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Anti-abortion demonstrators and abortion-rights activists demonstrate outside the Supreme Court in Washington on Saturday, June 25. (AP photo: Jose Luis Magana)

Minnesota legal scholars explore the post-Roe landscape

Minnesota legal scholars deconstruct Supreme Court's ruling

By: Laura Brown June 29, 2022

On Friday, June 24, the U.S. Supreme Court reversed *Roe v. Wade*, ending the constitutional right to abortion that had existed in America for nearly 50 years. While Minnesota will be a safe haven for those seeking abortion care — as Gov. Tim Walz has signed an executive order to shield abortion patients and providers — the ruling in *Dobbs v. Jackson Women's Health Organization* could have unintended, confusing and divisive legal consequences.

Three of Minnesota's best legal minds — Jill Hasday, professor of law at the University of Minnesota Law School; Laura Hermer, professor of law at Mitchell Hamline School of Law; and Michael Steenson, of Mitchell Hamline — weighed in on what may result from this seismic decision.

From left: Jill Hasday, Laura Hermer, Michael Steenson

Q: How can a state that claims a woman cannot travel to another state for an abortion prove that she did not happen to naturally miscarry on a short trip to a state where abortion remains legal? Would it be permissible for the state to use other techniques in furtherance of this aim?

Hermer: Enforcement is a big question. How aggressive will states become in surveilling their residents? What backlash might they experience from aggrieved residents who might become tired of being spied on and required to document and explain their

Hasday: The Supreme Court's decision overturning *Roe* has triggered waves of legal uncertainty. All of these questions about the scope of anti-abortion laws and their enforcement, including across state lines, will be fought out in the months and years to come. The answers are likely to change over time and vary between states.

Q: Are women going to be liable for inducing abortions at home?

Steenson: I don't think this is likely. While there have been prosecutions in the past, enforcement actions are more likely to target providers of abortion and those who aid and abet abortion. [South Dakota] Governor [Kristi] Noem recently said that persons obtaining abortions would not be targeted.

Hermer: While most states don't presently criminalize people for self-inducing an abortion, it is entirely possible that some of the more aggressive states will consider taking this route, especially if they become frequently unable to prosecute or otherwise hold liable health care providers and others, likely acting from outside their jurisdiction, who assist.

Q: How is the ruling going to affect people trying to build families through artificial insemination—specifically, in vitro fertilization?

Hasday: If a state defines life as beginning at fertilization, it will be extremely difficult (perhaps impossible) to pursue IVF in that state.

Steenson: This is likely to be a very difficult area. One of the striking things about Justice [Samuel] Alito's opinion in *Dobbs* is the impact of the court's adoption of rational basis review as the standard of review in cases involving regulation of abortion. Rational basis review requires a legitimate government interest. The court stated that "respect for and preservation of prenatal life at all stages of development" is a legitimate government interest. Applied to IVF, government would have latitude to regulate.

Hermer: The exigencies of IVF were a major reason some of the earlier state personhood amendments didn't pass when they went before the voters. Some states have sought to circumvent this problem by expressly including only *in utero* products of conception. It is possible that, post-*Dobbs*, some states that ban or severely restrict abortion may expressly except the selective reduction of multiple pregnancy, but I would be surprised to see this because the present push to ban abortions is grounded on the theory that fetuses, no matter the circumstances of their creation, are deserving of life if not also all the other rights of born children. We may also see more states adopt Louisiana's prohibition against the destruction of embryos created through IVF.

Q: Now that *Roe* has been overturned, are other rights in jeopardy?

Steenson: It's important to note that the position Justice [Clarence] Thomas took on fundamental rights is based on his conclusion that the issue should be analyzed not under the substantive due process clause of the 14th Amendment, but rather, the Privileges or Immunities Clause. Justice Thomas would eliminate all substantive due process rights. Justice Alito's opinion in *Dobbs* specifically distinguished other fundamental rights cases, including *Obergefell v. Hodges* (2015) (same-sex marriage), *Loving v. Virginia* (1967) (interracial marriage), and *Griswold v. Connecticut* (1965) (contraception). He distinguished those cases on the basis that they did not involve the destruction of potential life. Justice [Brett] Kavanaugh's concurrence specifically noted that those decisions would not be affected by the *Dobbs* decision. To be clear, other substantive due process rights should not be affected by *Dobbs*.

Hasday: In reasoning about what liberty the 14th Amendment to the U.S. Constitution protects, the *Dobbs* majority looked to 1868, the moment when the 14th Amendment was ratified. The court asked: If a plaintiff had brought a 14th Amendment challenge to an anti-abortion law in 1868, would that challenge have been successful? If the constitutional challenge would have been unsuccessful in 1868, then the Supreme Court argued in *Dobbs* that the constitutional challenge should be equally unsuccessful today. Under that mode of reasoning, many 14th Amendment precedents are vulnerable, including decisions on same-sex marriage and access to contraception.

Hermer: The majority emphasized that the (now-former) federal right to an abortion can be distinguished from other rights involving sex, marriage, and family that are based in the right to privacy in that abortion destroys fetal life (see, e.g., slip op., at 32), whereas the other rights don't. Justice Kavanaugh in his concurring opinion states that "[o]verruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents." (opinion of Kavanaugh, J., slip op. at 10). The italics won't save *Obergefell*, *Lawrence*, *Eisenstadt*, or *Griswold*, all of which now appear ripe for overruling by activist states that care little about their residents' freedom to decide the course of their own lives. The problem is the reasoning the court employed in its substantive due process analysis. If the court constrains itself to considering only what the law expressly protected in and around 1868 in determining "what the *14th Amendment* means by 'liberty,'" (slip op., at 14), then, once an emboldened activist state decides to enact a law, say, criminalizing sodomy, we can be pretty sure how the analysis will go. As for how far down the line of precedent the court will go, I don't know. It might refrain at least for now from invalidating a state law prohibiting interracial marriage.

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