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Conrad Wolf
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THE CONSTITUTION AND THE COURTS

CONRAD WOLF

On Flag Day, 1922, a United States Senator, addressing a meeting of the American Federation of Labor, denounced the exercise by the Supreme Court of the United States of the power to declare an Act of Congress void because unconstitutional, as a pure usurpation on the part of the court. This was a grave charge. A review of the history of the making of the constitution will, however, show that this statement of the United States Senator is without foundation. The Senator either ignored history, or was unaware of its existence. The convention that met in Independence Hall and framed the Constitution certainly knew its intention as to what powers the Constitution should give to the Supreme Court.

An examination of Madison's Journal of this convention will show that this question was fully understood and discussed in the convention. Strange to say it will also show that the discussion of the question arose, as an incident to the discussion of the question of what measure should be placed in the Constitution to prevent Congress (the very body to which the Senator belonged) from having the absolute and sole power to make laws because it was feared by all that the legislative branch would be the tyrannical branch of government. The fundamental basis of the Constitution was that the legislature should be confined to the legislative power, the executive to the executive power, and the judicial to the judicial power. It was feared that the legislative power might pass laws which would destroy the other branches of the government. This was one of the most serious questions discussed in the convention, and it was in this convention that the question as to the right of the Supreme Court to pass upon the constitutionality of laws was discussed.

Resolution Number Eight that was before the constitutional convention reads "Resolved that the Executive and a convenient

number of the National Judiciary, ought to compose a Council of Revision with authority to examine every Act of the National Legislature before it shall operate, and every Act of a particular legislature before a negative thereon shall be final; and that the dissent of said council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular legislature be again negatived by ----- of the members of each branch." In discussing this proposition on the 4th day of June, 1787, Madison's Journal shows this: "Mr. Gerry doubts whether the judiciary ought to form a part of it (the Council of Revision) as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some states the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation." Nobody disputed or questioned the statement of Mr. Gerry as to a court's right to declare laws unconstitutional. It was decided, however, to give the President a veto upon any law passed by Congress, and requiring that in order that any law so vetoed, before it could become effective, should again be passed by a two-thirds vote of each house. On the 6th day of June, Mr. Wilson moved to reconsider which was lost after considerable debate. The question, however, was not left to rest here, for on July 21, 1787, Mr. Wilson of Pennsylvania moved that "The Supreme National Judiciary should be associated with the executives in the revisionary power." This is the power to revise the laws before they should become effective. He admitted that this had been passed on before. "But upon reflection he thought that it should be passed upon again, that the legislative department was not sufficiently limited in its power to pass laws." He used these words: "It had been said that the judges as expositors of the laws would have an opportunity of defending their constitutional rights. There was weight in this observation, but this power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive and yet may not be so unconstitutional as to justify the judges in refusing to give them effect." Madison threw the weight of his powerful influence in favor of further curbing the legislative department, using these words: "It would be useful to the judiciary department by giving it an *additional* opportunity of defending itself against legislative encroachments." "It was much more to be apprehended that notwithstanding this co-operation of the two departments (Executive and Judiciary) the Legislature would still be an over-

match to them. Experience in all the states had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the source of real danger to the American Constitution, and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles." On the same day Mr. Luther Martin, widely known as a great lawyer, opposed the making of the judges a part of the Judiciary power using these words: "And as to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost if they are employed in the task of remonstrating against popular measures of the Legislature." On the same day Colonel Mason advocating that the judges should be included in the revisionary power used these words: "Notwithstanding the precautions taken in the Constitution of the Legislature, it would still so much resemble that of the individual states, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect of not only hindering the final passage of such laws, but would discourage demagogues from attempting to pass them." He then referred to what had been said about the judges having the double negative and said: "He would reply that in this capacity (that is as judges), they could impede in one case only the operation of the law. They could declare an *unconstitutional law void*. But with regard to every law, however unjust, oppressive, or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course." On the same day Mr. Ghoram used this language: "All agree that a check on the Legislature is necessary." Mr. Rutledge used these words opposing the admission of the judges to the revisionary council: "The judges ought never to give their opinion on a law until it comes before them." The resolution to join the Judiciary with the President as to a veto of laws was lost on this day but the question would not down. On August 15th, the question again came up on motion made by Mr. Madison to include the judges in the veto power. On that day was heard for the first time any statement criticising as to the power of the court to declare a law unconstitutional. Mr. Mercer on that day approved the motion of Mr. Madison to include the judges in the veto power because he said the true policy is that legisla-

tive usurpation and oppression may be obviated. "He disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be uncontrollable," but only because the judges would already have had their say. The motion was lost. Immediately following this Gouverneur Morris again commenced the discussion. Mr. Dickenson then used this language: "He was strongly impressed with the remark of Mr. Mercer as to the power of the judges to set aside a law. He thought no such power ought to exist. *He was at the same time at a loss what expedient to substitute.*" Gouverneur Morris suggested the expedient of an absolute veto in the Executive. He could not agree that the Judiciary which was part of the Executive *should be bound to say that a direct violation of the Constitution was law.* A control over the Legislature might have its inconveniences but he viewed the danger on the other side. The most virtuous citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of." These references to Madison's Journal show that it was clearly understood by the members of the constitutional convention that the courts would have the power to declare laws unconstitutional. No steps whatever were taken to check, destroy, or prevent the exercise of this power and the Constitution went to the people with this full understanding.

The Federalist consists of eighty-five letters addressed to the people of the State of New York, in which state there was the most strenuous opposition to the adoption of the Constitution. Before the last letters of the Federalist were published in the newspapers, they were published in the edition of "McClellan." The last of this publication was on May 28, 1788. The State of New York did not ratify the Constitution until the 26th day of July, 1788, so that the 78th number of the Federalist had been before the public for two months. This letter was written by Hamilton who was a member of the constitutional convention. In answer to the critics of the proposed Constitution, Hamilton said that some "perplexity had arisen as to the rights of the court to pronounce legislative acts void because contrary to the Constitution. As this doctrine is of great importance in all the American constitutions a brief discussion of the ground on which it is based cannot be unacceptable. There is no position which depends on clearer principles than that every act of delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act therefore contrary to

the Constitution can be valid." For United States Senators to now say that the power was usurped because it was never intended that the Supreme Court should have the right and the power to declare an Act of Congress unconstitutional or void, is preposterous in the extreme, and the best answer to all arguments advanced in favor of now taking away that power, are embodied in letter 78 of the Federalist, which should be read by every American citizen. There the dangers to liberty, growing out of encroachment by the legislative power of Congress, are clearly pointed out and are so clearly applicable to present day tendencies, that they must not be overlooked. The very fact that members of Congress have been in the last few years laboring to have the people so change the Constitution that the Supreme Court shall be deprived of the power we are considering, makes it clear that this movement puts Congress in the attitude of seeking to shake off its own limitation, and in the words of Madison, of Congress "evincing a powerful tendency to absorb all power into its own vortex."

All of us should open our eyes to the fact that the principal thing sought by the objectors now is not to deprive the Supreme Court of a power that it has enjoyed and possessed during all the period of our national existence, but to give to Congress powers which it has never had and which the fathers considered dangerous for it to have. It is the tearing down of the bulwarks of liberty and giving the Legislature the power to pass whatever laws it pleases giving it the supreme power without any limitation except that of the veto of the President. The next step would be to abolish that veto.

It seems presumptuous on the part of members of Congress to thus claim that it is best for the people and for all the future generations, that Congress should have the absolute power, not only to make, but to interpret the laws, unchecked by any other department of Government. Senators, who a short time ago were making this proposition, forgot the very fundamentals of our Government. They forget that our Government is one of limited powers, that it was never intended that Congress should be supreme in the making of laws, but that its power in making laws was limited; that it was only an agent. In other words, the Senators forgot the pit from which the power of Congress was digged.

We should not fall into that class who believe that the Constitution of the United States is the sum and end of all human perfection and so sacred and divine that it cannot be changed in any particular. The Constitution itself speaks upon this sub-

ject. The most informing article in the Constitution is Article Five (5) which provides that the Constitution may be amended; for the power to amend is the most important power granted or withheld within all the limits of the Constitution. Here we get a glimpse of a power that is sometimes ignored and especially by the Senator concerning whom we have been speaking. Who may amend this Constitution? Surely not Congress, surely not the Executive, surely not the Judicial Department. These words reveal back of this Constitution, higher than any branch of Government created by it, a power that stands above all others—the power and majesty of the American people. Congress is only a limited agent of this power that stands supreme. The President with all his powers is only an agent. The judges of the Supreme Court are only agents. Each one of these departments are limited to particular things, by this Constitution. The Tenth Amendment to the Constitution contains these words which throw further light upon this majestic power that stands above the Constitution. “The powers not delegated to the United States by the Constitution nor prohibited by it to the state are reserved to the states respectively or to *the people*.” When the people of the United States created a Congress, they gave to it only limited powers. They gave it no Judicial function and intended that it should have none, but even limited its powers to make the laws, because they were fearful of the usurpation of the legislative department. It was recognized on all sides that under a government, with powers limited by a written Constitution, it was within the power and the duty of the Judiciary, to pass upon laws enacted by the legislative department, when concrete human rights were in the balance before the court. If Congress should now be invested with the power to pass upon the constitutionality of the laws of its own making, what would be to hinder it from making and interpreting laws that would destroy the powers of the Judicial Department?

When the rights of two persons are in controversy and are at stake, before some tribunal to be settled, the function to settle the same is a judicial function not a legislative one. Speaking with all due respect of the objectors to the Supreme Court, is not any attempt to lead the people to believe, that their rights have been taken away from them by the Supreme Court, because Congress is deprived of the right to pass upon these very controversies, the artifice of the demagogue?

Many people assume that as soon as a law is passed by Congress, the Supreme Court in its superior wisdom proceeds to examine it, and say whether or not it is constitutional, or un-

constitutional; that the court passes upon all laws in this manner. It should be made plain that the courts have assumed no such authority; that no court has the jurisdiction or the power to take any Act of Congress or of any Legislature, examine it and pronounce upon it, and that no court has ever attempted to exercise any such authority. The courts exercise authority over individual parties to an actual controversy, where actual and real rights will be affected by the judgment rendered. The declaring that a law is unconstitutional is only an incident in arriving at a decision as to concrete rights.

In the famous case of *Fletcher vs. Peck*, Justice Johnson, in speaking of the duties of the Supreme Court of the United States, uses this meaningful language: "It is our duty to decide on the rights but not on the speculation of parties."

In the halls of Congress where the Legislative function is being exercised, there are discussions about general rules, what the law ought to be, what rules generally shall be established, for the government of certain procedure or certain rights. There are no individual rights before the legislators. They are looking only to generalities. No legislator, from Moses to the present day, has ever been wise enough to see in advance just how any law would work in actual operation, when it comes in contact with concrete individuals, who have concrete rights. No legislative body should have the right to decide in advance, that its general ideas, its general principles, the general laws and rules, that it sets down, should be construed so and so when it comes in contact with other rules, with other rights, which have been equally and as solemnly enacted and with as good intentions. This can only be done when the conflict comes and the function to do this is a Judicial function.

On the other hand when we step into the court room, we are far away from these generalities, we are now in the presence of concrete things. John Doe and Richard Roe, living individuals, have rights, which have come into conflict. Which one shall prevail? John Doe claims that under a certain law of Congress he is entitled to prevail, that the Supreme Legislature of the land has declared what the law is. Under this law, his rights are plain, but Richard Roe claims, notwithstanding this law, there are other laws and especially that there is a law passed, adopted and ratified, by the people themselves who are above their agent, the legislative body and under this law, he should prevail in the controversy. The particular facts in controversy are new. There have never been any like them before. These facts could not have been before Congress when it adopted law.

What is the court to do—say that a law enacted by the agent of the people is greater than the law that is enacted by the people themselves?

The United States Senator, and those who take the same view that he did, seem to imagine under such circumstances as this, that the real thing in controversy is a dispute between Congress and the Court, but Congress is not a party to the controversy. It has not been hailed into court by any summons, its rights are not involved. It can still legislate as it did before. It is not prevented from passing any kind of legislative act it thinks proper. The sole question before the court under these circumstances is, what are the rights of John Doe and Richard Roe? How shall these concrete rights be decided? If the court decides in favor of Richard Roe because his rights are guarded by the law, passed by the people, not by its agent, why should the Legislature feel that it has been curtailed in any of its powers?

In the Seventy-eighth Federalist, Hamilton uses these words: "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the Legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."

The people never intended that Congress should have any such power as is now sought for it, and the agent of the people selected by *them*, to pass upon this question should not be criticised on account of the jealousies of another agent, which has never been given such power as is now sought for it. Most people do not stop to think that if the parties in a law suit should get together, and compromise before the case is decided, that the court would at once dismiss the case, even though the parties desire a decision to guide them in the future. Courts have no jurisdiction of what would be the parties' rights, under circumstances which are not before the court.

In passing upon constitutional questions, the Supreme Court and all Supreme Courts have laid down these rules for themselves from which they have never varied.

1. There must be actual parties before the court, with an actual controversy, with rights actually to be decided, not mere speculations or intellectual disputes. It must be where personal rights or property rights are actually to be decided and affected by the judgment.

2. The court will presume that the Congress has kept within its constitutional limitations, and will resolve every reasonable doubt in favor of the constitutionality of the law.

3. The court will give such construction to the law, as to bring it within the terms of the Constitution, if that can reasonably be done, rather than to give it a construction that will make it unconstitutional.

4. The court will not state what the *law* ought to be but what the rights of individual parties are.

5. The court will not inquire into the motives or the reasons of the Legislature for passing a law. It will not undertake to determine the wisdom or the policy of the law, but will take it as it finds it, written by Congress. That it will decide no political question, that it will leave motives and political questions to the Legislature itself.

6. Congress has the power to pass any tyrannical oppressive or unjust laws, and the same will be law, unless they come in conflict with some law plainly established or plainly implied in the Constitution adopted by the people. It will not declare a law unconstitutional, because it is unjust, oppressive or tyrannical. The court has no jurisdiction to do this and so long as Congress keeps within the limit set by the Constitution, its acts are law no difference how tyrannical.

Has the Supreme Court ever abused this power, has it ever used this power to destroy the rights of any other branch of Government, or to take power unto itself, or has it kept faith with the people? The trouble with many of the opponents of the court is, not that the court has been wrong in declaring a law unconstitutional, but that it has declared laws unconstitutional, which the objectors think are in the interests of humanity, and are best for the people, but they forget that it is not the duty of the court to pass upon these questions of policy at all. It may be that some laws have been declared unconstitutional, which are humane, proper and right, but which under the constitution, Congress has no power to pass.

The Supreme Court held the child labor law, passed by Congress, unconstitutional. The unthinking said and no doubt thought that the court was guided by brutal and unjust sentiments in favor of greedy employers. This question was not before the court. In passing upon the case, the Supreme Court decided, that it was unconstitutional for Congress to pass this law, not because it was just or humane, but because the Constitution did not give Congress the power to pass such a law, be-

cause Congress was an agent that had not been entrusted with that power, that under the Tenth Amendment to the Constitution this power had been reserved to the people and to the states. There is not a state in the Union that cannot pass a Child Labor Act as good and wholesome as that of Congress. Most of the states do have such acts. The Supreme Court merely decided this power resided in the states and in the people and not in Congress. It is not a decision against the children, it is merely pointing out where the jurisdiction lies to make the laws.

It is urged that the Supreme Court should not have the power to hold an act of Congress void, unless the court is unanimous, or at least seven of the nine judges concur. This idea ignores the fact that the court does not sit to pass upon the constitutionality of laws, but to decide the personal or property rights of the parties before it.

John Doe claims under an act of Congress; Richard Roe under another act of Congress. The two laws are in conflict in the minds of the majority. If Richard Roe has the majority of the court he wins. Why should he not? Again John Doe claims under an act of Congress; Richard Roe claims under the Constitution. The two are in conflict in the view of the majority. Richard Roe has the majority, but not seven or nine of the judges, he loses his property, John Doe wins with the minority, why? The statement of the result shows the absurdity of the proposal.

The Constitution is a handicap to Richard Roe.

Upon the question as to whether or not the Supreme Court has sought to grasp power to itself, we respectfully refer to the case of *Marbury vs. Madison*, the first case in which the Supreme Court actually declared a law unconstitutional. As well known, this was a suit brought by Marbury, who had been appointed a Justice of the Peace, against James Madison, Secretary of State, to compel him to deliver the commission signed by the President commissioning Marbury to be a Justice. The question before the court, or one of the questions was, did the court have the right to mandate the Secretary of State? Congress had passed a law giving to the Supreme Court of the United States the right to issue a writ of mandamus against any officer of the United States to compel him to perform a ministerial duty.

The Supreme Court in this case decided that this law gave no authority to the Supreme Court because Congress had no power under the Constitution to give to the Supreme Court original jurisdiction, in addition to that given by the Constitution. Here the court refused to take unto itself the power which had been

granted it by the legislative department. Surely it cannot be said in this case that the court was grasping for power.

In exercising the function of declaring a law unconstitutional, the court is exercising the same function that it does in passing upon any other two conflicting laws. There may be two laws passed by the same Legislature which are in conflict with each other. In an actual trial the court decides which one is actually the law under the particular circumstances. Nobody has ever denied this right of the court and the Legislature has never felt offended by it, but it is only when the Legislature feels that the court has been loyal to the law established by the people, instead of the one established by its agent, the Legislature, that jealousy arises. The cases in which the court has passed upon constitutional questions is too long to be here reviewed. Suffice it to say that in one hundred thirty-six years, out of the innumerable laws passed by Congress, the Supreme Court has declared only forty-eight unconstitutional. The checks, put in the Constitution upon the courts, are still there. If the court goes wrong its members are still subject to impeachment and removal from office. We dare say that the court has never abused its powers.

On the other hand what are the things that are being grasped after now by the United States Senator opposed to the courts and those who take the same view? Is it not grasping after power to pass laws which are forbidden by the Constitution? Are not the fears of our fathers, of legislative usurpation, well illustrated by the very conditions of the present? Congress is at present, for almost the first time in our history, being divided into blocs; the farmer bloc, the labor bloc, and others, dividing into factions, and parties along the lines of particular pursuits, particular professions. This is the very essence of the system of Soviet Russia. Their members of the Government are selected from each group; each representative is looking after the interests of his particular group. This is exactly the contrary of the American system. Under the American system, representatives in Congress are selected from geographical divisions of the country. They are supposed to represent all interests, not merely a few, not merely the particular class to which they may belong. In fact classes rigid and fixed are the very antithesis of our constitutional system. The United States Senators opposed to the court were the very ones who engaged in the establishment of the bloc system. That factions of this kind are dangerous to human liberty, dangerous to Government, was known to the fathers and caused their gravest fears. This is shown by

the Tenth Letter of the Federalist, which was written by Madison. The opening sentence of this letter reads: "Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice." Again, "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Again, "a landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests, forms the principal task of modern legislation, and involves the spirit of party and faction, in the necessary and ordinary operation of the government." It was the very purpose of the Constitution of the United States to have such checks and balances that no faction, however large, could enact laws in its own favor, that would oppress the minority. If the power of the Supreme Courts should now be taken away, when the spirit of faction as shown by the bloc system is rampant in Congress, what would there be to hinder the leading faction, or a combination of the leading factions representing different interests, from passing laws in their own interests, which they would have the absolute power to say are constitutional, although in plain violation of the rights of the minority secured and intended to be secured by the Constitution? Is it not this impatience, with restraint, on the part of the factions guided by this self-interest, that is the cause of the criticism of the Supreme Court now? Is it not the desire to be free from restraint that is causing this grasping for power on the part of Legislators? What do they desire to do when the restraint is removed, unless it be to pass laws for interests, which cannot now be favored by the Legislature? Are not the dangers at this moment from the legislative department of the Government if relieved from its limitations and not from the court? What would happen if the restraint is removed? This is the question that should give every patriot pause. Was not the Flag Day speech referred to, made to a particular interest, or what Madison would call a particular faction, made for the purpose of influencing them,

to seek to gain power which they do not otherwise have? Power will ever grasp for more power.

After all, has the time come when the people are ready to abandon the rights which they have reserved to themselves and give that power to the legislative branch of the Federal Government? Are they ready to say that this particular branch shall have the power to settle the limitation and the extent of its own power without any other force to hinder the work? Are the people ready to abdicate in favor of Congress?

It has been shown by the enactment of Four Amendments to the Constitution within seven years, that the people can legislate and change the fundamental law, or add to it within proper time to make all parties safe. Why, then should the people themselves abdicate in favor of Congress?

In this time of factions or blocs, with a threatened bloc based upon religious and racial antipathies, if the power to interpret the Constitution as well as the laws, is placed in the hands of the political department of government instead of the judicial department, what will the great guaranties of religious and civil liberty, embodied in the Bill of Rights be worth?

Whatever may be said or thought of judges and lawyers for a century and a third we have lived under the system in which they have had a leading role. Under their administration, wrongs have been punished, and human rights vindicated. In the humblest court rooms, as well as in the greatest in the land, liberty has always dared to proudly raise her head, and her voice has been commanding.

When our forefathers crossed the ocean to come to a new land, among the dearest things, the indispensable things, that they brought with them were their ideas of law and legal institutions. Among their most precious possessions were their old dog eared law books. As the pioneers moved and settled from the Atlantic seaboard over the mountains, over the plains of the middle west, over the great plains that were once the Great American Desert, over the mountains again to the farthest reaches of the continent, in every community established, there went the function of the judge and the advocate. Everywhere arose the church, the school and the court house. The principles of justice, contained the dog eared law books carried in wagons, or horseback, on foot, through the forests, over prairies and mountains, were the foundation upon which American civilization has been built.

Our institutions have passed through sunshine and through storms. They have been tried by the bitter wrangles of factions. They have withstood the shock of civil war. Through

these trials, whoever may have failed, the courts have stood like a "great rock in a weary land." We may truthfully say to all the world, the Supreme Court has kept the faith.

When William Tell escaped from the toils of the tyrant, in the midst of a storm, he raised his hands to his native mountains "to show they still were free", and exclaimed, "I have heard of other lands whose greatest storms are as gentle zephyrs to these winds I know, and I have wished me there. But I have heard of their tyrannies and oppressions, and then I have raised my face into the teeth of this fierce gale, and said 'blow on, this is the land of liberty.'"

Poets and orators have sung paeans to the glory of the warrior and the statesmen. No poet has sung the epic of the court room. The warrior may "mount up with wings of eagles;" the statesman "may run and not be weary;" but though the courts "shall walk," through all the days as guardians of liberty, "they shall not faint." In the great chorus of the Union their steadfastness enables us to still sing in truth:

"My country, 'tis of thee, sweet land of *liberty*."