The legal reasoning behind Roe v. Wade's potential reversal

By SEAN FINE

A draft Supreme Court opinion would, if it becomes final, end the 50-year-old nationwide right to an abortion in the United States. Justice writer Sean Fine explains the reasoning of the leaked first take of Justice Samuel Alito's majority opinion, and why it is sharply at odds with Canadian approaches to constitutional interpretation.

How big a reversal to abortion rights would this opinion be, if it holds up in a final ruling?

A complete reversal. The 1973 Roe v. Wade majority ruling established that a woman's right to privacy includes the right to choose an abortion, up until the point of fetal viability, under the 14th Amendment of the U.S. Constitution. "In general, the idea of the due-process clause of the 14th Amendment is that there are some rights that are so essential to being a free person, that the government can't take them away," said Jill Hasday, the Distinguished McKnight University Professor and Centennial Professor of Law at the University of Minnesota Law School.

In 1992, in Planned Parenthood v. Casey, the court said government cannot place an "undue burden" on the right to choose.

The Alito opinion said abortion is a matter for legislators, not judges.

How did Justice Alito arrive at such a different conclusion than Roe and Casey?

The U.S. approach is to look at the country's law and history to determine whether an aspect of life is a fundamental liberty worthy of protection under the 14th Amendment. But it all depends on the questions the judges ask.

In Roe and Casey, judges asked whether the court had connected marriage choices (such as interracial marriage) and contraceptive use to liberty. The answer was yes.

They asked whether an unwanted pregnancy could lead to unwanted children and a distressful future. Justice Alito asks a narrower question. Was there an abortion right in previous times, such as when the 14th Amendment was ratified in 1868?

"He's looking back to a historical period when women are denied the vote and, more generally, almost any legal rights," Prof. Hasday said. "And he's saying that's what the Constitution is embedding for all time."

Do Canadian judges use similar approaches?

No.

"Courts define a constitutional right's content on the basis of its purpose, not its historical origins and traditional conceptions of it," said Joel Bakan, who teaches at the University of British Columbia's Allard School of Law.

University of Ottawa law professor Carissima Mathen said practices predating the 1982 Charter of Rights and Free-
doms "generally are not seen as relevant to the scope of the individual rights and freedoms. And there is a strong tradition in Canadian constitutional interpretation known as 'living tree' or 'progressive interpretation,' which explicitly rejects the concept of rights frozen to a particular moment in time."

What does Justice Alito say about abortion as an equality issue?

He rejects it entirely. The 14th Amendment has an equal-protection clause. Challenges to laws brought under this clause, for instance by women or racial minorities, require judges to give strict scrutiny to government action.

But the 1973 ruling in Roe v. Wade did not mention equality. Why?

Because, Prof. Hasday said, it was just two years earlier that the court began to apply equal protection to women.

The year after Roe, the court decided that discrimination against pregnant women was not a form of sex discrimination. (The Canadian Supreme Court made a similar ruling in 1978, but reversed itself in 1989: "It is a basic biological fact that only women have the capacity to become pregnant.") In Casey, the U.S. Supreme Court spoke of abortion as an equality issue, connected to women's economic and social participation in society, while still placing the right to abortion in the due-process clause. Justice Alito says a state's regulation of abortion is "not a sex-based classification" under precedent.

On what basis, then, could new abortion restrictions be challenged?

That could only happen, Justice Alito says, if a state lacked a "rational basis" for thinking the restrictions would serve legitimate state interests, such as the protection of fetuses. That is not a high bar; in fact, it is the lowest standard of justification a state can be asked to meet, Prof. Mathen said.

"Unless the law is arbitrary or in bad faith, it will pass rational basis."

In Canada, Prof. Bakan said, any restriction on abortion would be a limit on the Charter right to security of the person, and have to meet a much more stringent standard. It would have to accord with principles of fundamental justice and minimally impair the right, and its benefits would need to outweigh its harms.

What does the Alito approach mean, in practice, for the right to an abortion in the U. S.?

It would no longer be a constitutional issue. Justice Alito would return the authority over abortion to the "people and their elected representatives." Twenty-six states asked the court to overturn Roe and Casey. More than a dozen states have so-called trigger laws - restrictive abortion laws that will take effect if Roe falls. The U.S. would become a patchwork of abortion laws.

What are the implications for women who leave their state in search of an abortion?

A proposed Missouri law would make it illegal to help anyone to obtain an abortion in another state, said Aziz Huq, the Frank and Bernice J. Greenberg Professor of Law at the University of Chicago. Enforcement would be put in the hands of private citizens, who could sue for damages.

Other states are also proposing to penalize women who seek an out-of-state abortion, he added, drawing an analogy to fugitive slave laws: Blacks moving across state lines were presumed to be fleeing slavery and were vulnerable to private or state violence.

"You're seeing this effort on the part of red [Republican] states to treat women's bodies as if they are their jurisdiction - as if they are sovereign over women's bodies."

What are the implications of Justice Alito's frozen-in-time approach for other rights?

Justice Alito differentiates abortion from gay marriage (which he dissented on in 2015), contraception and interracial marriage: Only abortion raises a "critical moral question" involving an "unborn human being." (The term "unborn human being" used in the Mississippi law is being challenged at the Supreme Court. That law bans abortions after 15 weeks of pregnancy). Justifying abortion through broad appeals to autonomy could be a licence, he says, for declaring fundamental rights to illicit drug use or prostitution. This statement is "him indicating that Obergefell is illegitimate," said Prof. Hasday, referring to the 2015 same-sex marriage ruling.

Other privacy rights could fall, said Richard Albert, the William Stamps Farish Professor in Law at the University of Texas at Austin School of Law: "Everything is on the table." In Canada, the courts have granted constitutional protection to sex work and the use of illicit drugs.

So has Canada's Supreme Court de-
clared abortion to be a woman's right?

When the court struck down the criminal law on abortion in 1988 in the Morgentaler case, it did not declare abortion a right, and did not preclude Parliament from imposing restrictions. A subsequent law criminalizing abortion died in a tie vote in the Senate, and ever since abortion has been treated in law as a medical matter; it has become a no-go zone for the major political parties.

Restrictions on abortion would come up against protections of personal security, liberty and equality, Prof. Mathen said. She believes that the right to reproductive autonomy would tend to be seen by Canadian courts in the same manner as other deeply personal decisions cited in Roe and Casey.