



PERSPECTIVES

by **Rinaldo S. Brutoco**

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Don't Call This Court "Conservative"

"There's a bad moon on the rise..."

Does it upset you when you hear traditional media refer to the current Supreme Court as dominated by "Conservatives"? If not, it should. The truth is, there is nothing conservative about the current six-person majority of the Supreme Court. They are radical, pure and simple. Referring to these Justices as "conservative" implies that their judicial approach appears on some sort of reasonable spectrum of judicial thought. It does not.

What does it mean to be a "conservative" on the court as opposed to a progressive or some other label? While we can all agree that labels of any sort can be misleading, labeling this bunch "conservative" does violence to both logic and to the English language.

A conservative is someone who interprets the law not with the intention of changing it, but in preserving historical precedents into the future, particularly in relation to individual rights over the state.

What would a conservative do if faced with the choice of upholding more intrusive "Big Brother" government versus more of a laissez-faire ruling? Obviously, the conservative would opt for the laissez-faire approach based on the conservative philosophical principle that less government intrusion is better than more government peering into every corner of our lives. Yet, "the Gang of Six" in the Dobbs case overturned Roe v. Wade by coming out in favor of government intervention between a patient and her doctor.

Furthermore, overturning 50 years of established judicial precedent to come out with that intrusive ruling is the antithesis of conservative judicial principles. This ruling makes a mockery of stare decisis. A conservative jurist would go to great lengths to avoid overturning a well-established precedent of long standing. To change the law so radically after 50 years of settled precedent, is the very definition of "legislating from the bench".

Here's another example. Conservative jurists have put a very high value on "State's Rights"—leaving the states to decide local issues so that the Federal government need not to get involved. The tyranny of Reconstruction, leaving Jim Crow laws in place, and a host of other judicial failings have all been justified on the principle of States Rights. So how could the Gang of Six rule that New York is not legally allowed to make reasonable rules legislating the safe use of concealed weapons? That's a State's Rights issue if there ever was one.

In New York State Rifle & Pistol v. Bruen the Supreme Court reversed a decision upholding New York's 108-year-old law limiting who can obtain a license to carry a concealed handgun in public. That's not just a refusal to follow existing precedent, it is an appalling example of how the Court puts gun manufacturing profits in front of citizen safety. There is absolutely nothing conservative in that. Worst of all, Justice Clarence Thomas wrote that decision on behalf of the Gang of Six.

Why is that so awful? Because it was the same Justice Thomas who wrote the most frightening concurring opinion in the Dobbs case that many Constitutional law scholars have ever read. In this concurring opinion, Thomas laid out his belief that all privacy rights currently enshrined as the law are in imminent jeopardy of being overturned by this politically motivated group of judicial radicals who are doing their best to assert their version of Christian Nationalism on the nation.

Interracial marriage (*Loving v. Virginia*, 1967); the use of contraceptives in one's own bedroom (*Griswold v. Connecticut*, 1969); interstate travel (the *Passenger Cases*, 1849); same-sex marriage (*Obergefell v. Hodges*, 2015); and equal rights for LGBTQ individuals are just a few of the legal precedents that may come under judicial attack. All those cases correctly interpret the Constitution and are considered "settled law."

On what basis is Thomas willing to throw all those rights out? In Thomas's written opinion, there is no "right of privacy" in the Constitution. Thus, for Thomas, privacy is not protected.

That is pure poppycock. How do we know he's incorrect as a matter of judicial scholarship? Simple, he is denying the "Four Corners Doctrine" first held in 1849 in *The Passenger Cases*. You see, there is no stated right to travel from state to state in the Constitution. Nonetheless, the Court back then held: For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

In other words, the right to travel was so essential to the nature of a common union that the right itself need not be spelled out because the right to travel freely is inherent with any reasonable reading of what is contained within the four corners of the Constitution.

Thomas's logic also invalidates the other cases referenced above which confer rights not explicitly spelled out in the Constitution, but nonetheless are implied by the very nature of our government is one that protects citizens over the intrusions of the State. That is precisely what the Founders intended.

We need look no further than the Ninth Amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The "conservative" position is simple: the right of privacy for each of us is a right we had before the nation was founded. This was not taken away by the Constitution, and therefore under the Ninth Amendment remains our right to this day. That's not only the conservative interpretation of the Constitution, but it's also the only way consistent with our freedom-loving democracy's approach to balancing our rights as individuals as well as the rights of states and the federal government to govern us appropriately.

The dictionary definition of "radical" reads like this:

"Advocating...complete political or social change; representing or supporting an extreme section of a political party..."

That's precisely what the Republican party is fostering on us with its Christian Nationalism. It is radical. It is dangerous. It will destroy our Union if we let it, even if 70 percent of us don't agree and would not wish to live under it.

Thinking of a world where Thomas and the Gang of Six may prevail brings to my mind these Credence Clearwater Revival lyrics, "I see the bad moon arising, I see trouble on the way."

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