

## **THE JUDICIARY'S CLASS WAR** (GLENN HARLAN REYNOLDS)

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In this brief book, or rather pamphlet in the old political, Tom Paine-ish use of that term, law professor and well-known blogger Glenn Reynolds offers some thoughts on how the class structure of the judiciary affects judicial decisions. Rather than focus on the general class divide in American society, Reynolds focuses on that divide in the judiciary, which he shows is deeper than that in America as a whole. He believes the judicial divide is especially pernicious to our political system, and he offers some constructive solutions to the problem, although I think that those solutions both would be ineffective in practice and that the problems are deeper than Reynolds believes.

Reynolds organizes his pamphlet around the “Front-Row Kids/Back-Row Kids” dichotomy of Chris Arnade, documentarian of “America’s forgotten classes.” The former “did well in school, moved into managerial or financial or political jobs, and see themselves as the natural rulers of their fellow citizens.” The latter are less schooled and more focused on religion, family, and place, and they “resent the pretensions and bossiness of the Front-Row Kids.” This same basic analysis underlies much writing today, from the famous *Hillbilly Elegy* of J. D. Vance, to Joan Williams’s *White Working Class*, Arlie Hochschild’s *Strangers in Their Own Land*, and Katherine Cramer’s *The Politics of Resentment*, along with pretty much every piece of writing ever about Donald Trump. What Reynolds offers that is new is a precise application of this framework to the federal judiciary.

Really, this pamphlet is right up my alley. I should be very much a Front-Row Kid—coming from a privileged, though relatively poor, background; schooled in the very best law and business schools (and having clerked for a federal appellate judge); able to move fluidly through America’s social and business upper classes (helped by my stunning good looks). But I am a rebel who identifies mostly with the values of Back-Row Kids—I abandoned the Front Row to first become a blue collar worker and then run my own hands-on business in the provinces, which has made me rich. Therefore I am a double traitor to other Front-Row

Kids, in that I not only reject what they stand for, but, like Samson, want to pull down their pagan temple on their heads.

As Reynolds points out, the key class distinction in America today is no longer money or ancestry, but education. The right schooling is both filter and key. It gives those who are properly educated elite status unavailable to others, and it enables them to become and stay wealthy, engage in assortative mating, travel the world mingling with others of their international class, and, in general and most importantly, to regard themselves as not only superior to, but of a different quantum from, the Back-Row Morlocks. And, since education requires immense and ever-increasing investments of money and time, it is mostly barred to the poor (who, as Vance points out, are for the most part not even aware of the opportunities this world offers, or of how they could even begin to try to enter it). The inevitable result is a federal judiciary comprised exclusively of Front-Row Kids, and what is more, comprised of lawyers who are Front-Row Kids, where in the past non-lawyers were sometimes judges, and often judges who were lawyers came with diverse backgrounds with at least a Back-Row flavor, such as politics or military service. Not today.

So far, so good. Reynolds next unconvincingly tries to claim that Front Row and Back Row are not synonyms for Left and Right, and that in the judicial arena, their paladins sometimes even switch political positions over time. They may not be synonyms, but they are close enough in practice. Yes, there are Front-Row kids in the judiciary who are conservatives, but they have no influence over the direction of the judiciary in critical social matters, because they are Right, and (unfortunately) refuse to use the judiciary as a political tool. The only example Reynolds offers of switching, that the Left used to like free speech and now doesn't, not only proves little (other than that the Left prefers power to principle), but says nothing at all about any switch by the Back-Row Kids, because there are none (which is, after all, Reynolds's point). Probably Reynolds's claim is weak because, as he admits, he agrees with the holdings of a vast majority of the cases the Front-Row Kids have decided on a Front-Row basis in the last five decades, from *Brown v. Board* through *Griswold v. Connecticut* through *Roe v. Wade* through *Obergefell v. Hodges* (although he doesn't say which he does disagree with). But he's a conservative, so he doesn't want to align himself with Left decisions, therefore he

deludes himself that these are not all decisions that cemented the utter dominance of the Left and its values. (Alternatively, maybe he wants to distance his pamphlet from being perceived as political polemic.) Myself, not being burdened with this, since I think almost all these court cases were wrongly decided, and dangerously and perniciously so, I see more clearly that Reynolds is wrong, and the Front-Row Kids are, in practice, synonymous with the modern progressive Left. Realizing this clarifies matters, while Reynolds muddies them.

What is Left and Right is not Reynolds's main point, though. His point is that each of these Supreme Court decisions, to which he adds *Goldberg v. Kelly*, *Baker v. Carr*, and *New York Times v. Sullivan*, embody not only Front-Row values, but are decided with no evidence at all that the judges have any grasp of any other values, or even an understanding that they exist and are part of the warp and the weft of America. The costs of desegregation, such as forced busing (*Brown*) were borne by the Back Row, who could not send their kids to private schools (which the Supreme Court allowed to continue segregating in *Allen v. Wright*). Birth control and abortion (*Griswold* and *Roe*) benefited career-oriented women and men interested in casual sex, both, before the Left destroyed the culture of the lower classes, Front-Row focuses. Same-sex marriage (*Obergefell*) is almost exclusively a Front-Row concern, and especially a concern of the District of Columbia, which has a far greater percentage of homosexuals than most of the country. Welfare due process hearings (*Goldberg*) benefit Front-Row lawyers and social workers, not welfare recipients, since the total pot of money doesn't go up, it just gets reallocated to the lawyers and social workers. Dense urban, Front-Row areas were the beneficiaries of the radical imposition of uniform House of Representatives voting districts (*Baker*). And *Sullivan* benefitted Front-Row media companies and eroded the influence of juries, "the only Back-Row institution in the judicial system."

Reynolds thinks this is bad, though as I say not as bad as I think it is. He points to exacerbation of divisions and erosion of judicial legitimacy. I would say "total elimination," rather than "erosion," but perhaps that's semantics. He nods toward the possibility of an elected federal judiciary, but contents himself with relatively anodyne recommendations to appoint some non-lawyer judges, to all levels of the federal judiciary, citing similar recommendations by Harvard law professor Adrian

Vermeule (whom I knew mostly as an opponent of Philip Hamburger and an advocate of the legitimacy of the administrative state, and thus someone with whom I disagreed, until I read his fantastic article “A Christian Strategy,” in the November 2017 *First Things*, with lines like “Liberalism of the purportedly tolerant sort is to militant progressivism as the chrysalis is to the hideous insect.”). He also recommends appointing judges who went to law schools outside the Ivy League (all nine Supreme Court justices have essentially identical educational and career backgrounds).

To this second point, homogeneity in judicial educational background, Reynolds ascribes it to “credentialism in contemporary society” and to “the judicial conformation wars.” On this latter, he suggests that the problem is that “a gold-plated resume (coupled with a lack of controversial public statements) is seen as an essential part of getting nominees past the Senate.” Maybe Reynolds is trying to pour oil on troubled waters, but let’s be honest, it’s exclusively the Left that has troubled those waters, and it’s exclusively the judicial appointees of the Right for whom those are requirements. No Left judge would be allowed to be criticized for a less-than-gold-plated education (or for being advanced by affirmative action), much less for making controversial public statements or earlier judicial decisions. This is because Republicans are weak and simpering, and refuse to do to Left nominees triple what was done to Robert Bork, as they should. Instead, they let Left nominees sail through, while Right nominees must fight desperately to survive any nomination. What Reynolds describes is, again, not a mere happenstance Front-Row filter, it is an integral part of the Left’s war on America. For, mark it well, the Front-Row Kids may think they are born to rule, and they may rule, but not only do they only rule by their ability to manipulate democracy and supersede it with the rule of unelected judges (hence their desperation to appoint Front-Row judges), in a properly constituted mixed government with a properly restricted franchise, they would have no power at all.

A similar overly sunny view infects Reynolds’s idea of appointing Back-Row Kids, or at least Front-Row Kids from a few rows back, to the federal judiciary. He suggests state court judges, non-Ivy League lawyers, military veterans, and (by implication), politicians and non-lawyers. The idea is to bring diversity of thought and a reduction of the Front Row’s

focus on itself, and improvement in its inability to even grasp there is another America. But there are two debilitating problems with this. First, and less debilitating, they do grasp there is another America, and they hate it and what it stands for. (This does not apply, for the most part, to conservative federal judges, even though they are also Front-Row kids, but they have no real power over the most critical decisions made by our overlords on the Supreme Court, as Reynolds's own listing of crucial cases, those that have made modern America, proves.)

Second, and even more debilitating, if such new diverse voices were appointed to the Supreme Court, they would very shortly swing behind the program of the Front-Row Kids. Only the most intellectually robust and personally self-confident individuals, such as Antonin Scalia, can resist the onslaught of the Left on a new Supreme Court justice (and, to a lesser degree, on any judge). Like Satan showing Jesus the kingdoms of the world, any new judge is given a choice. On the one hand, he can vote Left, and be exalted in all the media, offered the choicest speaking engagements and teaching opportunities, invited to the best parties, and given a lifetime free pass to the Inner Circle. On the other hand, he can vote Right, and be continuously publicly and privately excoriated in the vilest terms, ostracized by his entire profession, socially spat upon, and end his days in isolation from the glittering people of society. In such an environment, any such new appointees as Reynolds recommends would merely become reliable acolytes of the Front-Row Kids, made even more rigid in their obedience by their knowledge that, in most cases, they are not as smart as the self-proclaimed Eloi, and by their consequent fear of being exposed and ridiculed for their inferiority. Oh, sure, there would be a few exceptions, but very few, since none of us are like Jesus. Sadly, Reynolds's program would merely reinforce the existing stranglehold of the Left upon the federal judiciary, which they use to rule us and to impose their evil ways on America.

No, something much more drastic is called for. If we want to take action that improves the "long-term legitimacy" of the Supreme Court and the lower federal courts, we need a sledgehammer, not a tiny crowbar. Some of what's needed is outside constitutional structures—we need to make sure that it's personally more profitable, or less expensive (in personal terms, not monetary terms) for judges to vote Right instead of Left, rather than the reverse, as our current system is. That would involve,

for each individual judge, both creating the proper future incentives and imposing punishment for past actions. Some of what's needed requires changed constitutional structures, preventing the courts from acting as a super-legislature and probably electing the Supreme Court and other federal judges on a geographic basis (similar to the Senate). What we can't do is offer half-measures. Reynolds is a very clear-thinking man (I read his blog religiously, and we have friends in common, though he has no idea who I am), with whom I agree on much (though he is a libertarian, and I am a reactionary). But his solutions are not equal to the problems he adroitly describes.