c)(1).

230. *Id.* at 26(c)(1)(A).

“undue burden.”²³¹ This provision is generally construed to require quashing subpoenas whenever complying would impose a burden that exceeds the benefit of admitting the evidence.²³²

Several courts have relied on these provisions to prevent abortion medical records from being shared with opposing parties or entered into litigation.²³³ While the cases are sparse by quantity and the opinions arise in relatively high-profile litigation, that is perhaps unsurprising given that these are, at core, discovery disputes—a context where the large bulk of decisions do not make their way into reported opinions.

For example, in the *Hodges* decision discussed above,²³⁴ where the Ohio district court concluded that abortion medical records were constitutionally protected, the court’s decision took the procedural form of an order denying a motion to compel discovery.²³⁵ The constitutional discussion was ultimately part of the court’s conclusion that requiring the production of those documents would violate the discovery rules’ proportionality principles embodied in Rule 26.²³⁶ The district court’s analysis, which incorporated its conclusion that the records were constitutionally protected,²³⁷ framed its decision in terms of traditional Rule 26-type considerations: First, the production of the actual medical records would have been overly burdensome as a logistical matter, especially given that statutorily mandated abortion complication reports and plaintiff-provided summaries of particular cases could supply much of the information defendants sought.²³⁸ Second, and most importantly for present purposes, the court concluded that the patient’s interest “in keeping their medical records private” (even though those records were de-identified) was greater than the defendant’s interest in using those records in the litigation.²³⁹ The court’s constitutional analysis under *Whalen* was part of this second Rule 26 inquiry.²⁴⁰

231. *Id.* at 45(d)(3)(A)(iv).

232. *Id.*

233. *See, e.g.*, Nw. Mem’l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004) (citing FED R. CIV. P. 45).

234. *See supra* text accompanying notes 205–17.

235. Planned Parenthood Sw. Ohio Region v. Hodges, No. 1:15-cv-00568, 2019 WL 1439669, at *6 (S.D. Ohio Mar. 31, 2019). The substantive principles guiding discovery are set forth in Rule 26; the rules for moving to compel discovery are in Rule 37. FED. R. CIV. P. 26, 37. Procedurally, this was an order denying a Rule 37 motion to compel discovery in which the court was considering the substantive standards from Rule 26 (as well as the constitutional principles discussed above).

236. *Hodges*, 2019 WL 1439669, at *5–6.

237. Notably, the district court judge, Honorable Michael Barrett, was a George W. Bush appointee. JOAN BRADY & LINDSAY POTRAFKE, FED. BAR ASS’N, JUDICIAL PROFILE: HON. MICHAEL R. BARRETT, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF OHIO 2, <https://www.fedbar.org/wp-content/uploads/2019/10/barrett-March13-pdf-3.pdf> [<https://perma.cc/V3CG-KMXXC>].

238. *Hodges*, 2019 WL 1439669, at *3–4.

239. *Id.* at *5–6.

240. One important factor that counseled against disclosure in *Hodges* was that an array of summaries and reports had already been handed over to the defendants, among other things, by virtue of reporting statutes related to abortion. *Id.* Depending on the litigation context—which can vary widely, as discussed

At least one other district court (in another circuit) has taken a similar approach: in *Planned Parenthood v. Ashcroft*, a district court in the Northern District of California denied a motion to compel discovery of an array of abortion-related medical records.²⁴¹ The court noted the constitutional right to informational privacy and then conducted a balancing test, in which it stressed the “extremely personal and intimate nature” of the information that might be included, as well as the “potential for injury to the relationship between patient and provider” that releasing the records could create.²⁴² The court concluded that the balancing required by the constitutional analysis counseled against release, and *also* concluded, as an independent ground for denying the motion to compel, that releasing the records would constitute an undue burden under the discovery rules.²⁴³ In so ruling, the court incorporated its analysis of the extent of the privacy imposition into its “undue burden” analysis.²⁴⁴

Other courts have relied on Rule 45, on its own, to protect abortion medical records. Most prominently, that was the route taken by the Seventh Circuit in a published opinion authored by Judge Posner.²⁴⁵ In *Northwestern Memorial Hospital v. Ashcroft*, the Seventh Circuit affirmed the district court’s decision to quash subpoenas for individual medical records that the federal government argued would be relevant to claims about the medical necessity of abortion procedures outlawed under the Partial-Birth Abortion Act.²⁴⁶ The district court concluded that the records were protected by HIPAA regulations and by an evidentiary privilege pursuant to Federal Rule of Evidence 501, which allows federal courts to recognize privileges under “[t]he . . . common law.”²⁴⁷ The court of appeals rejected that argument, and it also rejected an argument that the court should create a substantive physician–patient privilege under federal law.²⁴⁸ But in Rule 45, the court found the flexibility to do what these other

above—the balancing test might come out differently in the absence of easily available documents along these lines (though, of course, privacy advocates may not be terribly happy at the existence of these documents, which are not difficult to de-identify, either). But presumably such reports will exist in most litigation because nearly every jurisdiction requires similar reports.

241. *Planned Parenthood Fed’n of Am., Inc. v. Ashcroft*, No. C 03-4872, 2004 WL 432222, at *1 (N.D. Cal. Mar. 5, 2004).

242. *Id.* at *2.

243. *See id.* at *1.

244. *See id.* (noting that denial was based on irrelevance, undue burden, and imposition on the individual patients’ right to privacy, and that any of the three grounds would independently support its decision); *id.* at *2 (incorporating privacy concerns discussed in connection with constitutional balancing test into undue burden analysis).

245. *See* *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 932–33 (7th Cir. 2004).

246. *Id.*

247. FED. R. EVID. 501; *Nat’l Abortion Fed’n v. Ashcroft*, No. 04-C-55, 2004 WL 292079, at *2–3, *5–7 (N.D. Ill. Feb. 6, 2004), *aff’d sub nom.* *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004).

248. *Nw. Mem’l Hosp.*, 362 F.3d at 925–26 (concluding that HIPAA provides only a procedural mechanism for obtaining abortion records and rejecting argument that under HIPAA, an Illinois law protecting medical records should have been applied to the federal suit); *id.* at 926–27 (declining to recognize a new common law evidentiary privilege under Federal Rule of Evidence 501).

sources of law (in its view) did not: to quash the subpoenas and protect the medical records.²⁴⁹ The court ultimately quashed the subpoenas on the basis “simply that the burden of compliance with [the subpoenas] would exceed the benefit of production of the material sought by it.”²⁵⁰ Notably, the court reached this result without reliance on any constitutional right to informational privacy.

The key to the court’s decision was that it took a broad-minded, grounded, realistic view of the “burdens” imposed by the release of these records, evincing a willingness to interpret the federal rules’ balancing tests broadly enough to encompass such concerns and eschewing an interpretation that would limit the “burdens” to mere logistical or financial concerns. Though the *administrative* burdens to producing the records would have been “modest,” the actual burdens, the court concluded, would be far greater.²⁵¹ And the court was willing to consider burdens imposed both on patients and on physicians.

With respect to patients, the court explained, “[t]he natural sensitivity that people feel about the disclosure of their medical records—the sensitivity that lies behind HIPAA—is amplified when the records are of a procedure that Congress has now declared to be a crime.”²⁵² Accordingly, even though the records were to be de-identified, the court took exceedingly seriously the fear and anxiety that patients would experience about whether they would nevertheless be attached to the data.²⁵³ The court recognized that women would reasonably fear that redacted records would mean that “persons of their acquaintance, or skillful ‘Googlers’ . . . will put two and two together, ‘out’ the 45 women, and thereby expose them to threats, humiliation, and obloquy.”²⁵⁴ (This is especially striking given the rather significant advances in the ability to re-identify purportedly “de-identified” data since 2004.²⁵⁵) The court also noted a loftier type of injury, separate and apart from the concrete anxieties and fear the release might invoke, analogizing the “wound” caused by the release of records to the type of privacy injury that would occur if unidentified nude photographs of a woman were posted online.²⁵⁶

Posner’s analysis in *Northwestern Memorial* essentially undertakes the same analysis that other courts have taken under *Whalen*. That he did not expressly rely on the Constitution could be for any number of reasons—it is hardly unusual to avoid wading into a constitutional question when one’s

249. *Id.* at 933.

250. *Id.* at 926 (citing FED. R. CIV. P. 45(c)(3)(A)(iv)).

251. *Id.* at 927–29.

252. *Id.* at 928–29.

253. *Id.* at 929.

254. *Id.*

255. See Latanya Sweeney et al., *Saying It’s Anonymous Doesn’t Make It So: Re-identifications of “Anonymized” Law School Data*, TECH. SCI. (Nov. 12, 2018), <https://techscience.org/a/2018111301/> [<https://perma.cc/7TL9U-VBF5>], for an example relevant to the legal field.

256. *Nw. Mem’l Hosp.*, 362 F.3d at 929.

interpretation of statutes or rules will do the job. The opinion nonetheless suggests that the norms underpinning *Whalen* are sufficiently entrenched in our legal order so that they appear as a matter of common-sense normative reasoning.²⁵⁷ As for patients, the information in medical records—especially reproductive records, and even within that, perhaps reproductive records where an abortion or miscarriage is at issue—is not just whether there was an induced abortion. Rather, records also include information “of an extremely personal and intimate nature, including, among others, types of contraception, sexual abuse or rape, marital status, and the presence or absence of sexually transmitted diseases.”²⁵⁸ And this is on top of the exceedingly intimate social information that is increasingly recorded in medical records to reflect patients’ “social determinants of health,” which range from reported loneliness to family support to food access, domestic violence, and housing insecurity.²⁵⁹

The burden on patients is only heightened by the historic violence of anti-abortion advocates. Courts have emphasized that the history of violence and intensity of the historic rhetoric on abortion renders patients’ interests even greater than they might be with respect to other medical records.²⁶⁰ Judge Posner’s analysis stressed features of the abortion debate, that if anything have escalated post-*Dobbs*, including the fact that hostility to abortion “has at times erupted into violence,” including assassinations of physicians.²⁶¹ In short, women whose records are released—even if there are significant protections taken, like attempting to de-identify the information or subjecting it to a records request—will suffer a constellation of significant “wound[s]” that should be factored into the analysis.²⁶²

Releasing records also imposes burdens on providers. In *Northwestern Memorial*, the Seventh Circuit considered as one factor weighing in favor of quashing the subpoenas that the hospital risked losing the goodwill and confidence of its patients, especially those with sensitive medical conditions.²⁶³ Other courts have likewise recognized that medical-record disclosures impose a serious “chilling effect” on honest communications between patients and providers.²⁶⁴

257. See generally *id.*

258. Planned Parenthood Fed’n of Am., Inc. v. Ashcroft, No. C 03-4872, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004).

259. *Social Determinants of Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 [<https://perma.cc/TL37-N4BD>].

260. See, e.g., *Nw. Mem’l Hosp.*, 362 F.3d at 929.

261. *Id.*

262. *Id.*

263. *Id.* at 929–30.

264. Planned Parenthood Fed’n of Am., Inc. v. Ashcroft, No. C03-4872, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004).

C. Balancing in the Shadow of Dobbs?

There is enormous uncertainty around how informational privacy will shake out in future abortion-related cases. *Dobbs* changes both sides of the ledger in the balancing tests under *Whalen* and other contexts where abortion privacy may be at stake.

On the “benefits” side—the abortion-related records’s usefulness during litigation—*Dobbs* will heighten the interests. Under any balancing test, abortion-related records are of substantial “relevance” if the key question in litigation is: “Did this person get an abortion under X medical circumstances,” or “did this physician provide abortions to their patients?” The argument against disclosure in these cases is stronger than in the pre-*Dobbs* cases discussed above, which were generally challenges to the rationality and constitutionality of laws in which medical records were sought to show whether and how laws were rational.²⁶⁵ The question of what other information is available will also be key. In most states, even now, doctors are required to file reports on abortions and their complications with public health agencies, and the availability of those reports may make it easier to protect medical records.²⁶⁶

How any given court understands the “benefits” side of the equation may also depend on how the interests in prohibiting abortion are understood going forward. Some states may argue that criminal enforcement of abortion restrictions serves interests akin to preventing murder. In practice, the challenge with successfully using the right to informational privacy as a shield protecting abortion records will hinge upon the other factors in the balancing test. Under the Ninth Circuit test, for instance, factors like “(4) the degree of need for access, and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access” will be key.²⁶⁷ Most cases will involve a statute criminalizing abortion (whether it is focused on the patient or the provider) or authorizing civil suits, such as in the case of Texas’s S.B. 8.²⁶⁸ A sympathetic court may conclude, as the *Hodges* court did, that the information is so sensitive that it outweighs the need for access to investigate potential criminalized behavior.²⁶⁹ Indeed, in three different cases relating to the Partial-Birth Abortion Ban Act of 2003, the courts concluded that subpoenas for the medical records of patients were unenforceable in part

265. See, e.g., *Nw. Mem’l Hosp.*, 362 F.3d at 925.

266. Several of the cases discussed above note that much of the information sought can be gleaned from incident reports.

267. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2285 (2022).

268. See S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

269. *Planned Parenthood Sw. Ohio Region v. Hodges*, No. 1:15-CV-00568, 2019 WL 1439669, at *2 (S.D. Ohio Mar. 31, 2019).

due to the right to informational privacy.²⁷⁰ But a more reluctant court could well conclude that there is a right to informational privacy that protects abortion records but, like in *Whalen*, *Nixon*, and *NASA*, that prosecuting unlawful abortions justifies any particular governmental intrusion.

On the “burdens of disclosure” side—the arguments in favor of protected privacy—the practical stakes of disclosure for women are heightened in an era where abortion is not substantively constitutionally protected. Whether and how courts will consider burdens posed by states’ efforts to punish abortions in the analysis will likely vary widely, implicating potentially difficult questions about interstate comity beyond the scope of this project. But the bottom line is that there are indeed burdens.

And yet, if courts recognize the intensity of the patient and provider interests at stake, the fact that medical records may be plainly relevant need not be the end of the matter. Given the prevalence of abortion, miscarriages, ectopic pregnancies, and the need for other reproductive care, and so forth, a permissive approach to allowing discovery of medical records would allow fishing expeditions into these unbelievably sensitive records. Take S.B. 8 and similar statutory exceptions: If all someone needs to do is plausibly allege that a woman got an abortion (or a doctor provided one), and that is enough to gain access to her medical records, the effect would be essentially to authorize fishing expeditions into some of the most intimate of medical records. It may be that advocates could successfully argue that medical records do not sufficiently distinguish between “medically necessary” abortions and other abortions, meaning that the “benefit” of accessing these records is smaller than initially supposed. And advocates could perhaps argue that violating the privacy of medical records undermines the patient–provider relationship more broadly, making people more reluctant to seek necessary reproductive care even when they are not seeking “elective” abortions.

The strength of an argument under the balancing-test approach is all the greater if the target of litigation is the provider or other person besides the woman herself because it is unlikely that the woman would have an opportunity to object or participate in the litigation in such cases. In the litigation involving the “partial-birth abortion” ban, courts declined to enforce subpoenas for individual medical records in part for this reason.²⁷¹

The bottom line is that there is enormous uncertainty as to how courts will resolve balancing issues in the myriad situations where abortion-related medical records are likely to be at play in the coming era. We do not mean to be overly

270. *Nat’l Abortion Fed’n v. Ashcroft*, No. 03 Civ. 8695, 2004 U.S. Dist. LEXIS 4530, at *2 (S.D.N.Y. Mar. 18, 2004); *Nw. Mem’l Hosp.*, 362 F.3d at 932–33; *Planned Parenthood Fed’n of Am., Inc. v. Ashcroft*, No. C 03-4872, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004); see also Molly Silfen, *I Want My Information Back: Evidentiary Privilege Following the Partial Birth Abortion Cases*, 38 J. HEALTH. L. 121 (2005), <https://pubmed.ncbi.nlm.nih.gov/15968942/> [<https://perma.cc/5Y4Z-8S8L>].

271. See *Nw. Mem’l Hosp.*, 362 F.3d at 30.

sunny about the likelihood of success in any given litigation. As a practical matter, the balancing tests under both constitutional law and the various procedural rules where the issue is likely to arise vest significant discretion in judges. There will likely be room for judges who are skeptical about abortion-related rights specifically or a broad approach to substantive due process more generally to decline to apply the *Whalen*-style right in particular cases. That said, the arguments that those records are entitled to constitutional protection remain strong, despite the loss of *Roe*.

V. WHERE TO GO FROM HERE

Post-*Dobbs*, we are in a moment of enormous doctrinal upheaval and rapid technological change. While Justice Alito believed informational privacy has “nothing to do with” abortion privacy,²⁷² he is wrong: courts that confront abortion-related litigation will be faced with a morass of informational privacy questions, and people who seek reproductive care of all sorts are at risk of widespread exposure of their medical records. Fortunately, it turns out that there is significant doctrine throughout the courts recognizing that this type of informational invasion violates deep norms, including of a constitutional dimension.

This Article largely focuses on case studies related to abortion-related medical records as a particularly private form of potential information. But the development of post-*Dobbs* informational privacy law will be relevant not only to abortion, and not only to medical records. Any deeply personal information—from medical records to late-night Google searches—could be affected. The stakes are poised to be especially high in settings where deeply personal decisions are culturally or socially contested.

In this Part, we offer some tentative reflections about both abortion-related privacy and the role of courts more generally in this moment of flux.

A. The Sideline is Not an Option: Lower Courts' Role in the Further Development of the Right to Informational Privacy

As a practical matter, when it comes to the meaning of the Constitution as actually applied in our legal order, state and lower federal courts are not a mere sideshow to the Supreme Court. Unless and until the Supreme Court provides significantly more clarity or undertakes a wholesale revision of the right to informational privacy, the lower courts will continue to evolve this doctrine in the multitude of discovery fights and other litigation procedures. It can be easy to forget the practical import of these lower courts in constitutional development, especially the role of state courts, but they are poised to continue

272. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2269 (2022).

to play a central role in the development of both the laws and the norms surrounding informational privacy, in abortion contexts and beyond.

State courts are not just bound by federal constitutional law, as every 1L learns; they routinely apply and develop it, and the word of the state high courts on what the Constitution means will govern state courts' proceedings on those questions. This means that unless the Supreme Court expressly eliminates the *Whalen* line of informational privacy cases, state courts may continue to develop and apply the right to informational privacy as a relatively sturdy doctrine that can be used to push back on intrusive litigation or state action, including in the context of abortion. The same basic dynamic is true for lower federal courts. Under binding circuit precedent, the right to informational privacy exists, full stop, in just about every federal court. A right, albeit limited and sometimes a little ambiguous, to informational privacy is by and large the law of the land, and barring some dramatic further development, there is every reason to think it will continue to develop apace post-*Dobbs*.

Even if lower courts or other commentators are less optimistic than we are about the long-term direction of the informational privacy right at the Supreme Court level, they are not bound to follow prognostications about what the currently constituted Supreme Court will do or would do. They are bound by what the Court has actually held.²⁷³ The predominant interpretation of what the Court has said is that our constitutional order reflects a right to informational privacy. *Dobbs*, by its own terms, does not disrupt that right or pose any limitation to its development in the abortion context where courts have already found the informational privacy concerns to be of constitutional significance. There are, of course, practical limits; the informational privacy right is not absolute, and a court that used a right to informational privacy to, for instance, make it completely impossible to enforce a criminal prohibition on abortion would probably be inviting a successful certiorari petition. But it seems likely that there is room under existing law for courts to establish a very high standard for intruding into extraordinarily personal medical information short of that boundary.

Courts considering these questions about informational privacy, especially in abortion-related contexts or where abortion-related medical records are likely to be in play, face uncertainty and rapid change from multiple directions. The

273. We mean this point at a relatively high level of generality. There are generations worth of legal theory on what, precisely, counts as a holding that is binding, and what orientation lower courts should normatively take to interpreting the Constitution when they suspect that higher courts will ultimately go a different way. See Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 230 (2014) (finding that lower courts often define Supreme Court precedent broadly despite the classic distinction between holdings and dicta); see also Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 661–62 (2017) (taking issue with the binary paradigm that holdings are binding and dicta are not); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 260 (2010) (“Regardless of how one defines holding (and therefore dicta), it is clear that judges and lawyers routinely confuse the two. Most significantly, dictum is regularly elevated to holding.”).

legal landscape around abortion is in flux (to say the least). At the same time, the law and norms around informational privacy are wildly unsettled and changing, as informational capitalism makes it possible to aggregate and analyze huge swaths of data that reveal our internal thoughts, decision-making processes, and intimate decisions, as well as reliable information about everywhere we go and everything we do in a typical day.

Historically, when it comes to privacy questions, courts have used rhetoric suggesting they are on the sideline, simply *reflecting* existing norms (around, for instance, reasonable expectations of privacy and so forth). Doctrinal tests often assume this reflective posture. For example, the Fourth Amendment protections only apply to searches. Currently, searches are defined under the *Katz* test, which considers whether an individual has a “reasonable expectation of privacy” in what is being searched.²⁷⁴ Courts routinely rely on social norms to inform their approach to that question and other privacy questions.²⁷⁵

To the extent courts in the coming era seek only to reflect norms, there are solid arguments that abortion records like those we discuss here should be well protected. As we have shown, under existing law, courts have already routinely protected abortion-related medical records. More broadly, in the Fourth Amendment context, for instance, while the *Katz* test has often been critiqued as inconsistent, unworkable, and tautological,²⁷⁶ a reasonable expectation of privacy is a standard that may benefit individuals seeking medical care, even when that care is criminalized. Medical records are considered intensely personal. Indeed, they are one of the very few types of personal records that are afforded statutory private protections in the United States via HIPAA.²⁷⁷ Because HIPAA has an exception for law enforcement, HIPAA alone cannot protect abortion records in the context of state criminal prosecution or statutorily authorized civil proceedings.²⁷⁸ But HIPAA itself is valuable because it indicates a social norm in favor of protecting medical privacy whenever possible.

But courts inevitably do more than just reflect the social norms as they exist. They have a role to play in shaping those norms, too, and in this moment of multiple uncertainties and rapid change, that seems truer than ever. The way courts approach these questions will shape not only the law but also the norms and expectations in the coming world.

274. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); see also DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 76–78 (2017).

275. Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 267 (2021); see also Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 743 (2019).

276. Tokson, *supra* note 275, at 747.

277. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 100 Stat. 2548 (1996).

278. Shachar, *supra* note 27.

For example, imagine that for the next decade, lower and state courts develop informational privacy law to robustly enforce informational privacy protections, allowing abortion-related information to make its way to litigants or government officials only upon strict showings of need. That would be a world where, as a practical matter, people who obtain abortions (or other potentially at-risk care, from assisted reproduction to miscarriage management) can expect robust protection for their informational privacy. And it would likely be a world where patients, providers, and others who are adjacent to such care would have meaningfully different expectations than they would in a counterfactual world in which experience suggested that deeply intimate information would be revealed to the state or bounty-hunters on only the barest showing of “relevance” or pursuant to broad administrative edicts. Further development of the right to informational privacy would not only benefit people seeking abortions and their physicians; it would also strengthen privacy protections for all patients, from those seeking politically controversial care such as gender-affirming care, substance use treatments, and HIV treatment, to those whose medical care is more routine but just as private. This trend may act as a self-reinforcing circle: as more robust legal protections are granted to our medical records, the cultural expectations of privacy around our (health and other) data will grow, in turn further substantiating the right to informational privacy.

B. Abortion Medical Records: Exceptional Privacy Stakes, Unexceptional Medical Care

Beyond allowing courts to flesh out (and thereby create the forward-looking norms around) the informational privacy right, casting protections for abortion in terms of the broader right to informational privacy may serve to de-exceptionalize abortion as commonplace, if culturally contested, medical care. Focusing on informational privacy draws attention to the enormously sensitive and personal content of the medical records at stake in abortion-related litigation and on the invasiveness of efforts to intrude on intimate medical care without belaboring more loaded conversations about abortion itself.

Despite being a relatively straightforward medical procedure, abortion has been treated by our legal system as something distinct from most other medical procedures. Since 2012, legal scholars have referred to the approach “in which abortion is singled out for more restrictive government regulation as compared to other, similar procedures” as abortion exceptionalism.²⁷⁹ For example, abortion exceptionalism motivated challenges to abortion access in the early days of the COVID-19 pandemic, such as limiting telehealth for abortion

279. Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 3 (2012).

services only and requiring clinics to suspend their practices.²⁸⁰ Abortion exceptionalism is not limited to conservative, red states such as Texas. For example, the Food and Drug Administration long imposed a Risk Evaluation and Mitigation Strategy (REMS) on mifepristone, a drug that is approved to terminate pregnancies within the first ten weeks.²⁸¹

Prior to *Dobbs*, the right to *decisional* privacy as articulated in *Roe* and later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁸² acted as a somewhat of a counterweight to abortion exceptionalism. As the *Casey* court noted, “the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it[.]” meaning that state regulations could not place an “undue burden” on an individual’s abortion decision.²⁸³ Pro-choice advocates could cite *Roe* and *Casey* for the then-undeniable proposition that an individual had a privacy right to make their own reproductive choices. Because *Dobbs* removed this firewall, abortion exceptionalism may run amok even in settings where the legality of abortion itself is not up for debate.

The importance of counteracting abortion exceptionalism is at its apex. Even if one thinks abortion is different from other forms of medical care in morally significant ways, it is provided *as* health care throughout our system and is closely bound up with uncontroversial forms of health care—managing miscarriages, treating complications, communicating about medication or anesthesia reactions, etc. Failing to protect abortion-related information risks chilling not only access to abortion even where it is legal, but also the provision of solid medical care and well-being of people who have been or could become pregnant. Accounting for the informational privacy interests at stake may help counteract abortion-exceptionalist rhetoric and perhaps even help make clearer the stakes of radical anti-abortion legislative efforts. The social norms around abortion are partisan and unlikely to help individuals in red or even purple states avoid prosecution. The social norms around medical privacy, however, are less partisan and may be more likely to help shield individuals and clinicians from state investigations.

In framing the appropriate level of informational privacy for abortion-related medical records, those who wish to preserve informational privacy will need to straddle a fine line between acknowledging the exceptional role that abortion plays in our social, political, and legal world, on the one hand, and avoiding the pitfalls of “abortion exceptionalism,” on the other hand. Abortion medical records, such as they are, are one particular subset of reproductive records and medical records more broadly. Additionally, many of the privacy

280. Carole Joff & Rosalyn Schroeder, *COVID-19, Health Care, and Abortion Exceptionalism in the United States*, 53 PERSPS. ON SEXUAL & REPROD. HEALTH 5, 5 (2021).

281. Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 628 (2022).

282. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

283. *Id.* at 877.

concerns that abortion medical records raise are non-exclusive to abortion but apply to all sorts of medical records. Abortion-related records, then, provide a discrete example of what would be at stake in the absence of meaningful informational privacy protections.

On the other side of the coin, it may be that the best way to protect such records in a politicized environment is to situate the question of how to protect them within broader informational privacy concerns in a world of increasing data aggregation and centralization. For purposes of coherence and readability, this Article has treated abortion-related medical records as a clearly defined category, but the reality is not so simple. Multiple pieces of a medical record, besides, say, the record arising from a procedure or prescription for medication itself, may indicate that a patient has had an abortion. (For instance, a provider's notes at a primary care visit might well mention an abortion if the patient brought it up. Or a rheumatologist may note at one visit that the patient is pregnant while a prescribing methotrexate, a treatment incompatible with pregnancy, a short while after in a subsequent visit.) Medically speaking, the category of "abortion" is even unclear; medical records typically refer to what we colloquially call miscarriages as "abortions" (and may, for instance, refer to a woman with much-grieved repeated miscarriages as a "serial abortionist"). The laws that now outlaw abortion are famously vague about what, exactly, constitutes a forbidden abortion (consider recently reported scenarios of ectopic pregnancies or pregnant patients rapidly becoming septic).²⁸⁴ This is just one reason that the concerns raised in this piece should be shared well beyond just those who have or believe they would consider having an "elective" abortion.

To the extent abortion-related records can be meaningfully separated out as a useful category for analysis, there are good reasons to provide protection for abortion medical records above and beyond the protections provided to run-of-the-mill data precisely because the social, political, and legal stakes of the information contained in those records can be so high. For many women, abortion records are an exceedingly private kind of information, even where abortion is legal—the many first-person accounts of abortions revealed for the first time in the lead-up to *Dobbs* only underscore how closely held many view

284. See Mabel Felix et al., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KKF (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services/> [https://perma.cc/E45G-PV89]; see, e.g., Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html>; Kate Zernike, *Five Women Sue Texas Over the State's Abortion Ban*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/us/texas-abortion-ban-suit.html#:~:text=Five%20women%20who%20say%20they,since%20the%20U.S.%20Supreme%20Court>; Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/>.

this information.²⁸⁵ This may be because of the intimate nature of the decision itself, which may reflect thorny questions about life aspirations, belief systems, or medical concerns. But it is also surely a product of the stigma and even physical risk that comes with being associated with abortion in our society. Reproductive history can be as sensitive as mental health, substance use, or sexual health information—all information that is commonly afforded heightened privacy protections. Moreover, as the doctrinal developments reflect, records related to abortion can reveal other deeply intimate pieces of information, ranging from sexual practices or identities to health status to religion.

CONCLUSION

The bottom line is that the right to informational privacy exists separately from the right to decisional privacy struck down in *Dobbs*. By expressly leaving the right to informational privacy intact, *Dobbs* is the next case in the *Whalen* line of jurisprudence—a line suggesting a wellspring of constitutional privacy that exists alongside, and distinct from, both the substantive due process caselaw on intimate decision-making and the Fourth Amendment. This wellspring of privacy has deep roots in our legal order; it appears in the jurisprudence of all federal circuits as well as in most state courts. That its appearance traverses across doctrinal divides and resists full specification only underscores the intuitive and cultural force of informational privacy as a freestanding constitutional value. Whatever else *Dobbs* is, it is also an invitation to take this value seriously—and for scholars and advocates to press the development of an informational privacy jurisprudence that survives, and to some extent counteracts, the erosion of decisional privacy.

What is more, the example of medical privacy—and privacy around abortion, in particular—brings into focus the extent to which privacy is crucial to our constitutional order. Absent protection for informational privacy, litigation around abortion has the potential to undermine the privacy for medical records in general. Extraordinary statutes like Texas's S.B. 8, which essentially deputizes *anyone* to weaponize the civil system against those who seek abortions and related medical care—vigilantes, activists, ex-boyfriends, feuding neighbors—portend a near-future litigation environment in which fishing expeditions and social surveillance threaten to become the norm. Treating abortion medical records as the extraordinarily private documents they are, regardless of the constitutional status of the underlying substantive right to

285. See Brief Amici Curiae Advocates for Youth, Inc. and Neo. Philanthropy, Inc. in Support of Respondents at 21, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“Having an abortion was the only way to keep my relentless abuser away from me and my son. I . . . took the leap of confiding in my father. . . . He supported my decision and we kept it a secret from the rest of my family. . . .”).

abortion, is one avenue for keeping that future at bay. To be sure, further efforts for statutory privacy are certainly warranted and well-taken. But advocates would be remiss to overlook the existing protections that our legal order already enshrines.

Ultimately, the upshot here is stark, but not fatalistic. As our constitutional order becomes increasingly unprotective of decisional privacy, it can still protect informational privacy. This Article has sketched a preliminary vision of what it would mean to take the constitutional commitment to information private seriously: As seriously as lower courts and state courts have for decades. Now is the time, with *Dobbs* fresh in our collective minds, for scholars and advocates to think creatively to bring that commitment to life.