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PERSPECTIVES

by ***Rinaldo S. Brutoco***

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A Shocking Decision

Are We in a New Era of Judicial Activism?

A truly astounding event occurred this past week. It was both unanticipated and shocking at the same time. It was totally "out of left field," and yet I believe is an unfortunate harbinger of things to come. What was this incredible decision? It was the Supreme Court's decision to strike down New York's restrictions on large religious gatherings when the Coronavirus is raging out of control.

Why was this decision so "astounding"? First off, in the history of the Supreme Court one principal among others has steadfastly been adhered to – until now. This principle states that a case would not be decided by the Court unless it was concerning a "matter in controversy." The basis for this long-standing precept is the US Constitution itself, namely in, Article III, Section 2, Clause 1. Every Supreme Court upheld this principle since Justice John Jay wrote to then President George Washington that the Court could not offer advisory opinions as that would be beyond the scope of the Court's constitutional authority. He wrote to Washington that the Court could not go beyond its role as arbiter of actual judicial questions and controversies.

The US Supreme Court reiterated this principle as recently as 2006 in DaimlerChrysler Corp. v. Cuno by writing: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." In other words, until last week the Supreme Court historically maintained that unless there was an active controversy that had to be decided, the Court could not take it up as to do so would amount to "an advisory opinion."

The precise purpose of this clause has long been understood to prevent the judicial process from being used to usurp the powers of the legislative and executive branch of the US federal government. For all of our nation's history, up even until a recent 2010 decision, the purpose of Article III was deemed to be that an actual "injury" that is "concrete, particularized and actual or imminent; fairly traceable to the challenged action and redressable by a favorable ruling." (Emphasis supplied, Monsanto Co. v. Geertson Seed Farms). So much for the current Court's claim to be made up of strict constructionists.

Even more to the point, we now know Justice Amy Coney Barrett was not truthful when she said under oath at her confirmation hearing that "Courts have a vital responsibility to the rule of law, which is critical to a free society, but courts are not designed to solve every problem or right every wrong in our public life." She added: "The policy decisions and value judgments of government must be made by the political branches, elected by and accountable to the people." And yet, in her first case, she chose to substitute her judgment and that of the core Republican party jurists (amazingly, Republican Chief Justice Roberts himself refused to go along on the grounds that there was no "controversy" in the case) for scientific and political leadership — all of whom felt that limitation on the size of gatherings was a matter of public health and safety to curb the spread of the raging Coronavirus.

You see, there was no controversy when the case arrived at the Supreme Court. New York banned large gatherings for all purposes whenever a group of people were determined to live in a "red" zone, defined as one which had the highest level of Covid background infection. The Catholic Church and the synagogue who filed the case were no longer subject to the restriction on attendance as they were both back in a "yellow" zone when the case was heard by the Court. By tradition and precedent (this second word being particularly important in the context of a judicial decision) the case was "moot" by the time it arrived at the Court. Under every case since President Washington was turned down by Justice Jay in the 1790s, no Court has been willing to decide a case that was "moot." To do so is itself a violation of Article III (there are rare exceptions dealing with circumstances not remotely involved in this case).

So, if there was not "controversy," why did 5 arch-conservative, one could even say "reactionary," Justices decide to abandon the wisdom of the Chief Justice, himself appointed by a Republican, and stretch to make a decision in the New York case? One can only believe it was the religious prejudice of the overwhelmingly Catholic Justices who wanted to protect their religion in defiance of Supreme Court law and tradition. That's shockingly disappointing, no matter what religion you belong to or if you ascribe to any religion at all.

Every state governor has an absolute duty and authority to provide for public welfare and well-being under the thoroughly defined "police powers," which are consistently upheld by the federal judiciary. For the Court to violate its own tradition of "stare decisis" (future cases are to be bound by the decisions in prior cases until, in rare cases, specifically overturned) it signals a new direction. In issuing restrictions for various neighborhoods and/or zip codes based upon the science of a background rate of infections (the determinant of "social spread" for the virus), the Governor had the authority to issue restrictions on the size of gatherings when hundreds of thousands were dying of this epidemic and more "super spreader" events only inflicted more death and destruction. In doing so, there is no legal requirement for any religious group's exemption.

Chief Justice Roberts, writing in the minority, was absolutely correct when he noted that he might have sided with the majority if the case was legitimately before the Court, but since no "controversy" existed the Court could, and should not, render any opinion. The case was "moot." I ask you dear reader, why did this Court decide to break with precedence dating back to the founding of the Republic and the initial advice rendered to President Washington? The only answer is that this Court, at present, is more interested in making "judicial law" rather than impartially adjudicating cases. That's what makes this a "shocking decision".