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«What we're seeing now is a counterrevolution» – How the Supreme Court is changing American politics

The U.S. Supreme Court has overturned the 50-year-old right to abortion in the United States. In an interview with Peter Rásonyi, Zurich constitutional law expert Johannes Reich explains why this decision represents a constitutional upheaval.

Peter Rásonyi

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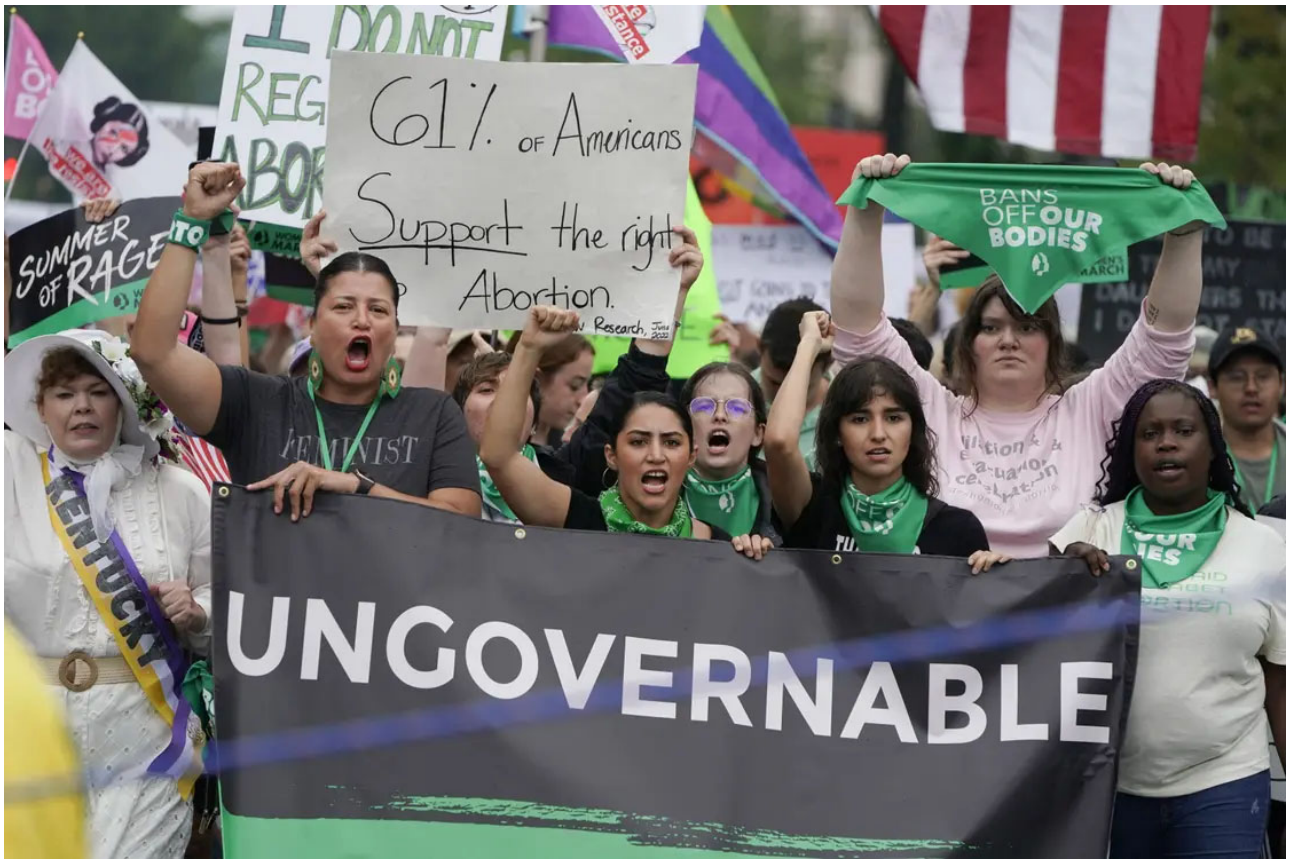

The U.S. Supreme Court's abrupt elimination of the right to abortion has caused a storm of outrage in the United States.

Joshua Roberts / Reuters

On June 24, the Supreme Court struck down the right to abortion that it itself enacted 50 years ago. This has caused an uproar in the United States. But the judges justified their decision in a very easy-to-understand way, by stating that the U.S. Constitution does not mention the issue of abortion anywhere. Therefore, the majority opinion said, the Supreme Court has no jurisdiction in this area. Mr. Reich, are you convinced by this line of argument?

Johannes Reich.
Frank Brüderli

The crucial question is the methodological one. Do we really understand the Constitution as the public supposedly understood it at the time the relevant amendments were written? At issue here is an 1868 constitutional amendment. This states that no one may be deprived of life, liberty or property without due process of law. But in fact there is nothing there about abortion. Analytically, the Supreme Court majority addressed this question by asking whether there was a right to abortion that was firmly rooted in tradition and legal practice at that time. In doing so, it came up with a negative answer.

Does this reasoning lead to a depoliticization of the court, by leaving this issue of such great sociopolitical importance to the legislative branch?

That is the claim of the originalism espoused by the court's conservative majority, at least. Indeed, this can be characterized as self-restraint by the courts. The Supreme Court greatly expanded fundamental rights in the 1950s and 1960s. It declared racial discrimination to be unconstitutional, and strengthened citizens' privacy rights. This was interpreted by conservatives as an encroachment on the powers of the legislature. In that sense, originalism, like the Reformation, is a restorative approach, going back to the text. In practice, however, it has a rather revolutionary effect. To simply throw out the Roe v. Wade ruling, which had guaranteed the right to abortion for 50 years, can be regarded as an upheaval.

The court's majority says it is guided by the letter of the U.S. Constitution, and that it has not let itself be influenced by the justices' personal preferences. Has it succeeded in that regard?

Here in Switzerland too, when interpreting constitutional provisions, it is normal to take into account the historical context prevailing at the time of enactment. However, the situation in the United States differs from that in Switzerland or Germany in two respects. First, the U.S. Constitution is very short. It contains only about 4,000 words, while the Swiss Federal Constitution has about five times as many. Second, the U.S. Constitution is virtually impossible to amend. If, for example, a dispute arises over whether or not abortion rights exist, the U.S. Constitution cannot be amended as easily as is the case in Switzerland. The U.S. Constitution applies as the Supreme Court understands it. But originalism is always selective. Unambiguously reconstructing the legal conditions of two centuries ago is practically impossible.

Why is the U.S. Constitution almost impossible to amend?

There are two requirements for constitutional amendments in the United States. First, a two-thirds majority in both houses of Congress must be achieved, and then ratification by three-fourths of the individual states is necessary. The second hurdle has risen in difficulty tremendously since the time of the Founding Fathers, after the large expansion from 13 to 50 states. Originally, it was not foreseeable that the hurdle would be so high. Therefore, constitutional amendments were still quite possible at that time. Today, such efforts have largely been blocked by this system.

So originalism expresses an ideal that is hardly realizable in practice?

It is certainly an ideal whose democratic claim can be questioned. It claims to be stepping back, and thus returning authority to the legislative branch. But this leaves the difficulty that, according to the doctrine of originalism,

it is necessary to hew as closely as possible to the terms of a constitution that no one today has agreed to. One might say that the cold hands of the Founding Fathers are continuing to determine the rules that are used today. But if it is impossible in practice to change the basic legal order, there is almost nothing left of the democratic ideal of self-government. In other eras, the Supreme Court mostly sought to facilitate or at least avoid standing in the way of general political trends.

Isn't that exactly what today's Supreme Court majority is seeking? To facilitate a general policy trend, but in this case merely a conservative rather than a progressive one?

The decisions of the Supreme Court majority are the result of the work of a social and political movement, the Conservative Legal Movement, which was initiated in the early 1980s. Today, what has long been promised is being delivered. What is surprising, however, is the vehemence with which the majority is proceeding. It is already creating an upheaval. «Move fast and break things» might be a good motto for a technology company, but certainly not for lawyers, who, after all, describe themselves as conservative. Being conservative in the tradition of Edmund Burke means engaging in incremental change. What we are witnessing now is a counterrevolution. It was promised, and it is now being delivered, because backers have achieved a clear court majority. Previously, the Supreme Court under Chief Justice Roberts had still sought to uphold the ideal of a court removed from politics. This could be seen, for example, in the rulings on Obamacare. That has now changed significantly.

One safeguard against such legal upheaval has been the court's tradition of according great respect to precedent. Why does that apparently no longer apply?

Originalism wants to follow the written word of the U.S. Constitution. The lack of respect for precedent thus comes naturally. It seeks to clear away all

legal developments that have accumulated since the time of the Founding Fathers, just as Protestantism did with Catholicism. In doing so, its advocates accept a decline in legal certainty. What is surprising here, too, is the vehemence with which the majority has proceeded. After all, Roe v. Wade was a decision that was valid for 50 years. Now it has been completely overturned. This sharp rhetoric is a sign of the conservative majority's determination.

The Supreme Court has asserted that the abortion ruling has no implications for other privacy rights. But the minority opinion expressed a concern that if the logic of the majority were to be followed, such rights might indeed be endangered. Will additional civil liberties soon be at risk?

Conservative Justice Clarence Thomas's opinion can certainly be read as an invitation to bring cases on same-sex marriage or the right to privacy to the court. These rights are based on previous Supreme Court decisions that, like the right to abortion, referenced the 14th Amendment to the U.S. Constitution. If the court took the same approach in these cases as it did with abortion, it would probably come to the same conclusion most of the time. But originalism has always been selective in its objectives. The abortion issue was of particular importance to this movement, as has been the general restriction of the powers of the central government, the courts and the bureaucracy.

Does such a selective approach indicate that originalism must be understood not only as an analytical approach, but also as a political program?

It was and always has been both. From the legal-approach perspective, it has been something like a profession of faith that was necessary for any justice to be considered by Republican presidents for the Supreme Court. Politically, it is an example of how to build successful long-term alliances in a democracy. This concept won support not only from conservatives, but also from libertarians, economic liberals and conservative Christians. This is

what gives originalism its appeal as the program of a well-organized social and political movement. Networks such as the Federalist Society have been formed. First at the law schools at Harvard, Yale and Chicago. The political reliability of potential candidates for positions in the administration and the courts can thus be traced back to the first year of study.

What strategies could progressives use to fight the conservative majority in Congress? If there are sufficient majorities in the Senate, would the appointment of additional judges be a possible path?

The U.S. Constitution does not specify the number of members of the Supreme Court. Legally, therefore, this would be possible. But there is a risk that the other side would do the same once it acquired the appropriate majorities. It would make more sense, and also be possible within the constitutional framework, to introduce de facto term limits. In other U.S. courts, there are regulations under which senior judges retire to an emeritus role after a certain period of time. After this point, they are involved in deliberations on cases only in exceptional circumstances, thus making room for new members. A similar arrangement would be possible for the Supreme Court and would make much more sense than «court packing.»

The justices of the conservative majority say they want to empower legislators. Will this move enable citizens to better assert their democratic rights and preferences?

When the court steps back and lets the legislature decide on such matters, it is even more important that the integrity of the political process be protected. But that is no longer the case. The problematic side of the new jurisprudence is that the Supreme Court is backing off in this area, too. For example, in the term before last, it stated that drawing the boundaries of electoral districts in an extreme way, to provide party-political advantages, was bad for democracy. Nevertheless, it ruled that such cases can no longer

be appealed to federal courts. This has contributed to the fact that in most electoral districts, it is clear from the beginning who will win. This means that the preferences of citizens can no longer be well represented, which in turn promotes polarization. And it may soon take another step in this direction. In the next term, one case will deal with whether questions relating to the organization of elections in the individual states may still be reviewed by courts at all.

Does the vehement approach of the newly appointed Supreme Court endanger its acceptance and authority among the population?

According to polls, the Supreme Court's jurisprudence on important issues is today no longer in line with the preferences of the majority of the population. Liberals have always defended the legitimacy of the Supreme Court by saying that, in general terms, it has tended to parallel the views of the majority of the population. However, conservatives have built a movement, and liberals have not. Now they are like the frog in the saucepan that realizes too late that the water has become boiling hot.

An expert on American constitutional law

pra. · Johannes Reich has been a professor of public and environmental law at the University of Zurich since 2018. In his research work, including at Yale University, he has dealt extensively with Swiss and international constitutional law.

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