Law professors “have earned a little contempt,” too

by Lev Tsitrin

In the recent *New York Times*' “guest essay” titled “*The Supreme Court Has Earned a Little Contempt*” Georgetown University’s law professor Josh Chafetz accuses the justices of the Roberts’ Supreme Court of self-serving hypocrisy: “Judges have long portrayed themselves as neutral, apolitical conduits of the law, in contrast to the sordid political branches. This portrayal serves to obscure the institution of the judiciary and to foreground the abstract, disembodied concept of the law. … Judges … present themselves not as one type of political actor but rather as the voice of the majestic principles of the law [and do so in the] language that drips with contempt for other governing institutions and in a way that elevates the judicial role above all others. … The result has been a judicial power grab.” Having laid out this charge, Professor Chafetz proceeds to illustrate his thesis by analyzing three court cases that, in his view,

resulted in unjustified self-aggrandizement of the court. His punchline is: “In recent years, the judiciary has shown little but contempt for other governing institutions. It has earned a little contempt in return.”

Given my own views on federal courts, I should have applauded the professor’s exposé – but its lack of substance makes me merely shrug my shoulders.

What is the professor’s piece missing – along with similar mainstream critiques of the court? Well, there is not a word about *how* cases are being adjudicated – even though this is the key to the problem the professor is bemoaning. He only cares about the outcomes, and about the court’s “paternalistic” attitude that in his view unjustifiably elevates it above the other two branches of government.

What does not seem to bother the professor is the fact that, while judging should be circumscribed by “due process of the law,” none is evident in judicial decision-making – federal judges routinely concocting their own argument for the parties instead of adjudicating parties’ argument as the “due process,” in any of its interpretations, demands. While lamenting split decisions, the professor does not ask how they are even possible. To him, it is just the self-evident “function of the court’s 6-to-3 Republican-appointed supermajority.” No, professor, you are not looking where you should: this is the result of the arbitrary nature of judging, federal judges shielding themselves from the need to stick to “due process” by the scandalous right to act from the bench “maliciously and corruptly” which they granted themselves in Pierson v Ray.

Not that the professor is unaware of it. Checking my “sent” folder, I see that I e-mailed him this information four times, stating in 2020, trying to alert him to this fact – but he never replied.

I wonder, why? Doesn't the empirical experience matter? Not to a law professor, I guess – he knows better. So, in writing to the professor, I committed a mistake that so many of "we the people" commit – a mistake of thinking that in our "democracy" people, rather than the "elites," govern – and so, we rednecks stick our noses where we aren't supposed to – and are being rightly treated by the "elites" like Professor Chafetz, and the *New York Times* with lofty disdain. As Mark Twain put it in his deliciously sarcastic "*As Concerns Interpreting the Deity*" pretending to translate an ancient inscription, "it is forbidden the unconsecrated to utter foolish and irreverent speeches concerning sacred things. This privilege, by the decree of the Holy Synod, being restricted to the clergy." Expand this, in today's secular world, to federal judges. and to professors of law – and you have the answer!

I guess we are supposed to be overawed by their superior intellect and learning, and overlook the "foolish and irreverent" nature of much of what the judges – who are our secular priesthood – backed by academe and the press, tell us.

We shouldn't be. We need critical thinking – like that practiced by Mark Twain (but – interestingly – cautiously suppressed by his early editors, the quote coming from a 1973 edition of his works – it was prudently excised from the earlier versions of the text.) We do not get much of it from the law professors, or from the likes of the *New York Times* that publishes bland "guest essays" whose superficial sophistication only covers their inanity, and deserves hardly more than – to borrow Professor Chafetz's phrase – "a little contempt in return."

Lev Tsitrin is the author of Why Do Judges Act as Lawyers?: A Guide to What's Wrong with American Law.