

July 9, 2018 – ROGUES IN ROBES

John Fund spotted something important in the Supreme Court immigration ruling. It was an aside in Justice Thomas' concurring opinion.

Whenever there is a Supreme Court vacancy, I view it as a chance to teach voters about the courts and their legitimate role in our government. We could use that. Last year, the Annenberg Center found that only 26 percent of those it surveyed could name the three branches of government (executive, judicial, and legislative). A full 33 percent couldn't name even one branch.

Confusion about the proper role of the courts extends to many of our sitting judges. Last month, while the Supreme Court narrowly upheld the so-called Trump travel ban, Justice Clarence Thomas raised an issue that the next Supreme Court justice may have to weigh in on. Why is it, he asked, that a single federal district judge can impose an injunction blocking a presidential executive order in all 50 states even if none of his colleagues (599 district judges) thinks it's a good idea? ...

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Glenn Reynolds had a good thought a few months ago about the people we put on SCOTUS. He call's them "front row kids." We can also think of them as "A" students. Pickerhead thinks we need more "C" students. After all, look at what the A students have brought us.

In the wake of the 2016 presidential election, we heard a lot about America's division into two mutually hostile camps: a largely coastal, urban party run by educated elites, and a largely rural and suburban "flyover country" party composed of people who did not attend elite schools and who do not see themselves as dependent on those who do. This divide is more fundamental than mere partisan identification, as there are Democrats and Republicans in both groups.

One of the best formulations of this division comes from photographer Chris Arnade, who has spent years documenting the lives of America's forgotten classes. In his characterization, America is split between the "Front Row Kids" — who did well in school; moved to managerial, financial or political jobs; and see themselves as the natural rulers of their fellow citizens — and the "Back Row Kids," who placed less emphasis on school; and who resent the pretensions and bossiness of the Front Row Kids.

While teaching constitutional law after the election, it occurred to me that though the Back Row Kids can elect whomever they want as president, senators or representatives, there is one branch of the federal government (and all state governments) that is, more or less by its nature, limited to Front Row Kids: the judiciary. ...

National Review

Why Should a Single Federal Judge Be Able to Make Law for the Whole Country?

While we fill a Supreme Court vacancy, let's also have that debate.

by John Fund

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Justice Thomas wrote:

"These injunctions are beginning to take a toll on the federal court system — preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality."

Since January 2017, the "resistance" to President Trump has succeeded in getting 22 injunctions against his actions on issues ranging from the "Dreamers" to sanctuary cities and transgender policy in the military.

The U.S. survived without judges' imposing nationwide injunctions for the vast majority of its history. The first such injunction came in a 1963 minimum-wage case, in which the D.C. Circuit Court ruled that executive-branch officials should honor a court decision "in all cases of essentially the same character." But such injunctions have been rare until, well, the Trump administration.

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that, as used today, they "boi[!] down to a policy judgment" about how judges define the limits of a president's power. But that judgment is supposed to spring from the Constitution, not from the preferences of a black-robed figure.

Even after the Supreme Court made its definitive ruling in the 16-month-old travel-ban case, the "Resistance" made clear that it hasn't given up. On the very day the Court ruled, a total of 16 states and the District of Columbia sued to stop President Trump over his border-security measures. The suit was "forum-shopped" so it would be heard by a federal judge in the distinctly anti-Trump Seattle area.

In another ruling that came down the same day the Supreme Court acted on the travel ban, a federal district judge in California overturned an executive order Trump issued June 20: Parents crossing the border with their migrant children must have regular phone calls with their children and be reunited with them within 14 days, the judge ruled. Parents with children younger than 5 must be reunited by this coming Tuesday.

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The Department of Health and Human Services has been tasked with reuniting the children. Alex Azar, the HHS secretary, has said that he will comply with those artificially imposed deadlines, but at a cost: Some of the "parents" being reunited with children are actually in league with smugglers, he noted. In a conference with reporters last Friday, Azar said:

Proper and careful vetting for child safety is essential. . . . Two purported parents were identified in ICE criminal background checks as having criminal history that were inconsistent with child safety. For example, these purported parents had a history of charges of child cruelty, rape, and kidnapping based on information revealed by ICE. . . . [But] we will comply even if those deadlines prevent us from conducting our standard or even a truncated vetting process.

It is madness that a single federal district court judge can impose such an arbitrary deadline covering the entire country and not have his decision reviewed for weeks or months. No one wants children separated from their parents, whether they are U.S. citizens or migrants, but many of these largely Central American parents bringing their kids across the border have made an unfortunate choice.

As Hans von Spakovsky, a scholar at the Heritage Foundation, points out, such parents passed through Mexico and other nations that have their own generous asylum laws. By not seeking asylum in those countries, they are sending a strong signal that they are illegally entering the U.S. to better their economic condition rather than to escape persecution.

Of course, something must be done to clean up our archaic immigration laws that make it impossible to issue regulated work visas for legitimate job seekers (such as we had until the 1960s) while also making it almost impossible to send back people who are abusing the system. Congress has failed to act, but the solution is not to have a single, unelected federal district judge make determinations on what our nationwide immigration policy should be.

If the confirmation hearings and debate about President Trump's Supreme Court nominee can bring some of those issues forward, we might have the beginnings of a more rational debate on just what legitimate power judges have and how some are currently abusing it.

USA Today

'Front Row Kids' and values have taken over our courts: Glenn Reynolds

The problem is not just that Back Row America's values won't be considered — it's that the Supreme Court may not even realize it's ignoring them.

by Glenn Harlan Reynolds

Glenn Harlan Reynolds, Opinion columnist Published 3:15 a.m. ET Oct. 23, 2017 | **Updated 8:50 p.m. ET Oct. 23, 2017**

In the wake of the 2016 presidential election, we heard a lot about America's division into two mutually hostile camps: a largely coastal, urban party run by educated elites, and a largely rural and suburban "flyover country" party composed of people who did not attend elite schools and who do not see themselves as dependent on those who do. This divide is more fundamental than mere partisan identification, as there are Democrats and Republicans in both groups.

One of the best formulations of this division comes from photographer Chris Arnade, who has spent years documenting the lives of America's forgotten classes. In his characterization, America is split between the "Front Row Kids" — who did well in school; moved to managerial, financial or political jobs; and see themselves as the natural rulers of their fellow citizens — and the "Back Row Kids," who placed less emphasis on school; and who resent the pretensions and bossiness of the Front Row Kids.

While teaching constitutional law after the election, it occurred to me that though the Back Row Kids can elect whomever they want as president, senators or representatives, there is one branch of the federal government (and all state governments) that is, more or less by its nature, limited to Front Row Kids: the judiciary.

Someone like Wisconsin Gov. Scott Walker can hold office without a college degree, but as a practical matter, the judiciary is limited to people who hold both undergraduate and graduate degrees. Since law degrees became a required part of admission to the bar, the judicial branch has been the domain of people who are not merely highly educated, but educated in the particular way that law schools educate. They are, in short, Front Row Kids of the first order.

After realizing that, my march through the decisions of the Warren court and its successors took on a different flavor. Again and again, seen through the lens of this class divide, important decisions look like decisions on behalf of the Front Row Kids.

In the famous Goldberg v. Kelly case granting due-process hearings before the termination of welfare benefits, the Supreme Court looks to have been holding on behalf of poor and uneducated people. Yet it turns out that the actual beneficiaries are the highly educated: social workers and lawyers who are paid out of welfare agency budgets. Likewise, the court's treatment of everything from reproductive rights to legislative apportionment has reflected Front Row priorities.

Meanwhile, the Supreme Court has become more and more elite. Increasingly, judges aren't just law school graduates, they're graduates of the most elite law schools. And that goes double

for the Supreme Court, where everyone is a graduate of Harvard or Yale except for Ruth Bader Ginsburg, who got her degree from that scrappy Ivy League upstart Columbia. As Dahlia Lithwick observed in 2014:

"The current justices are intellectually qualified in ways we have never seen. Compared with the political operators, philanderers and alcoholics of bygone eras, they are almost completely devoid of bad habits or scandalous secrets. This is, of course, not a bad thing in itself. But the court has become worryingly cloistered. ... There is not a single justice 'from the heartland,' as Clarence Thomas has complained. There are no war veterans (like John Paul Stevens), former Cabinet officials (like Robert Jackson) or capital defense attorneys. The Supreme Court that decided *Brown v. Board of Education* had five members who had served in elected office. The Roberts court has none. What we have instead are nine perfect judicial thoroughbreds who have spent their entire adulthoods on the same lofty, narrow trajectory."

Lithwick wrote this before the accession of Justice Neil Gorsuch to the court, but his background is the exception that proves the rule. Although some see him as bringing heartland values because he came to the court from Colorado, he is a graduate of Columbia, Harvard and Oxford. Only in today's Supreme Court, composed of "judicial thoroughbreds," would his résumé seem even a little bit populist.

There's nothing wrong with thoroughbreds as such, and if the court decided only narrow technical issues of law none of this would matter. But some of the most important social issues of the day come before the court, and given its members' insularity, the problem is not just that Back Row America's values won't be considered — it's that the court might not even realize it's ignoring them.

It's worse still when you realize that, as Angelo Codevilla has noted, America's ruling class is itself much narrower than it used to be:

"Today's ruling class, from Boston to San Diego, was formed by an educational system that exposed them to the same ideas and gave them remarkably uniform guidance, as well as tastes and habits. These amount to a social canon of judgments about good and evil, complete with secular sacred history, sins (against minorities and the environment) and saints. Using the right words and avoiding the wrong ones when referring to such matters — speaking the 'in' language — serves as a badge of identity."

To counteract this, we might want to bring a bit more diversity to the court. I'm not recommending that we eliminate the informal requirement that judges have law degrees (though non-lawyer judges were common in colonial times, and some countries still use them). But maybe we should look outside the Ivy League and the federal appellate courts. A Supreme Court justice who served on a state court — especially one who had to run for election — would probably have a much broader view of America than a thoroughbred who went from the Ivy League to an appellate clerkship to a fancy law firm.

Just a thought.

Glenn Harlan Reynolds, a University of Tennessee law professor and the author of The New School: How the Information Age Will Save American Education from Itself, is a member of USA TODAY's Board of Contributors

HAWAIIAN JUDGE RULES

KENNEDY RETIRING UNCONSTITUTIONAL

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DEMOCRATS SUDDENLY GET RELIGION...

Sotomayor Discovers Religious Bias

Supreme Court Justice Sonia Sotomayor blasted the majority decision to uphold President Trump's travel ban saying it was "motivated by hostility and animus toward the Muslim faith."

But in the Masterpiece Cakeshop case, where clearly anti-Christian comments were made by members of the Colorado Civil Rights Commission against Christian baker Jack Phillips, she found no religious hostility whatsoever.



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