Clanking Chains: 17th Amendment Alters Madison's Balance of Power; Article III Gives Congress Power to Control the Court

7- After eight weeks of debate, deliberation, and compromise the Framers decided upon the system established in the seven articles of the Constitution. Its dispersion of power, which in every case received its delegation from the people, was extremely close to what Madison envisioned. An excellent synopsis of the "separation of powers" contained in the Constitution is provided by:

> **Carson, Clarence B.** ***The Beginning of the Republic: 1775-1825*****. Vol. 2 of** ***A Basic History of the United States*****. (Greenville: American Textbook Committee, 1984), 98-99:**
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> To prevent the domination of one branch by another and enable them to check one another effectively, the Founders came to believe that each branch should have a separate and distinct source of power. Only thus could they be sufficiently independent of one another. What they hit upon was this. The House of Representatives would be chosen by the people generally; the Senate by the state legislatures, thus representing the state governments; the president by an electoral college, chosen for the purpose and in a manner directed by state legislatures. To complete the system, members of the Supreme Court were to be appointed by the president with the advice and consent of the Senate. By these devices they provided for a mixed government.
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> The powers of government are *dispersed* in the United States. This system extends the check-and-balance idea to coordinate governments, each exercising the power of government over the citizens. The national government checks the states by exercising certain powers itself, and the Constitution prohibits the states to exercise specified powers. The states check the central government both by the central government's dependence upon the states (for elections) and by having powers reserved to them alone.
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> The most important check of the states upon the central government was supposed to be that the state legislatures elected the members of the Senate and that each of the states was represented by an equal number of senators. The idea was that the state governments would be represented in the Senate … a means for the states to defend themselves from and check the national government.

1) It is instructive to note that the check and balance of senators being elected by the duly elected legislatures of the separate states was changed in 1913 by the Seventeenth Amendment:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.
>
> *The Constitution*
> Amendment XVII

2) The Seventeenth Amendment changed two words in **Article I, Section 3** of the Constitution:

> The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one Vote.

3) Under Article I, Section 3, each State was represented in the national Senate by two men *chosen* by its *Legislature*. The Seventeenth Amendment transferred power away from the state government over to an *election* by the *people* thus removing what Madison considered a very important "filter" within his system that stressed separation of powers. Dr. Carson continues on this subject:

Carson, *The Beginning of the Republic*, 100-101:

> A republic is "a state in which the supreme power rests in the body of the citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them."
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> For a government to be republican in character, it must be based on popular consent from the governed. But above all what the Founders wanted was to establish a good government. And to do that they generally believed it was necessary to bring to bear upon governing the best ideas, the best minds, and men of the highest capabilities and motives. Madison called the process by which this was to be done "the policy of refining the popular appointments by successive filtrations."
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> Therefore, in the plan they devised they provided not only for representation but also a filtering of the popular will through successive electoral and appointive checks. For example, the members of the Senate were to be chosen by state legislatures. The state legislatures themselves were chosen by popular vote. Thus, a filtering could be expected to take place. The filtering to arrive at judicial appointments was even more extensive. The president, who appointed judges, was to be elected by an electoral college, whose members might be appointed by state legislatures, themselves chosen by popular vote. [The judicial] appointment would go through further straining by the advice and consent of the Senate which was necessary to its completion. This filtration and straining was an essential part of republican government, as conceived by the Founders.

8- The Framers were confident that this "filtered" government would insure a balance of power among the three branches of government. The oldest delegate at Philadelphia was skeptical but supportive.

9- On the day the document was signed, September 17, 1787, Benjamin Franklin, 81 years of age and infirmed, asked fellow Pennsylvania delegate, James Mason, to read for him the text of his prepared speech. It said in part:

> Mr. President, I confess that there are several parts of this constitution which I do not approve, but I am not sure that I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. I doubt too whether any other convention we can obtain may be able to make a better constitution. It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies. Thus I consent, Sir, to this constitution because I expect no better, and because I am not sure that it is not the best.

10- Unfortunately, the Constitution, written by men, was not perfect, although nearly so. Yet the belief that "filtering" would somehow prevent lifetime-appointed Supreme Court justices from arrogating to themselves power was not considered a major concern.

11- It was not long before such arrogance began to capture the minds of the justices. The problem has continued to mount until today it has reached the point of judicial tyranny and outright rebellion against the Founding Fathers.

12- This opinion is among the concluding comments contained in the final chapter of:

Collier and Collier, *Decision in Philadelphia*, 268-70:

> The delegates to the Constitutional Convention, clearly, made some very wise and rather sophisticated decisions on some very basic questions. It was one of the most extraordinary intellectual adventures ever undertaken by a group of human beings.

But they were human beings, and it seems to us that in [several] areas they failed to think their way through to the best solution. It is out belief that the Convention failed adequately to deal with the question of judicial review **[the power of the Supreme Court to invalidate the acts of government officials as disallowed by the Constitution]**. The delegates recognized that somebody would have to decide when laws were in conflict with the Constitution. They assumed it would be the courts. But the idea of specifically giving any one body the last word troubled a good many of them, and in the end they deliberately left the matter vague.

The result was that the Supreme Court arrogated these functions to itself. In general, this was a good thing. If the Convention had dealt with the problem of judicial review, it would almost certainly have limited the power of the Court to interpret the Constitution as broadly as it has done.

The power of the Supreme Court to interpret the Constitution is what has given the document the flexibility necessary to deal with changing conditions. Yet it is certain that the delegates would have been horrified to see how broadly the Court has used it interpreting power. They believed, at bottom, that if final power had to lie anywhere, it ought to be in the legislature, which they saw as the primary voice of the people. They certainly did not expect the judiciary to be dealing with day-to-day details of school systems, prisons, and fire departments as they do today.

We are inclined to agree. It seems to us that the Supreme Court is setting national policy on a wide variety of issues that ought properly to be decided by Congress. A president who by chance is able to make a number of appointments to the Court may well leave a Court with a social philosophy which a decade later may be wholly out of tune with the wishes of the people. (The Congress, of course, has constitutional authority to take back control in most of these areas, but without a wide popular mandate it is unlikely to make the effort.)

13- Whatever do you think the gentlemen Collier had in mind? How is it possible for Congress to stem the power of the Supreme Court? Could Congress, should it so desire, rescind the aberrant emanations of conjured constitutional penumbra if it so desired? Certainly we need to be informed of this magical source of our temporal salvation.

14- An excellent article on this solution is the subject of the cover story in a recent article by:

Ponnuru, Ramesh. "One Branch among Three." *National Review*, July 29, 2002, 31-33:

Judicial errors are so hard to correct-and the potential remedies are now so weakened-because we have come to hold an inflated view of judicial authority. We think it natural that judges should have the last word on constitutional matters. We habitually treat the Constitution as though it were whatever the Supreme Court says it is. We assume that the Court has the job of determining the limits of everyone else's powers, which means, of course, that it has more power than everyone else. Such power, effectively unchecked, is bound to be abused.

HOW TO CHECK THE COURT

NOTE: Definition of the term "appellate jurisdiction":

Black, Henry Campbell. *Black's Law Dictionary*. 4th rev. ed. (St. Paul: West Publishing Co., 1968), 126:

> The power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages, but only after it has been finally decided by an inferior court. The power of review and determination on appeal. Jurisdiction to revise or correct the proceedings in a cause … already acted upon by an inferior court.

There is, however, a way to start changing these assumptions. The Constitution grants Congress the power to limit the jurisdiction of the federal courts. **Article III, Section 2**, explicitly gives Congress the power to limit the appellate jurisdiction of the Supreme Court (**"… the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."**). The power of Congress to limit the jurisdiction of the lower federal courts is implied. **Article III, Section 1**, grants Congress the power to create the "inferior Courts," which has to include the power to establish the scope and limits of their jurisdiction. (The Constitution spells out Congress's ability to limit the jurisdiction of the Supreme Court because the Constitution, rather than Congress, establishes that court.)

A simple majority of Congress and a presidential signature can regulate, or establish exceptions to, the jurisdiction of the federal courts. A constitutional amendment is not required. Such a bill would reduce the power of the judiciary-rather than merely recall a few judges (as impeachment would) or make an impotent gesture of defiance to the courts (as the congressional flag-burning statute did). In addition, the effort to pass a bill would be educational even if it failed to pass, since it would challenge prevailing misconceptions about the proper division of interpretive power over the Constitution.

So, for instance, Congress could pass a bill making it impossible for the lower federal courts to take up challenges to the constitutionality of schools' use of the Pledge of Allegiance-a bill that Republican congressman Todd Akin of Missouri has introduced. Judge Goodwin's decision would be effectively nullified, since neither he nor other federal judges would be able to enforce it.