What Overturning Roe v Wade May Mean for Assisted Reproductive Technologies in the US

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The leaked majority opinion in Dobbs v Jackson Women’s Health Organization,1 which many perceive to be very close to the final majority opinion the US Supreme Court will likely issue, would overrule Roe v Wade and essentially strip away any special federal constitutional protection for abortion in the US. Going forward, state regulation or even full prohibition of abortion, will not violate the Constitution unless the state lacks a “rational basis” for the law, the lowest possible hurdle and one that will be cleared easily by state legislatures.1 Even though much of the world’s attention is understandably focused on the implications for abortion, it is also important to consider the collateral consequences for assisted reproductive technologies in the US.

Across the US there exists a wide range of state laws (statutory and common law) regarding assisted reproductive technologies. For example, California courts essentially enforce agreements involving gestational surrogacy, whereas Nebraska treats such agreements as void and unenforceable and Michigan treats the creation of a commercial surrogacy agreement as a felony.2 When couples divorce with embryos in frozen storage, states vary on whether they will enforce agreements as to disposition of the embryos, and whether, in the absence of such agreements, they will permit the individual seeking to procreate with the embryos go forward or favor a so-called right not to procreate.2

Perhaps most closely tracking abortion, Louisiana treats “a viable in vitro fertilized human ovum” as a “juridical person,” whereas a similar Kentucky statute is limited to activities at public facilities.2 New state legislation that seeks to restrict in vitro fertilization (IVF) is easy to imagine. Germany, for example, prohibits the creation of more than 3 embryos per IVF cycle as a way to avoid embryo destruction.2 Could a state go further and prohibit IVF altogether?

The leaked opinion in the Dobbs case explicitly states that “to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right” and that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion” after sentences that reference the Supreme Court’s pre-Roe constitutional cases regarding a constitutional right to use contraception.1 But on its face, the key piece of the reasoning of the Dobbs decision, that a “right to abortion is not deeply rooted in the Nation’s history and traditions,”1 would seem to apply with even more force to IVF, which was first used in the US in 1981, after Roe v Wade—and certainly was not present at the time of the framing of the Fourteenth Amendment (1868).

Moreover, in explaining why other rights with a common intellectual origin as Roe are not automatically swept aside, Justice Alito’s leaked opinion states: “What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is [that]...abortion destroys what those decisions call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’”2 Unlike a right to interracial marriage (one of the other comparator cases listed by the Court), this distinction may leave IVF on the wrong side of constitutional protection.

A future Supreme Court opinion might easily group embryo destruction as more like abortion because of its involvement with the destruction of “potential life.” If anything, it is easier to see how the Supreme Court might reach such a decision because there is not a countervailing claim to a woman’s gestational bodily autonomy raised by, for example, a prohibition on IVF.

Clinical aspects of IVF make it vulnerable to restrictions in the name of embryo protection. Data collected by the US Centers for Disease Control and Prevention reveal that virtually every IVF clinic in the nation provides embryo cryopreservation services,3 an essential adjunct to treatment when more than 1 or 2 embryos are produced in a single cycle. In addition, nearly half of all IVF cycles in the US involve preimplantation genetic testing, in which cells are biopsied from a developing embryo to determine the health of any resulting child.4 Both cryopreservation and preimplantation genetic testing often result in embryo discard, either because patients no longer wish to procreate with stored embryos or because test results reveal genetic abnormalities potentially associated with negative health outcomes.

Although both technologies promote healthy pregnancies and offspring, neither can reasonably be categorized as prioritizing potential life over the needs and desires of the patient. Thus, laws restricting or even prohibiting embryo freezing and preimplantation genetic testing could survive constitutional challenges under a post-Roe rubric. In fact, the proposal to ban abortion from the moment of fertilization, as recently advanced...
in Oklahoma, calls into question the unrestricted access to any assisted reproductive technology in which an embryo is harmed or deprived of the opportunity for live birth.³

For these reasons, post-Roe, it will be very difficult to argue for a constitutionally protected right to use various forms of assisted reproductive technologies. How concerned should this make prospective parents seeking to use these technologies and the physicians and others who provide them? In the almost 50 years between Roe and Dobbs, there are hardly any federal cases holding that state action restricting assisted reproductive technologies violates the constitution. A 2002 Utah federal district court opinion declared part of Utah’s surrogacy law unconstitutional and a 1990 Illinois federal district court opinion that found portions of the state’s abortion law were unconstitutionally vague because of its potential reach into IVF embryo transfer.⁴,⁵

Beyond these 2 opinions, both by lower courts without much precedential value, some cases have referenced a potential constitutional right to use assisted reproductive technologies but not actually holding that such a right exists.⁶ What this means is that while Dobbs signals a Supreme Court unlikely to recognize constitutional rights to use assisted reproductive technologies going forward, there is no established body of law offering such protection, which is quite different from abortion.

What does this mean for the future? It is possible that some states have not yet restricted IVF or other forms of assisted reproductive technologies because of a belief that the Constitution restricts them from doing so. If so, the Dobbs decision will reassure them that they may go forward. It seems more plausible, though, that many states have not yet restricted assisted reproductive technologies simply because the politics are different. The constituencies, who have pushed for restricting abortion and have used the abortion issue to energize their base, seem to have less interest in restricting IVF or other types of assisted reproductive technologies. Even for religious voices that oppose both abortion and IVF, the intensity of their political preferences seem much weaker when it comes to assisted reproductive technologies.

A good example of this phenomenon is the defeat of the Personhood Amendment in Mississippi, which was on the ballot in November 2011. Although the amendment’s language, aimed primarily at abortion, initially had significant support, the data suggest that this support waned when voters became concerned regarding the amendment’s potential for restricting IVF.⁷ According to a 2019 report,⁶ births resulting from IVF accounted for an estimated 2 of every 100 children born in the US, making assisted conception a somewhat common practice that touches numerous US families.

For this reason, going forward, as in the pre-Dobbs era, it will be the political and not the constitutional considerations that will hold states back from seeking to restrict or prohibit IVF or other types of assisted reproductive technologies. The Mississippi Personhood Amendment episode suggests a different concern in that state legislation using the terms fertilization or conception when seeking to prohibit abortion may inadvertently end up restricting assisted reproductive technologies as well or at least creating uncertainty as to what activities are rendered unlawful.

Abortion is intended to end a pregnancy, whereas IVF is used to bring about a pregnancy, but legal protections for both are now threatened if the leaked Dobbs opinion becomes law. As with abortion, this may be a moment for federal or state legislative efforts to work to better secure reproductive justice.