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UA37/23 WHAS Broadcast No. 23

WHAS

Western Kentucky University

Earl Moore

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Bowling Green, Ky.
February 12, 1936.

Esteemed Friend:

I should like to call your attention to the special radio program we are having February 25 from 3:30 to 4:30 P. M. It is to be a debate between our debating team and that of Asbury College on the subject, Resolved: that Congress should be permitted, by a two-thirds majority vote, to override any decision of the Supreme Court declaring acts of Congress unconstitutional. The debate will be broadcast from WHAS at Louisville, but our speakers will be located here on our campus and the Asbury speakers will be located on their campus at Wilmore, Kentucky. The novelty of the speaking arrangement, the timely interest of the subject to be debated, and the merit of the speeches will, I believe, make the program extremely interesting and worth while.

I am hoping that you can be one of our radio audience on that occasion.

Fraternally yours,

[Signature]

[Address]

[City, State]
At this time, we bring an unusual feature. A debate between Asbury College, Wilmore, Kentucky, and the Western Kentucky State Teachers College at Bowling Green. Each team will speak from its own respective campus. The Asbury team from Wilmore, the Western team from Bowling, Green. The subject of the debate will be announced by the chairman, Mr. James Ranck who speaks from Wilmore, Kentucky.

Wilmore

Remarks by chairman

First affirmative speech

Introduction of first negative speaker:

The debate will be continued by Mr. Paul Huddleston speaking from the campus of Western Kentucky State Teachers College, as he opens the case for the negative.

Bowling Green

First negative speech, ending with:

Therefore the change advocated by the affirmative is unnecessary, and the conditions of our present form of government would certainly not justify the American people in assuming the risks involved in adopting the plan advocated by the affirmative.

Wilmore

Remarks by the chairman, introduction of second affirmative speaker

Second affirmative speaker

Introduction of the second negative speaker:

You have just heard the conclusion of the constructive case for the affirmative on the Supreme Court judicial review question. Mr. Coy Parsley of Western Kentucky State Teachers College will now conclude the constructive case for the negative speaking from Bowling Green, Kentucky.

Bowling Green

Second negative speech: Ending with:

That protection of minorities which we have so long held dear would have been destroyed and our government would become one merely of the majority, by the majority and for the majority.
Wilmore

Chairman:

Mrs. Parsley of Western Kentucky State Teachers College has just concluded the constructive case for the negative in a debate on the Supreme Court judicial review question. Rebuttal of the case will be given by Mr. Huddleston as he concludes the case for the negative speaking from Bowling Green.

Bowling Green

Negative rebuttal, ending with:

In conclusion, I should like to say again that we have enjoyed greatly participating in this debate with our friends from Asbury, and that we thank the officials of station WHAS for the privilege of putting our discussion on the air.

Wilmore

Introduction of the affirmative rebuttal

Affirmative rebuttal:

chairman: You have just heard the conclusion of the radio debate between Asbury College of Wilmore, Kentucky, and Western Kentucky State Teachers College of Bowling Green, Kentucky. Western Teachers College will be on the air next Tuesday at four o'clock Central Standard Time, when a play based on happenings in Ohio County, Kentucky, will be broadcast. We now return you to the Louisville studios.

(Organ fade out)
WHAS Broadcast No. 23
February 25, 1936.
3:30 - 4:30 p.m.

From Studios in Wilmore and Bowling Green.

Debate between Asbury College and Western Kentucky State Teachers College.

The chairman and the two affirmative speakers spoke from Wilmore. The organ fill was also from there. The two negative speakers (two main speeches and one rebuttal speech) spoke from Bowling Green. Copies of the Western speeches are attached.
Mr. Chairman and worthy opponents at Asbury, ladies and gentlemen of the radio audience. It gives us great pleasure to participate in this radio debate with our friends from Asbury College. To them we extend the warmest greetings from ourselves and from Western Kentucky State Teachers College here at Bowling Green. To the officials of station WHAS at Louisville we wish to express our appreciation for the privilege of being allowed to broadcast our discussion of this subject which the first speaker from Asbury has already introduced to you.

The question which we are debating this afternoon is the one chosen by the Pi Kappa Delta forensic society as the national question for this year. The choice was made last fall shortly after the N.R.A. had been declared unconstitutional by the Supreme Court. It seemed then that the American people felt that the Supreme Court in that and other recent decisions had unjustly invalidated certain very desirable social legislation advocated by the administration and passed by Congress. Consequently the ones who formulated the question to be debated felt justified in assigning to an affirmative team the burden of proof for a proposed change in our government that would curtail the power of the Supreme Court by placing in the hands of Congress ultimate authority over its own legislation. During the winter, however, as time has passed and public opinion has had a chance to make itself felt, two facts have become increasingly clear. The first one is that the American people since they have had time to think the matter through calmly, are very much in doubt as to whether or not the invalidated social legislation would have been beneficial. It has become evident that the American people now feel that the Supreme Court, instead of depriving them of desirable legislation to which they were entitled, actually, in the face of legislation which was at the best questionable, gave them that protection to which they were entitled under the constitution. The fact that almost two-thirds of the 10,000,000 votes polled by the Literary Digest
in the last few months have declared themselves opposed to the New Deal policies, which, of course, were chiefly identified with this social legislation, is sufficient proof for this statement. I might say too that the special ballots of clergymen announced last Saturday, February 22, showed that over 70% of the 21,000 polled were opposed to the New Deal policies.

The second fact that has become so very evident since this question was selected for debate last fall is that the Supreme Court, rather than passing upon the merits of the social legislation—as some at the time felt it had—was actually passing upon the constitutionality of it, and is glad to declare such legislation constitutional when it can possibly do so. The two actions which have made this truth indisputably evident were first the 8-1 decision given a week ago yesterday in favor of the TVA, potentially the most important of all the New Deal legislation; and second the passage by the House last Friday of the rewarded substitute for the A.A.A. That fact in itself shows that the members of Congress know that if they can make their acts constitutional they will not be invalidated by the Supreme Court.

Now, whether or not such legislation really is desirable is beside the point so far as this debate is concerned. The only important point is that such legislation will not be invalidated by the Supreme Court if it is constitutional. Quite obviously, if this legislation cannot be made constitutional, and if it really is desirable, the only reasonable remedy is not the changing of the authority of the Supreme Court, but the changing of the constitution itself by amendment. I shall consider that procedure further on in my discussion.

Just now I wish to point out to you that the affirmative, composed of our friends at Asbury, according to the statement of the question for debate, are committed to the support of a definite change in governmental procedure and must accept the full burden of proof for the proposal which they advocate. The question reads: "Resolved, that Congress should be permitted, by a two-thirds
majority vote, to override decisions of the Supreme Court declaring acts of Congress unconstitutional. The affirmative, in order successfully to defend their case, must prove: first, that the evils of our present system of government are such as to make a change necessary; and second, that the change which they propose will be satisfactory in operation. My colleague and I will oppose the affirmative case with two major contentions; first, that the affirmative cannot prove that a change in the present system is necessary; and second, that the plan proposed by the affirmative is not only unnecessary but that it is undesirable and dangerous as well.

I shall present the first contention. First, I should like to remind you that the ultimate outcome of any change in governmental procedure is necessarily uncertain. In any plan proposing such a change there are possibilities which cannot be anticipated at the outset. Therefore, in order for the affirmative to prove that a change in the present system of government is desirable, they must prove that conditions are such as to justify the American people in assuming the risks involved in adopting the plan which they advocate.

The main contention of the affirmative in attempting to show that a need exists for a change in the present set up is that the Supreme Court from time to time has blocked certain progressive legislation, especially that of a social nature, and thereby deprived the people of something very desirable to them. I have already exposed something of the fallacy of this contention in regard to recent social legislation, but let us glance for a moment at the history of the Supreme Court. During its 146 years of existence, the Congress has passed over 24,000 laws; yet during this time and of this number only 72 acts of Congress have been declared unconstitutional. The affirmative would contend that these 72 decisions deprived the people of desirable legislation and prevented national progress. We of the negation feel that the affirmative cannot prove that the 72 laws in question would have proved beneficial had they
been allowed to stand. Certainly history does not justify the conclusion that they would have. As a matter of fact, only four of those unconstitutional laws were supported by the people to the extent that they were incorporated in amendments to the constitution. And in those cases the will of the people was not defeated, but merely temporarily restrained until its desire could be accomplished by the safe and sane process of constitutional amendment. In the case of the child labor law the Supreme Court declared an act of Congress unconstitutional and Congress submitted the bill to the people in the form of an amendment. That was in 1924, and now, twelve years later, only seven states have ratified the amendment. On several occasions Congress has passed laws limiting the rights of citizens, such as freedom of speech, freedom of the press and the right of trial by jury. Does the affirmative contend that those laws were desirable? Did the Supreme Court decisions declaring them unconstitutional defeat the will of the people and deprive them of desirable legislation, or did they give the people that protection to which they were entitled under the constitution? We ask you to remember, ladies and gentlemen, that the plan offered by the affirmative gives to Congress ultimate authority over, not only social and economic legislation, but also over every personal and political right which you have come to accept as inalienable.

**Further, in regard to decisions of the court invalidating legislation,** we have already pointed out that many times the majority of the people, after they have had time to fully consider the issue, have come to the conclusion that the Court did not deprive them of a desirable law, but rather protected them from a dangerous and unsound policy.

If, after careful consideration, the people decide that they really want certain legislation, they can get it by any of several means. First, there is state legislation, which in itself will take care of most of their needs. Second, Congress can rewrite the law, leaving out the unconstitutional features.
This has been done on many occasions. As I mentioned at the beginning of this discussion, Congress only last Friday passed a substitute drafted to replace the invalidated A.A.A., and designed to accomplish virtually the same benefits as the original law. Third, if the legislation is of such a nature that it cannot be handled by the various states, or be made constitutional through reworking, the people can change the constitution by amendment so as to permit the desired legislation. The idea that the process of amendment is too slow has been exploded. The last one required less than seven months for ratification. The average time is about two years. This method is the safest yet devised for securing needed legislation. It allows the people to study the issue from every angle and to arrive at conclusions as to what the effects of the proposed law will be.

Our worthy opponents from Asbury, contend that the Supreme Court can and does interpret the terms of the constitution in the lights of the experiences of its own members. We of the negative assert that if the constitution is so vague as to admit various interpretations, then the fault lies in the constitution itself and not in the Supreme Court. If such is the case, the reasonable thing to do is not to take ultimate authority over legislation from the Supreme Court and give it to Congress, but by our established process of constitutional amendment to define and clarify those vague clauses of the constitution so that will be specific and definite and not admit of different interpretations.

I have shown that no change in our present system of government is necessary, for our system contains within itself the means of taking care of the different problems in government that arise. Also our present judicial system has not in the past and cannot in the future block legislation which the people want. Therefore the change advocated by the affirmative is unnecessary, and the conditions of our present form of government would certainly not justify the American people in assuming the risks involved in adopting the plan advocated by the affirmative.
Mr. Chairman, My opposing Friends, Ladies and Gentlemen:

Contrary to the statement of my friend from Asbury, who just left the air, the plan advanced by the affirmative would be a definite change since it would transfer to a legislative body a judicial power now held by the Supreme Court.

For nearly a hundred and fifty years our system of government has remained practically free from change, and at the present time, as my colleague has just shown, popular opinion is opposed to such change as would certainly be brought about should the plan just proposed by the affirmation be adopted.

The second speaker for the affirmative has also maintained that government flexibility which would result from this plan would be desirable, but may I remind him that the best test of sound government is not its flexibility but its quality of remaining stable in times of stress.

Now, My colleague has thus far definitely shown that a change in our present system of government is not necessary. It is now the purpose of the negative to prove that the change proposed by our friends of the affirmation is both highly undesirable and extremely dangerous.

This change which has been proposed is undesirable chiefly because of three major reasons. First: The members of Congress are not qualified to handle efficiently such an important obligation as would be placed upon them. Since these members of Congress come from various professions they are, of course, not familiar with constitutional law.

If this proposed system should be adopted, any bill declared unconstitutional by the Supreme Court, and passed by Congress a second time by a two thirds majority vote would have to be regarded in either of two ways. Congress would either have to say that the Supreme Court, experienced in Constitutional interpretation as it is, had made a mistake in declaring the law to be unconstitutional
or pass the law upon its merit regardless of its constitutionality. If its agreement with the constitution should be considered, then a legislative body would have taken upon itself a judicial power to declare laws of its own enactment constitutional. To think of Congress considering its own legislation from the standpoint of constitutionality then is absurd. It must necessarily consider such laws on the basis of their merit or the end to be accomplished. If the law be passed upon its merit alone, then the power of the constitution would have ceased to exist and all things provided for by it, would be liable to a change.

William Keen in the "Outlook" Magazine for October of 1935 says that of the five hundred thirty-one Congressmen a small percentage are lawyers, and that the others know but little or nothing about constitutional law. Surely then constitutional interpretation should not be given to men ignorant of constitutional law.

Second: Congress is open to political influences. Members voted in by one major party, naturally are inclined to favor this party, and political interpretation should never be applied to the Federal Constitution.

The members of Congress are usually desirous of re-election, and evil which does not exist in the Supreme Court, and thus are susceptible to the influence of political powers. Its members are also hampered by hasty and outdated campaign promises made upon the eve of the election to the people who supported them.

The third reason why Congress could not do justice to this judicial power, were it intrusted to it by the adoption of the proposed system, is that Congress is too transient. In two years it is impossible for Congressmen to become familiar enough with the constitution to intelligently interpret it and apply the interpretations to our present problems.

By this change the very foundation of our government would be demolished and its fundamental principles would be hopelessly destroyed. The founders of our government provided for three coordinate but distinct departments
of government. The legislative, the duty of which was to make laws, the executive to enforce these laws, and the judicial department to interpret them. The adoption of this suggested plan would immediately take from the judicial branch one of its highest judicial powers and place it upon an already over-burdened legislative department. This transfer of such duties upon an improper body would mean the eventual destruction of the present American organization of government, proved to be satisfactory through a period of a century and a half, and the establishment of an entirely new and different system.

That the framers of the constitution intended for the Supreme Court to exercise authority by its judicial power is evidenced by this quotation from Hamilton's Federalist papers explaining the constitution. (quote) "The interpretation of laws is the peculiar province of the Courts." (unquote) Again he says, "No legislative act contrary to the constitution can be validated." (unquote)

Madison, in a letter to George Washington asserts (quote) "The national supremacy ought to be extended to the judiciary departments." (unquote) The quotations then are sufficient evidences that in the Constitutional Convention there existed well formulated ideas that the judiciary department should be supreme in its sphere.

The plan to give Congress authority over the Supreme Court would undoubtedly weaken our system of checks and balances. It would take from the Supreme Court, a body unswayed by political influence, partisan heat or temporary excitement, the authority to determine right from wrong.

This plan advocated by the affirmative would permit unwise and unfair legislation, a thing for which Congress has, from time to time, received considerable criticism. Congress has been known to enact such bills as would directly conflict with personal rights held dear by the American people and protected by the Federal Constitution. Is it safe then to entrust our bill of rights, so essential to personal liberties, to Congress without the safe guard of an official defender? The answer is "No".
The opinion of John Marshall relative to this question is definitely expressed in this quotation (quote) "To what purpose are powers limited, and to what purpose is this limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained." (unquote)

The adoption of this unwise plan would be a grave danger to state rights since Congress could pass whatever laws it desired without respecting the powers reserved to the state governments. The possibility of such evils exists and if our government is to be sound, all dangerous possibilities must be avoided.

It is plain that under such power as would be given to Congress by this proposed system, the Constitution would be no more than a mere scrap of paper. Congress would be left almost without check to interpret the Constitution in any manner that would sustain their legislative acts, whether or not they be in accord with the Constitution. A recent editorial in the "St. Louis Globe Democrat" expresses the idea that if Congress were given the power to over ride the Supreme Court, the Constitution would be repudiated and a federal autocracy would be established.

It is not our intention to maintain that the Constitution is a sacred document not to be touched or changed. We do not believe that. We do believe however that under our present system of government we have sufficient means of changing the Constitution whenever a change of conditions demands it. This method is that of amendment which gives the people an opportunity to meet needs that did not exist during the time of the Constitutional Convention. It was intended that changes in the Constitution should be brought about by the people, and under the proposed system the Constitution would become a thing of wax to be shaped by the desires of Congress.

It is contrary to the idea of democracy, however, to throw our Constitution at the feet of Congress allowing the Constitution to be molded in such a way and at such a time as Congress would desire. Whenever Congress is allowed to over ride the Supreme Court, our Constitution is likely to be destroyed, and whenever the Constitution is destroyed, democracy will be destroyed.
It is practically certain then that a nation of Americans is not going to allow the Constitution, the protector of the people's rights, to be placed in the hands of a legislative body to be handled as it pleases the Congress. It is as equally certain that the American people wish to preserve our system of government as it is, allowing the Supreme Court to retain its guardianship of popular rights by prohibiting legislative encroachment upon the document which gives such rights to the people.

In summary, let us examine the facts as shown by the negative to be true.

First: The present system of government does not necessitate a change.

Second: The proposed plan is highly undesirable because:

Congress does not know Constitutional law.
Congress is open to political influences, and
Congress is too transient.

Third: There is extreme danger in the proposed plan because:

Our governmental system would be destroyed by the combination of judicial and legislative duties.

There would be no check upon unwise and unconstitutional legislation except by the body which enacted such legislation, and a possible infringement of the Bill of Rights would exist.

State rights would likely be destroyed, and last; the Constitution no longer would be the supreme law of our land thus endangering our democratic government which we have supported and cherished for nearly a hundred and fifty years.

The Supreme Court has long been hailed as the protector of the minority. With the adoption of the proposed system, our government would no longer be a government "of the people, by the people and for the people." That protection of minorities which we have so long held dear would have been destroyed and our government would become one merely "of the majority, by the majority and for the majority."
In our constructive speeches my colleague and I have shown you that our friends from Asbury, in order to prove their case in advocating the shift of judicial authority from the Supreme Court to Congress, must show that present conditions are such as to make such a change necessary—so necessary that the American people would be justified in experimenting with their plan. I hardly need point out that they have failed to do this, for they have given very little consideration to the actual conditions present in our country today.

Quite obviously it would be foolish for the American people to experiment with such a plan as our friends at Asbury advocate unless present conditions are such as to make some kind of change absolutely necessary, and they have signally failed to do this.

In constructing their case our worthy opponents have tried to make it appear that they are shifting ultimate authority, as they term it, from the Supreme Court, where, according to their statement, it now resides, to the people, where of course it should be.

Our worthy opponents' assumption that ultimate authority rests with the Supreme Court, however, just simply ignores the facts. At present ultimate authority rests with the people, where our worthy opponents would have it. The basis of our government is the Constitution, the supreme law of our land. Only the people can change that law. The Supreme Court decides only whether or not new laws made by Congress come within the limits the constitution places upon them. At present only the people can change the constitution and it is their only protection; so ultimate authority does not now rest with the Supreme Court but with the people where our worthy opponents say they would like to have it, but where it would no longer be if the change which they advocate should be affected. As soon as Congress secured the power to override decisions of the
Supreme Court declaring its acts unconstitutional, it would be in positive and absolute control of the constitution itself, the supreme law of the land, and the only protection of the people. The change advocated by our friends from Asbury then, rather than transferring ultimate authority from the Supreme Court, where it does not rest now, to the people; would actually transfer ultimate authority from the people, where it does rest now, to Congress.

Our opponents claim to have discovered the startling fact that even the amendments to the constitution are subject to interpretation by the Supreme Court. "We have no assurance," they say, "that the amendment which we passed to evade the decision of the justice will be interpreted as we intended it to be." The implication is that it will not. History of the court furnishes no basis for such a contention. Of the eleven amendments ratified since the adoption of the original instrument, not one has ever been interpreted by the court in such a way as to defeat its original purpose.

There is perhaps no better way for us to refute the arguments of our opponents than to ask you to imagine the actual status of Congress under their plan. Let us assume for a moment that it is in operation. Congress passes a law which continues in effect until a case brought under it reaches the Supreme Court. That august body gives the case its earnest and expert consideration and declares the law to be unconstitutional. A member of Congress then introduces the bill for re-enactment by a two-thirds majority. Every member of Congress who votes for the re-enactment must take one of three attitudes toward the Supreme Court and toward the constitution. First, he may openly or tacitly charge the majority of the court with malicious dishonesty and malfeasance in office, by reason of which a deliberately false decision was rendered. But our opponents have paid high compliments to the integrity of these judges, and we agree with them, so this possibility can be dismissed.

Second, the individual Congressman might take the position that the Court had rendered an honest verdict but was in error in its judgment. In
other words, the Congressman takes direct issue with the majority of the Supreme Court on the question of constitutionality. Whenever two-thirds of the Congressmen take this attitude and have the power to place themselves above the Court, one of the three branches of our government will have suffered an irreparable injury. Furthermore, these congressmen have been chosen at random, as it were, from different walks of life. They are not constitutional lawyers. They are seekers of political advantage, many of whom have only a transient official existence and many of whom are candidates for re-election. Into their hands is placed the interpretation of the document that has been the basis of our government for a century and a half. This is the group that would be setting precedents to influence the history of our nations for generations to come. Never again could our courts be expected to render unbiased opinions on constitutionality with the constant threat of veto hanging over them.

Third, the individual congressman might take the attitude that the law really is unconstitutional but that its merits as a law are such as to justify its being passed in direct violation of the constitution. Whenever two-thirds of our congressmen take this attitude, at that moment the constitution is removed from the high place it has had through so many decades and becomes a scrap of paper, bits of which may be torn away by the Congress at its pleasure, without the orderly and dignified method of amendment requiring the action of the several states. Thus, ultimate authority would be transferred from the people, where it now resides, to Congress, where the plan advocated by our worthy opponents would place it.

In conclusion, I should like to say again that we have enjoyed greatly participating in this debate with our friends from Asbury, and that we thank the officials of station WHAS for the privilege of putting our discussion on the air.