Senate Democrats worry Roe draft puts other rights at risk

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By Charlie Cook

After the draft opinion that would overturn *Roe v. Wade* leaked this week, Senate Majority Leader Chuck Schumer warned Democrats that "there is more to come."

"The question is, what will these Republicans—these right-wing Republicans—target next?" Schumer said Wednesday.

Senate Democrats have spent the week asking themselves the question of what other Supreme Court decisions could be in jeopardy beyond *Roe*. That isn't because the decision to overturn *Roe* itself is surprising—the Court's lean is 6-3 conservative and states across the country have been passing a flurry of antiabortion laws—but rather, the language and arguments in the draft indicate possible trouble for other key cases.

The 98-page draft, first reported by *Politico* on Monday, was penned by Justice Samuel Alito. In it, he draws into question the scope of protections for unenumerated rights, or rights the Constitution protects even if they're not expressly mentioned in the written text.

"[Alito is] saying that abortion isn't mentioned in the Constitution, so it's not explicitly protected, nor is the broader right to privacy," said Bernadette Meyler, a Stanford Law professor.

The Supreme Court applied a constitutional right of protection and privacy to a woman's ability to have an abortion in its 1973 *Roe* decision.

Alito argued that the decision must be overturned because abortion is not a right explicitly stated within the Constitution and "is not deeply rooted in the Nation's history and traditions."

"[Alito] is saying that there is no basis for thinking that the due-process clause of the 14th Amendment would protect a right to abortion because states did not protect that right at the time the 14th Amendment was ratified," Meyler said. The 14th Amendment states that citizens have rights to due process and equal protection under the law.

Alito's logic has raised concerns that precedent could be set and used on a range of issues, including marriage equality, right to contraceptives, and more. Alito claimed his opinion was exclusive to abortion and should not "be understood to cast doubt on precedents that do not concern abortion."

Lisa Ikemoto of UC Davis School of Law said that the draft opinion "indicates that he thinks the whole idea of substantive due process is wishy washy, that it's subjective, that it's made from whole cloth."

"If that's true, then the line of cases that led up to *Roe* and have followed since 1973 also seem like they might be fair game for either narrowing down substantially in scope of the protections they provide or eliminating altogether," Ikemoto said.

Meyler, Ikemoto, and other law experts who spoke to *National Journal* said other rulings that could be at risk include 2015's *Obergefell v. Hodges*, which guaranteed same-sex couples the right to marriage; the 1967 *Loving v. Virginia* ruling that legalized interracial marriage; and the 1965 *Griswold v. Connecticut* decision, which ruled that the Constitution protects the right to contraceptive usage.

Though the rights established in these cases are not explicitly mentioned in the Constitution, they are associated with personal autonomy, privacy, equality, and dignity.

> The concerns that contraception and same-sex marriage could also be considered not "deeply rooted" in American tradition reverberated throughout the halls of Congress in the wake of the draft's release.
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> "When the Court starts the opinion by tossing out *Roe* because it claims there is not a long, historic precedent for protection of abortion, then where will they draw that line?" Sen. Elizabeth Warren told *National Journal*.

“Could the same be said about same-sex marriage? About access to contraception? About interracial marriage? About sex outside marriage?” added Warren, a former law professor. “There’s a lot potentially on the table.”

Sen. Angus King said the language regarding unenumerated rights and the foundation of American tradition was “very disturbing” as it would undercut some of those other Supreme Court cases.

“The Supreme Court in this opinion … said if those [initial rights] are not listed, they've got to be 'deeply rooted' in American history. What that means is if they weren't in the heads of a bunch of middle-aged white men in 1787, you can't protect them,” King said, noting the Framers weren’t thinking of issues like same-sex marriage or abortion.

“It's a profoundly reactionary doctrine that means that our Constitution is unable to accommodate progress and development in our moral and ethical views of what's important in the world,” said King, an independent who caucuses with Democrats.

Meyler agreed, saying, “If you look at any kind of legislation that discriminates against disadvantaged groups, historically, you won't find that a lot of states were protecting their rights … because that's the whole point.”

Of those cases possibly in jeopardy, Lee Strang, the John W. Stoepler professor at the University of Toledo College of Law, said *Obergefell* would potentially be the one most likely to be challenged.

“I could see there being a majority of the justices who thought that *Obergefell v. Hodges* was wrongly decided and that maybe it could be overruled,” Strang said, pointing to Chief Justice John Roberts’s dissent in that case.

Notably, Ikemoto pointed out, Alito’s opinion on *Roe* resembles his dissent in the *Obergefell* ruling, in which he also said the 14th Amendment's due-process promise only protects rights rooted in America's tradition and history.

"And it is beyond dispute that the right to same-sex marriage is not among those rights," Alito penned in that 2015 dissent.

“Justice Alito’s analysis, which looks at the laws in 1868 when the 14th Amendment was adopted, could lead one to believe that there is not a constitutional right to same-sex marriage,” Strang said.

Others have flagged the right to contraception as a potential major issue. Meyler said the case that “would be most clearly implicated by this decision would be the contraception case, *Griswold,* as it is the basis for *Roe*. That's where the right to privacy was first articulated. So that, definitely—I think it would be the next to fall.”

“It was very expansive language, and if the [*Roe*] opinion starts out by saying abortion isn’t in the Constitution—well, contraception or birth control is not in the Constitution,” Sen. Amy Klobuchar told *National Journal*.

Strang said the justices may try to differentiate the arguments made in Alito’s draft opinion from these other cases because of their claims that abortion “leads to the death of a human being, whereas artificial birth control doesn’t do that, same-sex marriage doesn't do that.”

But many lawmakers expressed concern that other rights could be at risk. King told *National Journal* he addressed the possibility of other cases being impacted at the Democratic Senate Caucus Lunch meetings this week.

“Alito tried to say, ‘Well, this doesn’t apply to these other cases.’ You can’t have it both ways," King said. "If you’re saying that reproductive choice is not in the Constitution and it’s not rooted in the traditions of America—if that’s your rationale, then you’ve got to logically say, ‘Well, how about gay marriage? How about interracial marriage? How about contraception? How about all these other things that we have developed as a body of law that essentially protects people’s privacy?’

“I’m very concerned. I think the rationale and the opinion is profoundly dangerous.”