The US Supreme Court case and how protect citizens' rights in Europe

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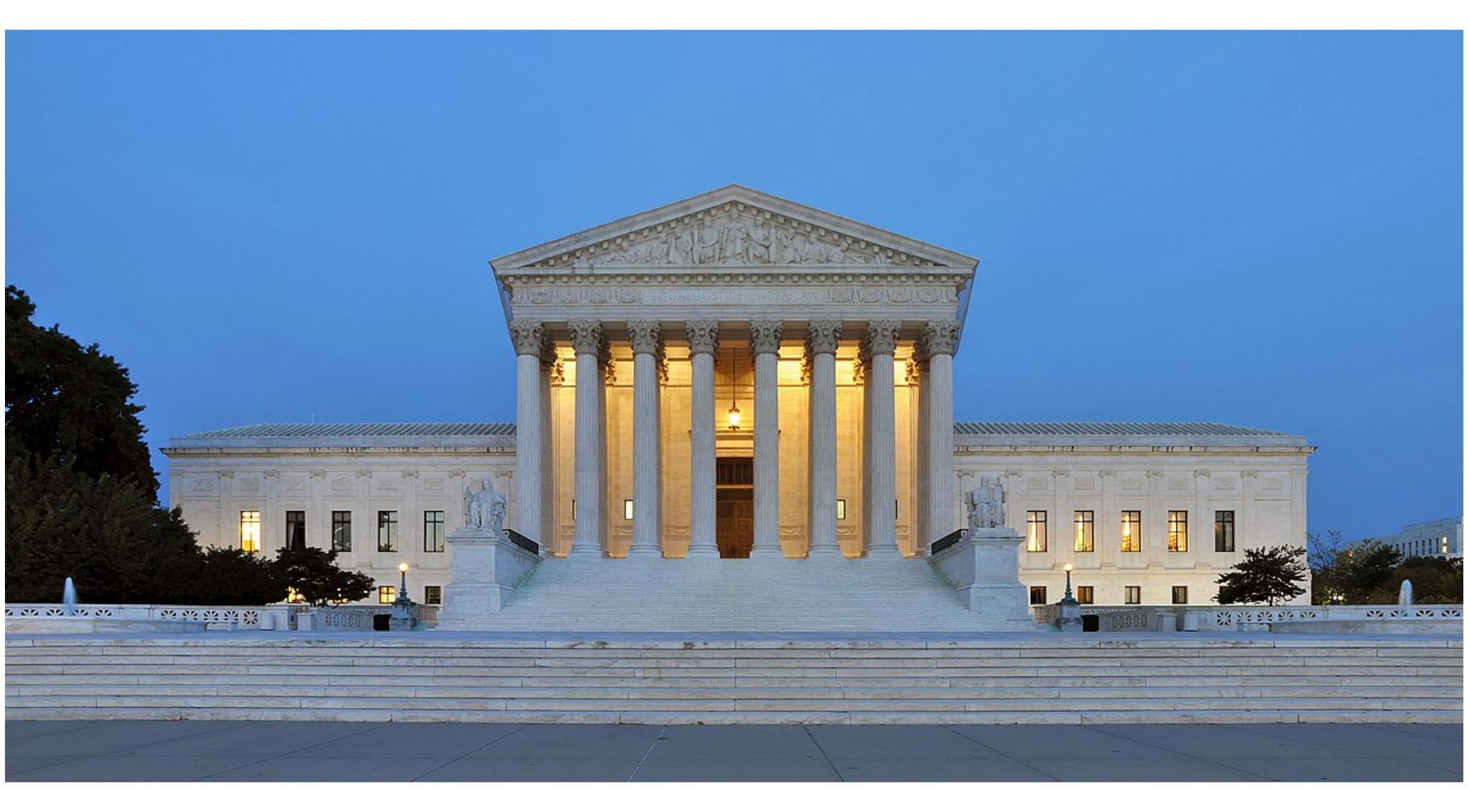

On 24 June 2022, the US Supreme Court ruled (6 to 3 in Dobbs v Jackson Women's Health) that the US Constitution provides no basis for abortion. With that ruling, it overruled the almost 50-year old precedent of Roe v Wade, which federally legalized abortion in 1973. The verdict shocks the world. Conservationists rejoice. Progressives weep. In the first part of this article, the board of the Federal Alliance of European Federalists (FAEF) describes why this judgment may be seen as a serious damage to representative democracy in the US. The second part deals with the legal basis of the 1973 judgement, the correctness of which is now being denied. The third part explains why such a thing is not possible within the federal constitution designed by FAEF's Citizens' Convention in 2021-2022.

Part I – Why does this judgment damage representative democracy?

The shortest answer to the above question is:

1. because the US Supreme Court is a politically constituted body,
2. which, under the influence of power politics, relies on a mandate from a minority of the people,
3. which was caused by a construction defect during the composition of the federal constitution in 1787.

So we go back to that construction error first.

Between May and September 1787, the Philadelphia Convention made concrete law of what political philosophers had been describing for centuries in terms of phrases such as: "The people are sovereign, but they must be represented. How should that be done? How do we prevent ourselves from being ruled again by an autocrat?"

These questions focused on the discussion of how to appoint a president: an appointment from and by the Congress (= House of Representatives and the Senate), or by direct election by the people (popular vote)? The opponents of appointment by Congress feared a new absolute ruler, whereas they had renounced the autocratic King of England eleven years earlier. The opponents of the popular vote feared manipulation of the – easily influenced – people.

So it became a compromise. Subsequently, that compromise turned out to be the root cause of what in the science of public administration has come to be called the 'spoil system'. The compromise is known as the Electoral College. Every four years, the states appoint a temporary group of electors equal to the total number of members of Congress. The number of members in the House of Representatives per state, plus the two senators each state has in the Senate, determine the number of electors per state in the Electoral College. In this system, even sparsely populated states have at least three electors in the College. Technically, the College elects the President whereby – according to current figures – the candidate who gets 270 out of 538 votes is the winner.

It is important to point out the way in which the Electoral College formulates its vote. The US Constitution contains no provisions on how the members of the states in the Electoral College should cast their votes. But over time, all states – except Maine and Nebraska – made laws stipulating that all votes must be allocated to the candidate who won the state's popular vote. That prevents members of the College from casting an independent vote individually. And so there is always grumbling about that. That is why Trump tried in the last election to persuade electors from states where the Democrats had won the popular vote to ignore their own state's law and vote for the Republican candidate anyway. However, as far as we know, this was not successful.

It is not correct to criticize the choice of that system with the benefit of hindsight. The Philadelphia Convention was faced with a well-nigh impossible task. The direct election of a president was still an unknown phenomenon at that time. Moreover, the Convention members were tired and frustrated by the difficult choices that had to be made, not knowing whether their first federal constitution in the world with only seven articles – based on their undeveloped vision of representative democracy – would work. Nor should we underestimate how difficult it was for a people who had a deep-seated aversion to an absolute ruler. Against this background, a compromise in the sense of an Electoral College was perfectly understandable. However, it is precisely this compromise of 1787 that made possible what was wanted to avoid at all costs, namely, the arrival in 2016 of an autocrat, Donald Trump, who did everything in his power – including a coup – to seize absolute power.

In the combination of (a) district-by-district elections, (b) the winner takes all and (c) the placing of state-by-state election results in the hands of the Electoral College, a two-party system emerged naturally. This is the core of the 'spoil system': when changing political power after an election, the new power breaks down what the previous one has built up. Representing the people thus became secondary to acquiring power. At any price. Pathological excesses of this are – among others – Gerrymandering (periodically changing the boundaries of districts to acquire the most voters) and Political Actions Committees (gigantic budgets to attract votes)[1].

Little is more wrong than to organise elections for federal offices in a federal state on the scale of the constituency of districts and states. Elections at the federal level should not be about interests of districts and states but about common interests of all citizens and states together. In other words, about the interests of the federation. Districts and states are free to look after their own interests. And that, by definition, requires taking the territory of the federal state as the encompassing constituency. Thus – also by definition – popular vote as an unconditional principle.

The two-party system is the engine – and also its fuel – for the power politics-oriented system in America, which has developed into an absurdity. We mention one absurdity that also serves to support our contention that the Supreme Court's abortion ruling is a serious (but perhaps repairable, see Part II) damage to US representative democracy. In the 58 presidential elections in the US, it happened five times that a President was elected by the Electoral College although he had lost the popular vote. These were, respectively, John Quincy Adams (1824), Rutherford B. Hayes (1876), Benjamin Harrison (1888), George W. Bush (2000) and Donald Trump (2016).[2]

The US Constitution stipulates that candidates for the nine-member Supreme Court are nominated by the President and appointed after approval by the Senate. In the power politics driven system, the President nominates candidates from his own party. In this way, Bush appointed 1 and Trump 3 conservative members, even though they had lost the popular vote as presidential candidates. So they were President with a mandate from a minority. And therein lies the damage done to representative democracy. Representative democracy is based on a mandate provided by a majority, with respect for minorities. In the five cases mentioned, a minority rules over a majority. That contains the seeds of autocracy.

This situation is immensely aggravated when the negative effects of district-based federal elections are combined with the pure majoritarian electoral system. In this case, two mega parties tend to form as an agglomeration of various and often conflicting social minorities. In these mega-agglomerations it may happen that one minority succeeds in becoming, for a short or long period, dominant. But, with the majoritarian system combined with federal elections on a district basis, the dominant minority in one of the two parties can easily express a majority of elected officials on a national basis.[3] This is what has happened since Trump took control of the Republican Party by largely leveraging ultra-conservative minorities. With the addition of the custom of the spoil system, also applied to the Supreme Court in the U.S., this conforms as the domination of an ultra-conservative minority over other minorities or the majority itself.

The institution of the Supreme Court has thus lost legitimacy. It is no longer an independent third part of the trias politica but a tool of a political party. And this in a country that, with the overarching adage "All sovereignty rests with the people", pretends that the government derives its power from the people. Now it is "All sovereignty rests with the Supreme Court". That means a breakdown in the system of checks and balances, the corrective mechanism if one of the three powers tries to outstrip the other.

It is likely that this question of legitimacy will be emphatically asked in the time to come. There are even calls for the impeachment of the judges concerned. Especially since one of the judges has stated that this is the beginning of a series of rulings on subjects that have long troubled conservative America, such as anything under the LGBT umbrella. Whether that contains sufficient grounds for impeachment is a big question. For the record, under Article III of the US federal constitution, judges can indeed be impeached. This has happened fourteen times, on charges ranging from drunkenness to accepting bribes. It happened to one judge of the Supreme Court, on the basis of biased decision-making.

Part II – The US law in question

Let us start with a pithy detail. The four Bush and Trump appointees to the Supreme Court had explicitly stated during Senate hearings that they had no intention of overturning the Court's 1973 Roe v Wade decision. On 24 June 2022, they did so anyway.

So there is more to the question than just the legitimacy of the current Supreme Court as an institution. It is also about the morality of the four most recently appointed conservative members. Their views during the hearings gave them the ticket to become members of the Supreme Court. Those views turn out to have been a lie. Pointing to 'advancing insight' as an argument to declare that the constitution does not provide a basis for abortion is not appropriate because many judges since 1973 have once and again ruled that the 1973 constitutional interpretation – namely, that abortion is protected by the federal constitution – is correct.

The question is, of course: what is this federal right that was invoked in 1973? To answer that question, it is necessary to understand the legal structure of a federal constitution. It does not contain any policy subjects. So, nowhere in the constitution does it say that abortion is either permitted or prohibited. Nor was there any federal law under the constitution that regulated anything about abortion. In order for the Supreme Court to decide in 1973 that abortion was permissible, it had to interpret the Constitution. The Court found a basis for this in the 14th Amendment to the Constitution. This has five Sections. For us, only Section 1 is important. The text reads as follows:

> *Amendment 14, Section 1 (1868)*
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> *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

This amendment was ratified in 1868, three years after the end of the Civil War. It is therefore an extremely principled – values-driven – law. By extending civil rights and enshrining rights in law for the formerly enslaved, it complements the Bill of Rights that had already been offered to Congress by James Madison in 1789 with ten amendments to the Constitution. In interpreting Amendment 14 of 1868, the Supreme Court ruled in 1973 that a woman's choice of abortion is part of her personal privacy and that states did not have the authority to invade that privacy with laws. Nevertheless, the Supreme Court did give states the power to regulate the application of the right to abortion 'in protecting the potential of human life'. These may vary from state to state and are not considered here. They are also not relevant because the judgment of 24 June 2022 denies that the Constitution provides a federal basis for abortion, leaving the states free from now on to regulate on this subject whatever they want. Including a total ban.

The question now is: has this said the last legal word? No. Not by a long shot. The gap in the checks and balances can be closed. In a nutshell: by making a federal law that allows abortion, order will be restored. Obama could have made such a law, but he did not. Partly because he had other matters to attend to, partly also because of divisions about abortion in his own party. And that makes the statement just made – 'with a federal law, order is restored' – a relative matter.

It would be going too far to explain the procedure for federal legislation in this article, but the bottom line is that if the Democrats retain their majority in the House of Representatives after the mid-term elections in November 2022 – and if a so-called bipartisan Conference Committee (which mediates between the House of Representatives and the Senate in the event of a conflict) realizes how much the Supreme Court ruling has damaged representative democracy – that federal law will be passed anyway. If the Supreme Court subsequently tests the federal law to see if it is not contrary to the Constitution, it will not be able to find any basis in the Constitution for finding it to be contrary to the Constitution. After all, with the June 2022 ruling, the non-existence of a federal right to abortion is not based on a constitutional prohibition on abortion, but on an interpretation of Amendment 14.

Part III – The resilience of FAEF's Federal Constitution to Autocratism

Between the beginning of October 2021 and the end of March 2022, the 70-member Citizens' Convention of the Federal Alliance of European Federalists (FAEF) designed a European federal constitution. On the homepage www.faef.eu, click on the icon 'Federal Constitution' for the text of this ten-article constitution, its explanatory memorandum and a series of fourteen in-depth studies to accompany that explanatory memorandum. Through this link, you can also see who the members of our Convention were.

The question naturally arises: does our federal constitution allow for anti-democratic manoeuvres such as those described above? The answer is short: no, there is no room. At least not by legal standards. But if politicians subordinate those standards to the pursuit of absolute power – for example by abusing emergency laws in crisis situations, the autocrats' favorite means of seizing absolute power – then any calamity is of course conceivable.

FAEF's Citizens' Convention federal constitution for Europe is designed on the foundation of representative democracy. But one does not have to study much to know that this representative democracy is under pressure all over the world, threatened by processes of autocratization. FAEF's Citizens' Convention constitution therefore contains provisions that are explicitly intended to prevent the violation of representative democracy. They are built-in defences against attacks on representative democracy. The most important ones are listed below.

The members of the federal European Court of Justice are not appointed by one or two members of the trias politica (i.e. the President and the Senate in the US), but by an independent Praesidium of judges. Undisputed, politically independent expertise is the criterion for appointment.

The Constitution requires legislation with hard criteria for the competence and suitability of members of the House of Citizens and the House of States. Criteria that guarantee that members of the European Congress have internalized the fundamentals of political office – the most important office in the world. Internalized in the sense of possessing such knowledge and understanding of the meaning of democracy – in form and in substance – that it cannot be corrupted by ignorance or intent. We are not aware of any other constitutions with such requirements for membership of the Chambers of the legislature.

Executive power is not in the hands of just one person, the President, but rests with a Praesidium, consisting of the President and two Vice-Presidents. So, much power in the hands of one person is undesirable. All important executive decisions must be taken by the Praesidium.

The constitution has a very strong system of checks and balances. Any possible attempt by one of the three state powers to dominate another immediately calls for countervailing powers.

The constitution also has a number of provisions for direct, deliberative and process-driven democracy. It concerns rights such as citizens' initiatives and referendums. This guarantees that organised citizens can adjust policy so that damage to representative democracy can be prevented or repaired. No other constitution in the world so clearly establishes a constructive link between the strength of representative democracy on the one hand and the opportunities for citizens to strengthen that representative democracy on the other. This is completely missing in the American constitution.

FAEF Citizens' Convention Constitution grants executive powers to a federal Ombudsman. If opinions of the Ombudsman to redress injustice – done by organs of federal authority – are not or not correctly followed, there are legal means available to the Ombudsman to enforce that redress.

We trust that with this article we have informed the reader satisfactorily. If so, we invite you to support us by signing this petition and donating for petition distribution: SOS Europe – A call for unity: give Europe a democratic federal Constitution.

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[1] For the relationship between Gerrymandering and the situation with Supreme Court in the USA, also see this article by David A. Lieb on Huffington Post: https://www.huffpost.com/entry/abortion-gerrymandering-scotus_n_62c2e55ae4b0a21d8429c1f6 .

[2] John Quincy Adams was not elected by the Electoral College but by the Parliament, as prescribed by Amendment XII in case of no absolute majority in the Electoral College.

[3] For the relationship between majoritarian electoral system and threats to democracies, see also this article by Mauro Casarotto, published on Europe Today: https://www.europe-today.eu/2021/01/20/the-trump-case-seven-lessons-it-taught-us-and-a-final-question-for-europe/ . In particular, lesson number 7.

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