Clanking Chains: Ramesh Ponnuru's "One Branch among Three": How to Check the Court: Article III; Section 2

> If the bill starts to gain steam, there will be no shortage of criticisms of it. People will call it an overreaction to one bad decision that the courts are already correcting. They will say that it is not the place of Congress to do the correcting, that it is the job of the courts alone to interpret the Constitution.
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> Some conservatives will be among the critics. Many of them accept judicial supremacy, criticizing how the Supreme Court rules us rather than the fact that it rules us. In some cases, they want to use judicial power for conservative ends. They may not be familiar with the constitutional basis for regulating the jurisdiction of the federal courts.
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> Even conservatives who are familiar with it sometimes raise the objection that reining in the federal courts would only empower the state courts, which are in many cases even worse. Pass Akin's bill, for example, and a California court could issue an anti-Pledge ruling. The objection is not persuasive. When state courts overstep their mandates, opponents in the state have political recourses available to them. In many states, they can vote out the offending judges at reelection. They can impeach the judges; they can amend state statutes and constitutions. It may be difficult to accomplish these things, of course, but they are not even theoretical possibilities when a federal court moves against a state. A state is practically powerless in such situations.
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> In the normal course of things, it's not the federal government's concern when a state court runs amok. When a federal court wrongly diminishes state autonomy, however, a branch of the federal government is acting as a rogue agent and should be restrained by the other branches. It is worth noting that the state courts are as riotous as they are because the legal culture has been influenced by decades of federal court usurpations unchecked by any effective political response. Perhaps the Akin bill or something like it would inspire similar efforts at the state level.
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> Another argument against limiting the jurisdiction of the federal courts merits serious consideration. It is that it would set a dangerous precedent. Congress would soon start passing bills to undo sound judicial decisions merely because they are unpopular with the public or with congressmen. Of course, any power can be abused. But the present system-in which it is easy for federal judges to amend the Constitution by fiat, but difficult for their amendments to be undone-is far more open to abuse than one that checks the judges would be.
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> Hamilton famously remarked that the judiciary is "the least dangerous" branch of the federal government because it has "no influence over either the sword or the purse." These words are often cited ruefully by conservatives, who think that Hamilton underestimated the dangers the federal judiciary could pose. But those words point to an enduring truth about judicial overreach: Its continuation depends on the acquiescence of the other branches.
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> Under our Constitution, self-government is not merely an option; it is an obligation. Passive acquiescence in judicial rule-a failure to resist it-does not legitimize it. The Congress is full of politicians who have been reciting the Pledge of Allegiance. But they take an oath to defend the Constitution, too. If they look, they will find in it the means for its reclamation. (© National Review, Inc. Jul 29, 2002. All rights reserved.)

8- There are those who are waxed about the recent ban on students reciting the Pledge of Allegiance by the Ninth District Court. But this abuse is petty by comparison to those inflicted by the entire judicial branch beginning in earnest with *Everson* in 1947.

9- Mr. Ponnuru mentioned in his piece the effort by Congressman Todd Akin of Missouri to limit the jurisdiction of the Ninth Court's ban of the pledge by using Article III.

10- Although Mr. Akin's effort fails to address some of the more serious damages caused by the courts, the manner by which he is attempting to correct the Pledge issue is exactly the solution to what Justice Rehnquist described as the "mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights." (*Wallace v. Jaffree* , 472 U.S. 38 (1985).

11- Here is how Mr. Akin's "Pledge Protection Act of 2002" reads:

> **H. R. 5064: No court established by Act of Congress shall have jurisdiction to hear or determine any claim that** the recitation of the Pledge of Allegiance, as set forth in section 4 of title 4, violates the first article of amendment to the Constitution of the United States.
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> http://thomas.loc.gov/cgi-bin/query/C?c107:./temp/~c107IngfQr.

12- Akin's House bill H.R. 5064 provides a model that Congress may use to abridge the power of the Supreme Court. If the lower courts cannot hear a case then the Supreme Court is trumped. The phrase "No court established by Act of Congress shall have jurisdiction to hear or determine any claim that …" could introduce numerous bills that would restore the "balance of power" that Madison so successfully achieved in Philadelphia in 1787.

13- Even if Mr. Akin's bill gets nowhere, he at least has introduced into the arena James Madison's solution to the problem. He has challenged his fellow congressmen to utilize the option in Article III, Section 2 of the Constitution that grants "Congress" the power to make "exceptions" and "regulations" to the "appellate Jurisdiction" of the "Supreme Court."

14- This constitutional strategy is not likely to be employed against any of the significant Court decisions of the past 55 years. But the important point is that "the People" do have the power to reign in the Supreme Court through their elected representatives which now include not only their representatives in the House but also the Senate.

15- The reason that this strategy has little hope of meaningful employment is that the culture has gradually come to accept the power of the federal government as a good thing and not a bad thing.

16- Only public outcry could cause Congress to employ their power delegated by Article III. Even then the political pressure against it would be overwhelming. Lives would be destroyed and lies told to defend the sanctity of "judicial activism" based on the non-traditionalist attitude of "relativism."

17- This philosophy, born and reared in Enlightenment thought, is the subject of a chapter in a book by:

> **Barton, David. "A Changing Standard—toward a New Constitution." Chapter 12 in *Original Intent: the Courts, the Constitution, & Religion*. (Aledo: WallBuilders Press, 1996), 227-31:**
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> The Founders' natural law philosophy remained the unquestioned standard for law and government until the turn of this century. At that time, a different philosophy was beginning to gain strength among judges and educators. By the mid-twentieth century, this competing philosophy, often termed "relativism," had become mainstream in a number of academic disciplines. *The Encyclopedia of Religion* (New York: Macmillan Publishing Co., 1987, p. 247) describes the basic tenets of relativism:

> Views are to be evaluated relative to the societies or cultures in which they appear and are not to be judged true or false, or good or bad, based on some overall criterion but are to be assessed within the context in which they occur. Thus, what is right or good or true to one person or group may not be considered so by others. There are no absolute standards. "Man is the measure of all things," and each man can be his own measure. Cannibalism, incest, and other practices considered taboo are just variant kinds of behavior, to be appreciated as acceptable in some cultures and not in others. [Relativism] urges suspension of judgment about right or wrong.

When applied in law, "relativism" is called "legal positivism." According to constitutional scholar and law professor John Eidsmoe, this philosophy is characterized by the following five major theses (John Eidsmoe. *Christianity and the Constitution*, Grand Rapids: Baker Book House, 1987, p. 394):

(1) There are no objective, God-given standards of law, and if there are, they are irrelevant to the modern legal system.

(2) Since God is not the author of law, the author of law must be man; in other words, law is law simply because the highest human authority, the state, has said it is law and is able to back it up by force.

(3) Since man and society evolve, therefore law must evolve as well.

(4) Judges, through their decisions, guide the evolution of law.

(5) To study law, get at the original sources of law, the decisions of judges; hence most law schools today use the "case law" method of teaching law.

This philosophy of "positivism" was introduced in the 1870s when Harvard Law School Dean Christopher Columbus Langdell applied Darwin's premise of evolution to jurisprudence. Langdell reasoned that since man evolved, then his laws must also evolve; and judges should guide both the evolution of law and the Constitution. Consequently, Langdell introduced the case-law study method under which students would study judges' decisions rather than the Constitution.

Under the case-law approach, history, precedent, and the views and beliefs of the Founders not only became irrelevant, they were even considered hindrances to the successful evolution of a society. As explained by a leading relativist John Dewey in 1927:

> The belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling-blocks in the way of orderly and directed change.

Langdell's case-law approach was gradually embraced by other law schools, and the result was a diminishing belief in absolutes. In fact, within a few short years, *Blackstone's Commentaries on the Law* had been widely discarded. *Blackstone's* was deemed to present an outdated approach to law since it taught that certain rights and wrongs—particularly those related to human behavior—did not change.

Roscoe Pound (1870-1964) strongly endorsed the positivistic philosophy introduced by Langdell. As a prominent twentieth-century legal educator, Pound helped institutionalize positivism. As Dean of the law schools at Harvard and at the University of Nebraska, his influence was considerable.

According to Pound, no longer should it be the mission of jurisprudence to focus on the narrow field of legal interpretation; the goal should be to become a sociological force to influence the development of society.

The effects of these teachings by Langdell and Pound—and others like them—had a direct effect on the Supreme Court as individuals who embraced this philosophy were gradually appointed to the Court. For example, Oliver Wendell Holmes, Jr. (1841-1932), appointed to the Supreme Court in 1902, explained that original intent and precedent held little value:

> The justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end.

Consequently, during his three decades on the Court, Holmes argued that decisions should not be based upon natural law and its fixed standards, but rather upon:

> The felt necessities of the time and the prevalent moral and political theories.

Benjamin Cardozo (1870-1938), appointed to the Supreme Court in 1932, openly refused to be bound by any concept of transcendent laws or fixed right and wrongs:

> If there is any law which is back of the sovereignty of the state, and superior thereto, it is not law in such a sense as to concern the judge or lawyer, however much it concerns the statesman or the moralist.

Like many of its predecessors, Cardozo also encouraged the Court to eliminate the use of its foundational precedents. He even condoned the prospect of the Court departing from its traditional role and instead assuming the function of lawmaker. As he explained:

> I take judge-made law as one of the existing realities of life.

Reflective of this same philosophy, Charles Evans Hughes (1862-1948), the Court's Chief Justice from 1930 to 1941, declared that:

> We are under a Constitution, but the Constitution ***is*** what the judges ***say*** it is. (Emphasis mine.)

Although prominent educators and individual Justices faithfully endeavored to advance this philosophy in the first half of the century, it was not until the late 1940s that their movement had gained the sufficiently wide-spread number of adherents to produce radical societal change. The overwhelming change in direction was especially visible after 1953, when Earl Warren (1891-1974) became Chief Justice of the Court. Warren's world in *Trop v. Dulles* (1958) foreshadowed what was soon to become standard practice in American jurisprudence:

> The Constitutional Amendment (i.e., the Bill of Rights) must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Governments do need to change from time to time and to make some social adjustments. However, such change must not occur through the Court. **Article V** of the Constitution establishes the proper means where by the people may adjust their government:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States …

The Constitution
Article V

Very simply, the *people* may amend the Constitution to update or modernize it as they think necessary. As Samuel Adams forcefully declared:

> The people *alone* have an incontestable, unalienable, and indefeasible right to institute government and to reform, alter, or to change the same when their protection, safety, prosperity, and happiness require it.

George Washington, in his "Farewell Address," warned America to adhere strictly to this manner of changing the meaning of the Constitution:

> If, in the opinion of the people, the distribution or the modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation [wrongful seizure of power]; … the customary weapon by which free governments are destroyed.

The real danger of positivism rests not in the fact that societal corrections are needed, but rather in the fact that they are made by unelected Justices—individuals whose personal values not only often do not reflect those of "we the people" but who are virtually unaccountable to the people.

If evolution of society still rested in the hands of the people as originally intended, then America today would still retain much of what Courts have struck down over recent decades. Very simply, the allegedly evolving values of the nation have not been reflected in the Court's evolution of the Constitution.