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Woodrow Wilson: Interpreting the Constitution

Christopher Wolfe

A close examination of early and modern American constitutional interpretation reveals that there has been an essential change in the *manner* in which the Constitution is interpreted. When that comparison takes the form of a comparison between very early Supreme Court decisions and very recent ones the difference is relatively clear—at least that there is a difference. To some extent, what some of the differences are is observable. For instance, the overt balancing of interests (those of state and individual) in modern civil liberties cases is quite different from the character of earlier Supreme Court decisions.

On the other hand, an examination of the history of the Supreme Court does not immediately reveal when, why, and through whom this change occurred; nor is the precise character of the change readily ascertainable. This article will attempt to discover the character of that change, and the reasons for it, through an analysis of an important American political thinker and actor: Woodrow Wilson. Wilson's writings are peculiarly useful, because in some measure the process of change seems to have occurred *within* his thought. He cannot be said to be simply traditional or simply modern in his approach, even at any one point in his development. But he seems to have started his political writing with a generally traditional approach to constitutional interpretation (i.e., one similar to the Founders') and to have closed it with a generally modern approach. The character of the change itself, and the reasons for the change, then, will be the central focus of this article.

Wilson's early position regarding American government is clearly, forcefully, and attractively portrayed in a book which still remains, despite his subsequent alterations, the most lasting statement of his political views: *Congressional Government*.[1] This outgrowth of his doctoral thesis (and an earlier undergraduate thesis), published in 1885, describes Wilson's early views of the Constitution.

Wilson has not one but three overlapping and somewhat contradictory views of the Constitution in *Congressional Government*.

[1] Woodrow Wilson, *Congressional Government* (1885; Boston, 1913).

The first view is perhaps the most obvious and striking one: the Constitution is inadequate as a basis for modern government.

Wilson describes the origin of the Constitution in the concluding chapter of *Congressional Government*. It was an imitation of an older stage of the English constitution, when "the sovereignty was at see-saw between the throne and the Parliament" (p. 311), and our separation of legislature and executive was intended to prevent executive dominance. The American Constitution was therefore superior to the English constitution at that time. But "the natural, the inevitable tendency of every system of self-government . . . is to exalt the representative body" (p. 311), and accordingly Parliament established its absolute supremacy. Thus, the English constitution is now superior "because its growth has not been hindered or destroyed by the too tight ligaments of a written fundamental law" (p. 311).

But, regarding American government, although "a written constitution may and often will be violated in both letter and spirit by a people of energetic political talents and a keen instinct for progressive practical development," still "as long as they adhere to the forms of such a constitution . . . its political development must be in many directions narrowly restricted . . ." (p. 312). The Constitution established a government in which the legislative and executive powers were separated, and thus gave to the nation a government unable to meet the needs of our day. "The government of a country so vast and various as the U.S. must be strong, prompt, wieldy, and efficient" (p. 317), but the division of function and authority in the Constitution (especially separation of powers) frustrates this necessary goal.

Federalism is another problem. "The times seem to favor a centralization of governmental functions such as could not have suggested itself as a possibility to the framers of the Constitution" (p. 53). The Constitution is therefore inadequate because it fails to vest sufficient power in the central government, and that inadequacy may be rectified only by changing the Constitution: *de jure* through constitutional amendment or *de facto* through "still further flights of construction" (p. 55).

But this first view of the Constitution is supplemented by two other views. The first of these is that the Constitution is not what it is thought to be, namely, the governing framework of American politics. Wilson says that the newborn criticism of the Constitution

arises not only from the Civil War and subsequent policy problems, but also from the fact that

> we are really living under a constitution essentially different from that which we have been so long worshipping . . . The noble charter of fundamental law given us by the Convention of 1787 is still our Constitution, but it is now our *form of government* rather in name than in reality, the form of the Constitution being one of nicely adjusted, ideal balances, whilst the actual form of our present government is simply a scheme of Congressional supremacy (pp. 5-6).

The Constitution is no longer able to provide a government of balanced and separate powers, since the natural democratic tendency to deposit all power in the representative assembly has been operative in the United States as well as Great Britain. (It is only effective enough to make that unified congressional government chaotic and inefficient.)

The second view of the Constitution (that it is our form of government in name rather than in reality) is based on the

> commonplace observation of historians . . . that institutions constantly undergo essential alterations of character, whilst retaining the names conferred upon them in their first estate, and the history of our own Constitution is but another illustration of this universal principle of institutional change. . . . Ours is, scarcely less than the British, a living and fecund system (p. 7).

This second view emphasizes that external forces in American life have changed the Constitution.

> The Constitution is now, like Magna Carta and the Bill of Rights, only the sap-centre of a system of government vastly larger than the stock from which it has branched—a system some of whose forms have only very indistinct and rudimental beginnings in the simple substance of the Constitution, and which exercises many functions apparently quite foreign to the primitive properties contained in the fundamental law (pp. 7-8).

The third view of the Constitution in *Congressional Government* is one which makes it a rather vaguer and more nebulous thing. It rephrases the second point to argue that a constitution by definition, as it were, is shaped by external forces, and changes with them.

> The Constitution is not a complete system; it takes none but the first steps in organization. It does little more than lay a foundation of principles . . . the fact that it attempts nothing more is its chief strength. For to go beyond elementary provisions would be to lose elasticity and adaptability. The growth of the nation and the consequent development of the governmental system would snap asunder a constitution which could not adapt itself to the new conditions of an advancing society. If it could not stretch itself to the measure of the times, it must be thrown off and left behind, as a by-gone device; and there can, therefore, be no question that our Constitution has proved lasting because of its simplicity. It is a corner-store, not a complete building; or, rather, to return to the old figure, it is a root, not a perfect vine (pp. 8-9).

For Wilson, then, "the chief fact of our national history is that from this vigorous tap-root has grown a vast constitutional system" (p. 9). The use of this metaphor raises interesting questions, however. Is not the growth of the vine from the root determined by powers and qualities inherent in the root? Does not the vine follow from a blueprint or pattern contained within the root itself? Yet Wilson has previously argued that the change in government is rather more complete: our system "exercises many functions apparently quite foreign to the primitive properties contained in the fundamental law"; the Constitution is government "in name rather than in reality."

Perhaps the house-building analogy is more accurate, for the growth of a house by additions is determined by the builders of the additions rather than by the original architect. True, the elegance of the house would be enhanced by maintaining the original style (by adhering to the original principles of the Constitution, the "literary theory" of "ideal balances"). But what if the original style is outdated (as separation of powers is)? Perhaps the new owners world prefer to tear down the original structure and replace it, but cannot afford to do so (that is, they don't have the votes or political power to adopt a constitution more to their liking).

At this point even this analogy weakens, because the house can never be the house only in name rather than reality—unless, perhaps, the front is maintained as a facade while considerable reconstruction goes on behind the outdated surface appearances.

At any rate, the third view of the Constitution emphasizes its "simplicity," "elasticity," and "adaptability," which allows it to "adapt itself to the new conditions of an advancing society." Of

course, the Constitution cannot literally adapt itself, according to Wilson. How then is it adapted? His references earlier regarding the need to add power to the central government provide a clue to a possible answer never really elaborated in this book. Change can come by way of constitutional amendment, but "the legal processes of constitutional changes are so slow and cumbersome" that this is seldom feasible (p. 242). The other method is by "still further flights of construction" (p. 55). And since the Constitution establishes the Supreme Court "with ample authority of constitutional interpretation" (p. 8), this raises the question of the role of the judiciary in *Congressional Government*.

There is little to be said about this question, however, since *Congressional Government* has chapters on the House of Representatives, the Senate, and the executive, but has no chapter on the courts. The few remarks on the judiciary in this book occur in the introductory chapter, where Wilson shows the feebleness of any supposed judicial check on Congress. The tone of the discussion is such as to minimize its power greatly. There is virtually no discussion of the interpretive role of the Supreme Court and its relation to the status of the Constitution within the American system.

What are the implications of Wilson's discussion of the Constitution for the specific topic of constitutional interpretation? The different emphasis at various points makes it somewhat difficult to say. There is a certain "traditional" character to Wilson's idea of constitutional interpretation in *Congressional Government*; that is, at some points Wilson seems close to earlier Americans (Hamilton, Marshall, Story) in the manner in which he interprets the Constitution, although not at all in the evaluation of the Constitution once interpreted. For instance, he stresses certain limitations on the exercise of judicial review, especially the principle of deference to the constitutional opinions of the legislature. He resists at least generally the temptation to interpret the Constitution to make it suit his own principles, as for example when he argues that more centralized government power is necessary, but can come about only through constitutional amendment (unlikely) or through what he somewhat disparagingly refers to as "still further flights of construction."

This approach to interpretation is ultimately rooted in the fact that Wilson takes the Constitution seriously, is interested in finding out what it says rather than making it say what he wants it to say.

Or, to be more precise, he wants to show what it says, because that is an essential element of his critique of the Constitution as inadequate.

On the other hand, his own generally progressive principles do exert some pressure upon him to emphasize a more modern idea of the nature of constitutions. Thus, at some points he talks about the necessity of an elastic and adaptable constitution, which is lasting because of its simplicity. It must be able to "adapt itself to the new conditions of an advancing society," to "stretch itself to the measure of the times." And, in fact, Wilson says, the Constitution has proved lasting, it is a "vigorous tap-root" and a "noble charter of fundamental law."

But the praise of the Constitution is a brief interlude in the face of his barrage directed against the structure of government (separation of powers) and its extent of power (too limited powers of the central government). *Congressional Government* is a powerful attack on the Constitution, and thoroughly deserves its rank as one of the first amongst those works "in the first season of free, outspoken, unrestrained constitutional criticism."

Wilson, however, came to believe that *Congressional Government* was outdated by subsequent developments, especially the emergence of executive leadership in the wake of the Spanish-American War, and so he published a new book in 1908, based on the previous year's lectures at Columbia University, entitled *Constitutional Government in the United States.*[2]

Constitutional Government in the United States is quite a different book. While the criticism of the Constitution partly remains, it does so in considerably muted form. It is largely submerged in a new *emphasis* on the adaptability of the Constitution.

The Constitution, according to Wilson, was written in supposed imitation of the English government, which was even then advancing to a newer form of constitution. By the constitutional separation of the executive from the legislative "we were fixed fast, in respect of the presidential office, at the stage of constitutional development which England was leaving for forms simpler and still more advanced" (p. 44).

"The government of the U.S. was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy

[2] Woodrow Wilson, *Constitutional Government in the United States* (1908; New York, 1961).

of the Newtonian Theory of the universe" (pp. 54-55). Whig government, like the Newtonian universe, is composed of bodies governed by the "nice poise and balance of forces which give the whole system . . . its symmetry and perfect adjustment" (p. 55).

But this construction upon Whig principles does not call forth the wholesale attack on American political institutions that characterizes *Congressional Government*. True, Wilson does reject the Newtonian theory of government, in favor of a more Darwinian theory: government falls "not under the theory of the universe, but under the theory of organic life. . . . It is modified by its environment, necessitated by its tastes, shaped to its functions by the sheer pressure of life." But, if Wilson rejects the Whig view, and if the Constitution was constructed on the basis of Whig views, why is there no rejection of the Constitution in *Constitutional Government*? The reason is Wilson's shift of emphasis regarding constitutional interpretation.

> Fortunately, the definitions and prescriptions of our Constitutional law, though conceived in the Newtonian spirit and upon the Newtonian principle, are sufficiently broad and elastic to allow for the play of life and circumstances. Though they were Whig theorists, the men who framed the federal Constitution were also practical statesmen with an experienced eye for affairs and a quick practical sagacity in respect of the actual structure of government, and they have given us a thoroughly workable model (p. 55).

This is a far cry from earlier strictures.

What is Wilson's new view of the Constitution? A favorite phrase, repeated in several places, is that the Constitution is a "vehicle of life," and not a "mere lawyer's document" (pp. 157, 192). For instance, "no lawyer can read into a document anything subsequent to its execution; but we have read into the Constitution of the United States the whole expansion and transformation of our national life that has followed its adoption" (p. 157). Thus, the Supreme Court has adapted the Constitution in ways which would amaze "its framers of the simple days of 1787," for "the powers drawn from it by implication have grown and multiplied beyond all expectation" (p. 158).

The adaptability of the Constitution is due to its practical character. It "contains no theories. It is as practical a document as Magna Carta." Thus, it is possible, and inevitable, that

> around even a written constitution there grows up a body of practices which have no formal recognition or sanction in the written law, which even modify the written stipulations of the system in many subtle ways and became the instrument of opinion in effecting a slow transformation. If it were not so, the written document would become too stiff a garment for the living thing (p. 22).

Thus, the elasticity of a constitution lies not only in its allowing for many possible solutions to general kinds of problems, but in the possibility that the constitution can itself be modified and transformed.

The transformation of the Constitution is achieved through the courts, according to Wilson, in a significant departure from his earlier thought. While there is little discussion of the judiciary in *Congressional Government,* Wilson devotes a lengthy chapter, as well as significant portions of two other chapters, to the courts in *Constitutional Government in the United States.* This, perhaps even more than Wilson's new view of the presidency, is the chief difference between the two works.

The courts, says Wilson, are the "instruments of the nation's growth," because the Constitution "would have proved a straitjacket," if it had been interpreted "in its strict letter, as some proposed" (p. 167). The court must read the Constitution broadly, for "each generation of statesmen looks to the Supreme Court to supply the interpretation which will serve the needs of the day" (p. 158). Thus, "no doubt, the courts must 'make' law for their own day" (p. 194).

Unlike *Congressional Government,* Wilson's later book takes up questions regarding principles of constitutional interpretation at some length. First, we can note his reference to the historical interpretation of the Constitution by courts. Wilson holds that the courts have "built the implications of the Constitution out to meet the needs and the changing circumstances of the nation's life" (p. 169).

The man largely responsible for this kind of constitutional interpretation is John Marshall who "may be said to have created for us the principles of interpretation which have governed our national development" (p. 158).

> He read constitutions in search of their spirit and purpose and understood them in light of the conceptions under the influence of

> which they were framed. He saw in them not mere negations of power, but grants of power, and he reasoned from out the large political experience of the race as to what those grants meant, what they were intended to accomplish (p. 168).

Marshall's interpretations were the products of insight, "conceived in the spirit of the law itself," not products of "sheer will." Thus, his "learning was the learning of the seer, saturated with the spirit of the law, instinct with its principle of growth" (p. 159). He could render the Constitution in such a way as to verify its spirit and enlarge its letter "without straining a single tissue of the vital stuff" of which it is made.

The emphasis is, then, on two aspects of Marshall's interpretation—his faithfulness to the spirit of the law, and his ability to read it in such a way as to promote the nation's growth.

Second, Wilson also provides a general discussion of the principles which should guide the judges' interpretation of the Constitution.

> As the life of the nation changes so must the interpretation of the document which contains it change, by a nice adjustment, determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself. . . . The commerce of great systems of railway is, of course, not the commerce of wagon roads, the only land commerce known in the days when the Constitution was drafted. The common interests of a nation bound togther in thought and interest and action by the telegraph and telephone, as well as by the rushing mails which every express train carries, have a scope and variety, an infinite multiplication and intricate interlacing of which a simpler day can have had no conception. Every general term of the Constitution has come to have a meaning as varied as the actual variety of the things which the country now shares in common (pp. 192-93).

Thus, Wilson argues that "the general lines of definition" in the Constitution are lucidly drawn, but yet "the subject-matter" of those definitions is constantly changing, "for it is the life of the nation itself." There seems to be a distinction between form and substance in this: the "old measures of the Constitution are every day to be filled with new grain as the varying crop of circumstances comes to maturity" (p. 173).

For instance, it is clear that the general commercial, financial, and economic interests of the government were to be regulated by

the federal government; but what those interests are "is a question of fact, to be determined by circumstances which change" (p. 174).

Constitutional interpretation is, therefore, according to Wilson, a matter of determining the new particulars which fall under the general concepts of the Constitution. What those new particulars will be is determined not by the opinions of the Framers as to what they were or might be, but by the judges in light of the actual facts of the nation's development.

> The makers of the Constitution were not enacting Whig theory, they were not making laws with the expectation that, not the laws themselves, but their opinions, known by future historians to lie back of them, should govern the constitutional action of the country . . . they were statesmen, not pedants, and their laws are sufficient to keep us on the path they set us on (p. 70).

Thus, for instance, the Framers shaped the presidency in light of the Whig theory, but this is only one, "the strict literary," "the Whig," "the Newtonian" theory of the Constitution. In fact, however, "the President is at liberty, both in law and conscience, to be as big a man as he can" (p. 70).

Wilson was certainly aware of the expansive character of this notion of constitutional interpretation, and he was concerned to preserve limits to it. "The real difficulty has been to draw the line where this process of expansion and adaptation ceases to be legitimate and becomes a mere act of will on the part of the government served by the courts" (p. 170). An example of this which particularly concerns Wilson is the constitutional provision for congressional regulation of "commerce among the several states." Here "the temptation to overstep the proper boundaries has been particularly great" (p. 170). Almost every item of life in a commercial nation directly or indirectly affects commerce. What is Congress to regulate?

Wilson's answer is: the actual movement of merchandise and persons from state to state, clearly yes; the conditions of labor in field and factory, clearly no. Why not the latter?

> That would be to destroy all lines of division between the field of state legislation and the field of federal legislation. . . . If the federal power does not end with the regulation of the actual movements of trade, it ends nowhere, and the line between state and federal jurisdiction is obliterated. But this is not universally seen or admitted.

Wilson sees this decision as a crucial test case for the principle of constitutionalism in America:

> It is, therefore, one of the things upon which the conscience of a nation must make test of itself, to see if it still retains that spirit of constitutional understanding which is the only ultimate prop and support of constitutional government (p. 171).

Having summarized the development of Wilson's thought regarding the Constitution, judges, and constitutional interpretation, it is necessary to raise certain questions and objections to his views.

The first thing to note is the great shift in emphasis from his early to his later work. *Congressional Government* emphasizes the inadequacy of the Constitution as a basis for modern government. The "too tight" ligaments of a written constitution have restricted American political development, even though Americans, being a people of energetic political talents, have violated both its spirit and letter. Above all, separation of powers and, to some extent, the constitutional division of authority between federal and state governments, have hampered the development of a "strong, prompt, wieldy, and efficient" government.

In *Constitutional Government in the United States,* the view of the Constitution upon which the earlier criticism was based has become merely one "theory" of the Constitution, and a "very mechanical" one at that. What had been *the* proper understanding of the Constitution for Wilson has become merely an inadequate and unsatisfactory view of it. The critical question is, of course, the extent to which the new view represents a genuine change of mind regarding the meaning of the Constitution, rather than a remolding of the Constitution (conscious or not) into what Wilson regards as a more satisfactory constitution. Is the change, one might say, fundamentally interpretive or political?

One observation which must be made is that Wilson's view of the original intention of the Framers of the Constitution is not very accurate. His characterization of the original theory of the Constitution as "Whig theory" or "Newtonian theory" which "prevailed over the very different theory of Hamilton" misrepresents the founding period. The most obvious problem for Wilson's position lies in his statement that "the boast of the writers of *The Federalist* was of the perfection with which the convention at Philadelphia had interpreted Whig theory and embodied Whig dynamics in the

Constitution," thus rejecting "Mr. Hamilton's theory." After all, Hamilton did write most of *The Federalist*. While Hamilton clearly regarded the Constitution as something less than the best form of government and probably preferred the British constitution, he admired the latter precisely in the form which Wilson regarded as outmoded, that is, the older English constitution which exemplified separation of powers.[3] While Hamilton preferred to "high-tone" government, and was worried about possible defects of American government (especially the centrifugal force of state power), he did respect the Constitution and work for its success.[4] Nor was his action on behalf of government contrary to his preratification rhetoric, as it is often regarded. *The Federalist* emphatically states the need for energetic government in many places,[5] and calls for, not a weak and inactive, but a powerful and energetic president.[6] While it would not be precisely true to say that the Constitution embodies Hamilton's principles, it would be closer to the truth than Wilson's assertion that it "prevailed over" his views.

Implicit in Wilson's assertion is his belief that the "original Constitution" is most accurately to be found in the views of Jefferson, for instance in the Virginia and Kentucky Resolutions, rather than in the views of Hamilton and Marshall.[7] For reasons which could be elaborated at some length, we believe that this is erroneous. As an example of the evidence we may cite Madison's "confession" in a letter of 1821, where he states that at the time of the Convention he was anxious to rescue the principle of self-government from the danger that seemed to threaten it, namely the inadequacy of the old Confederation. Thus, the Convention as well as Madison himself may have given too great weight to the necessity of providing such "energy as would ensure the requisite stability and efficacy."[8] The Constitution was a *Federalist* document.

Madison escapes the implications of this by arguing that the Constitution should be interpreted as it was understood by the state

[3] Max Farrand, ed., *Records of the Federal Convention of 1787,* 4 vols. (New Haven, 1937), I:288-89.

[4] Henry Cabot Lodge, ed., *Works of Alexander Hamilton,* 12 vols. (New York, 1953), IX:532-35.

[5] Alexander Hamilton, James Madison and John Jay, *The Federalist,* Modern Library (1964), No. 23, pp. 141-47.

[6] *Federalist,* No. 70, pp. 454-55.

[7] See, for example, his *Division and Reunion: 1829-1909* (London, 1910), pp. 44-48.

[8] Farrand, *Records Federal Convention,* III:448-49.

ratifying conventions, not the Framers of the Constitution themselves. But Wilson's descriptions of the Framers as Whigs is directed at the Convention. Thus, Madison, who certainly would have cited convention Whiggishness, if he could have, in order to buttress his own, later, case, seems to disagree with Wilson.

Wilson argues essentially along the lines of the general modern appreciation of Hamilton and Marshall: they were great men, whose prudence lay not in their capacity for interpreting the Constitution in such a way as to secure its true meaning, but in their creative act of molding the Constitution in sound political ways.[9] The case for the latter view presupposes, to a considerable extent, that there is no real "true meaning" of the Constitution (excepting only the most basic and obvious provisions). That is a view, however, which Hamilton and Marshall certainly did not adopt.[10]

A corollary to the Whig theory of the Framers is that they would be "amazed" at the manner in which the Constitution has been adapted, since it has had to deal with matters of which they could not even conceive. But one must make a distinction between kinds of amazement. Perhaps the Framers would be surprised or amazed at airplanes and railroads, for instance, though even that may be doubted—one suspects that curiosity would be rather more accurate than surprise or amazement, given the broad learning and interests of the Framers. But why should they be surprised that railroads and airplanes have fallen within the bounds of their constitutional provision for federal regulation of commerce with foreign nations and among the several states? Given Marshall's opinion in *Gibbons v. Ogden*,[11] one would think that he would have been amazed had they not done so.

Wilson ultimately relegates the intention of the Framers to a secondary role, anyway, as it turns out. The Constitution contains no theories, he says; it is a practical document. The Framers enacted laws, not their own opinions known by future historians to be behind them.

Properly interpreted, this is quite true. It accords with Hamilton's own opinion in his discussion of the constitutionality of the

[9] See, for example, Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), pp. 169-70.

[10] See, for example, Marshall's opinion in *Osborne v. Bank of U.S.*, 9 Wheaton 738, 866.

[11] 9 Wheaton 1 (1824).

National Bank,[12] when he argues that law is to be interpreted on the basis of its own words, not on the basis of the expectations of those who framed it. Marshall makes the same point in the *Dartmouth College* case, contending that the specific problems the Framers probably had in mind do not constitute the whole class of problems which the general words of their provisions embrace. Fair inference may easily and legitimately lead to the inclusion of other particular circumstances than those immediately before them.[13]

Yet, for all that the point is acceptable, one wonders whether Wilson is making only that point. Despite the fact that the Constitution contains no theories, in a certain sense, is it not true that, if the Framers were intelligent draftsmen, and if they had in mind a particular theory of government, then the specific provisions of the Constitution would reflect that theory and would be difficult to harmonize with contrary theories of government? Wilson seems to deny this, since he argues that the Framers did have a theory (the Whig theory) and they did construct constitutional provisions on the basis of that theory (e.g., the presidency), and yet those provisions are capable of supporting very different theories ("the President is at liberty both in law and conscience to be as big a man as he can").

Likewise, Wilson argues (after noting that the Framers enacted laws, not the opinions behind them), that the Framers were "statesmen, not pedants, and their laws are sufficient to keep us to the paths they set us on." Yet this occurs in the middle of a discussion of the presidency, during which Wilson maintains that the Framers modeled the executive on the Whig theory, but that the Whig theory is only one, "very mechanical," interpretation of the presidency. This is "not inconsistent with the actual provisions of the Constitution," he says, but the very use of the word "actual" indicates his suspicion that it is inconsistent with what the Framers meant to do. Thus, according to Wilson's analysis, the Framers' laws were *not* really sufficient to keep us to the paths they set us on, unless those paths are of the broadest, most nebulous kind, for example, "self-government," "democracy," and so forth. Yet that would be a very equivocal use of the word *paths*. If someone mapped out explicit directions on how to get from New York to

[12] *Works of Hamilton,* III:463.
[13] 4 Wheaton 517.

Washington, but I chose to take a different route, I would hardly be following his directions, simply because I was still going to Washington.

We have argued here that Wilson's broad statement regarding the subordination of "the Framers' intentions" (i.e., extrinsic sources thereof) to the law of the Constitution itself is proper, on its face, although Wilson may have had an improper interpretation of that proper general statement. The same is even more true of his description of the interpretation of John Marshall. His general description of Marshall very accurately reflects the "traditional" view of interpretation, and the manner in which Marshall viewed his own work. Marshall "read constitutions in search of their spirit and purpose and understood them in the light of the conceptions under the influence of which they were framed." Marshall's learning was "the learning of the seer, saturated with the spirit of the law, instinct with its principle of growth." Thus, the standard of Marshall's interpretation, what guided and informed it, was the Constitution itself, its spirit, purpose, principle of growth, and the conceptions which influenced its formation. Marshall was not a "creative" judge who molded the Constitution along the lines of principles prudent but extrinsic to it.

But again there is serious question as to whether this is the sense in which Wilson meant his own general statement to be taken. Marshall interpreted the Constitution in the light of the conceptions under the influence of which it had been framed. Yet Wilson indicates that those conceptions were Whig conceptions, and he criticizes them, while praising Marshall. Marshall's interpretation was very close to Hamilton's, so that, for instance, *McCulloch v. Maryland* and *Marbury v. Madison* could easily pass for extended commentaries on Hamilton's Bank opinion and *The Federalist*, No. 78. Yet the Constitution, Wilson has told us, constituted a rejection of Hamilton's view of government.

Here too, the only way out of the apparent contradiction seems to be taking the Constitution's "spirit," "purpose," "principle of growth," and formative "conceptions" only in a broad, abstract, and rather nebulous sense, such as those we have suggested (e.g., "self-government," "democracy," etc.). This tendency to see the Constitution as a collection of broad and rather vague principles which require judicial specification is precisely one of the distinguishing marks of the modern approach to constitutional inter-

pretation.

The question is, of course, whether or not specification of broad and vague principles can really go under the name "interpretation." If one speaker on a particular topic said no more than "I think we ought to do what's just in this matter" and another speaker gave a detailed plan for dealing with it, would the latter be an "interpretation" of the first speaker's statement? Is not an attempt to effect some broad purpose by a particular means quite different from what any normal or commonsense definition of "interpretation" involves? Such a question must be asked, since it is precisely on this point that the power of judicial review is based: "it is the peculiar province of the judiciary to *interpret* the law."

The same problem arises in Wilson's discussion of particular principles of interpretation. In his discussion of the relation between the federal government and the states, he says that it is clear that the general commercial, financial, and economic interests of the nation were meant to be brought under regulation by the federal government. What those interests are, however, is determined by circumstances; and case-by-case, new and unforeseen matters are included under the established definitions of law.

The appeal to what was "meant" to be done by the Constitution looks suspiciously like an appeal to the intention or expectation of the Framers, which Wilson has previously ruled out. If we read it kindly, it may be interpreted as a gathering of what is intended from the document itself, and not simply from extrinsic sources, and as such the statement is acceptable if properly qualified. The qualification is that case-by-case inclusion of new matters must not be done simply on the basis of the intention (regulation of general economic interests), but in terms of the specific constitutional provisions written to effect that intention. That is, when a case regarding federal regulation arises, the question should be not "is this part of the general economic interest?" but "is this part of the power to regulate interstate commerce, or to establish public credit, or to coin money, etc.?"

Why is this distinction necessary? It is so because matters which are arguably general economic interests now may not have been so in 1787, and the provisions of the Constitution as they stand may not provide for them. In such a case, constitutional amendment might be called for. Why that, rather than simple judicial effecting of the broad intent of the Framers? The reason is that the judicial

adaptation might have broader implications and consequences than the simple modification of particulars to effect a general intention. What appears to be only a minor adjustment might be in fact a wholesale transformation.

Wilson himself gives a very fine example of this possibility. He argues that commerce among the states includes the movement of trade, but not the conditions of the production of articles for that trade. Now labor conditions in large industries are certainly part of the general economic interests of the nation, so why does Wilson not permit an extension of federal regulation to these newly "common" interests? After all, he says that the judges adapt the Constitution by extending to things common now, the rules for things which were common in the beginning.

The reason why Wilson refuses to permit an extension is because it leads to a fundamental change in the nature of American federalism. If the federal regulation does not stop with trade, it ends nowhere (an analysis, it should be pointed out, that has been verified by subsequent events). Thus, the constitutionally implied distinction between commerce "among the several states" and commerce within a particular state would be obliterated. Interpretations of this kind would virtually eliminate important constitutional limitations on Congress and the federal government.

Yet one must question Wilson's consistency in this regard. While his observation with respect to the problem of interstate commerce is a fine one, and indicates genuine concern for not straining the Constitution unreasonably, it may be that constitutional concerns are secondary. This is indicated by the fact that Wilson is less sympathetic to the principle of separation of powers. For instance, when exalting the tendency toward a more powerful presidency, Wilson argues that this tendency is

> merely the proof that our government is a living, organic thing, and must, like every other government, work out the close synthesis of active parts which can exist only when leadership is lodged in some one man or group of men. You cannot compound a successful government out of antagonisms (p. 60).

He is willing to undercut separation of powers, though it is a constitutional principle, because he thinks that principle impolitic. Federalism, on the other hand, is necessary, because "uniform regulation of the economic conditions of a vast territory and a vari-

ous people like the United States would be mischievous, if not impossible" (p. 179).

Several other formulations of interpretive principles in Wilson are objectionable from the traditional viewpoint. For instance, he characterizes the judges' activity as "reading into the Constitution" the whole expansion and transformation of national life. Such a phrase buttresses the view of the Constitution as a merely formal document whose content or substance can be changed at will; that is, the constitution has no real inherent substance. But is this the truth of the matter?

The idea of reading things into the Constitution is often associated with the adaptability of the Constitution. But there is not a necessary connection between the two, since the adaptability of the Constitution might lie in the character of its provisions rather than in the opportunity to modify or transform them. For instance, Marshall's classic opinion in *McCulloch v. Maryland* emphasizes the adaptability of our government which stems from the great breadth of power given to Congress through the necessary and proper clause: the ends of government are the same, the broad grants of power are the same, but the means to achieve these ends and to effect those powers can vary with the different circumstances of different times. This is what Wilson rightly cites when he says that Marshall saw in constitutions "not mere negations of power, but grants of power, and he reasoned out from the large political experience of the race as to what these grants meant, what they were intended to accomplish, not as a pedant, but as a statesman, rather" (p. 168).

Thus, the Constitution's adaptability, according to Marshall, lies not in the opportunity to "read into it," but in the fact that the powers of government are granted in broad terms: one only has to read what is there.

Sometimes Wilson employs the idea of adaptation rather loosely, and improperly. For instance, the judges adapt the Constitution by noting that commerce includes railroads, although the Framers never knew the vast modern system of railways. But this is hardly adaptation. If I say "animal" and you say "that includes 'dog,'" is that a case of reading "dog" into "animal"? No—there is a difference between reading something into a word, and recognizing that something is already there. To see "railroads" in "commerce" is not an adaptation of the Constitution by the judges, but

simply a recognition of the proper breadth of its terms.

Another imprecise use of terms is Wilson's reference to the judges' duty to provide interpretations required by the times. This is a failure to distinguish between interpretations which themselves change and an interpretation which remains the same while allowing for the broad requirements of governments at all times. Marshall's conception of the Constitution requires that (in principle, at least) there be a single interpretation of the Constitution which because of its breadth suits the needs of future as well as present governments. Wilson, however, speaks of new interpretations for new times.

The difference may be represented by an image. There are two ways in which a glass of water may be said to have changed. One could replace a glass of water with a new glass of new water, or one could empty the glass of old water and fill it with new water. Thus, if I ask a hostess for another glass of water and she refills it with water, no one would think that she had denied my request. On the other hand, she might bring me a new glass as well as new water. The new glass, it should be noted, might be of the same type, or quite different, with changed form and volume.

The image is homely, yet it makes a distinction often neglected, and one which Wilson in this case obscures. According to Marshall, the glass is always the same (the Constitution), though the water varies with the times (in commerce, horses and carriages one generation, trains the next, and airplanes the next). Wilson's looser formulation of the concept of interpretation seems to allow for considerably different glasses from generation to generation (new interpretations and, therefore, in effect new constitutions). Whether or not that latter image is an accurate image of what Wilson meant, it is certainly a fair interpretation of the words he uses to express his ideas, words which have become generally accepted descriptions of what judges do. And the general acceptance of that position has had the effect of greatly altering the scope of judicial power in modern American government.

As we have noted, there is never any clear-cut resolution of certain important ambiguities in Wilson. His actual discussion of certain constitutional particulars, especially the commerce clause, is very traditional and attests to a genuine concern not to violate the spirit of the Constitution. His discussion of other particulars is strikingly different (especially the chapter on the presidency in

Constitutional Government in the United States). More important, his general discussion of Constitution and judges seems to place emphasis on the changeableness of the Constitution rather than on fidelity to it. In this context, fidelity to the spirit of the Constitution appears to be no more than a general, vague, abstract desire to promote self-government.

Wilson, then, seems to make the Constitution a purely formal document, whose substance differs according to the interpreter. One important factor contributing to this view comes out with particular clarity in his thought, especially in *Constitutional Government in the United States*. Constitutions must change, either formally or informally, not simply because of particular inadequacies in their construction, but because change is the essence of politics.

> Every generation, as Burke said, sets before itself some favorite object which it pursues as the very substance of its liberty and happiness. The ideas of liberty cannot be fixed from generation to generation; only its conception can be, the large image of what it is. Liberty fixed in unalterable law would be not liberty at all. Government is a part of life, and, with life, it must change, alike in its objects and in its practices; only this principle must remain unaltered,—this principle of liberty (pp. 4-5).

The flux of politics is given order, in the end, by public opinion.

> It is therefore particularly true of constitutional government that its atmosphere is opinion, the air from which it takes its breadth and vigor. The underlying understandings of a constitutional system are modified from age to age by changes of life and circumstance and corresponding alteration of opinion. It does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of the nation's needs and purposes (p. 22).

Thus, progress in America enables Wilson to refer to the founding period as "a simpler day," and "the simple days of 1787" (pp. 158, 193).

It is this emphasis on progress in society, and on the organic, evolutionary, "Darwinian" character of politics which underlies Wilson's writings, and helps to explain even his own change. John Henry Newman once noted that a man's conversion from one

religion to another represents not so much a change of mind regarding dogma itself, as a discovery that some other religion (or substitute) more accurately expresses his views on what he regards as the most fundamental dogma. In like manner, one may say that the development of Wilson's views represents not so much a change of mind regarding his most basic political tenets, as a change of mind regarding how these tenets stand with regard to the Constitution. An organic, national political life, which permits the nation to develop new governmental forms when the common consciousness has changed; unity of the executive and legislative, to ensure efficient and responsible government; strong, prompt, wieldy, and efficient government to deal with modern-day problems—these are the basic political doctrines of Wilson's writings, and these remained ever the same. The greatest change regarded whether the Constitution could provide these things: the answer seems to have changed from "no" to "yes," as we have seen, because of a change in his conception of the Constitution, made possible by a different approach to constitutional interpretation.

The question which obviously intrudes itself once more is the extent to which the wish was father to Wilson's thought in this respect. Given the "blind worship" accorded the Constitution, any man intent on having practical political influence certainly had every incentive to adjust his views to provide a more sympathetic view of the Constitution. Yet there is no way to unravel motives, and whether a man's ideas are reasons or rationalizations is never entirely clear. One can only start by assuming that they are reasons and reduce them to the position of rationalizations if the weakness of the reasons seems too palpably clear to have been beyond the view of the writer. On the basis of this analysis, it is difficult to see Wilson's position as anything other than an attempt to *change* American government so as to make it conform to what he regarded as the essential principles of good government.

This analysis of Wilson points to several important characteristics of modern constitutional interpretation. First, the emphasis on change and progress necessarily encourages the view that interpretation involves extrinsic *judicial* adaptation (not just a recognition of intrinsic constitutional adaptability through legislative discretion). This notion of judicial adaptation seems likely to weaken any sense of constitutional judicial self-restraint (i.e., restraint by the Constitution rather than a discretionary policymaking

restraint). Second, the means by which judicial adaptation appears most easily achieved is the "elevation" of constitutional principles to a high level of generality or abstraction ("self-government," "democracy," etc.) which can easily be used to justify whatever course of action seems demanded "by the times" or otherwise. (This is realized particularly in modern interpretations of the due process and equal protection clauses, which are in principle capable of being used to prohibit or mandate almost anything.)

To the extent that constitutional interpretation becomes *modification* of the Constitution rather than adherence to it, serious questions must be raised regarding the character of the American regime and the role of the judiciary in it. Judicial power has no direct and obvious roots, and thus its maintenance in a democracy cannot simply be taken for granted. That is why we witness what one scholar called "atavistic regressions to the simplicities of *Marbury v. Madison,*"[14] when the power of the Court seems threatened, as it was in *Nixon v. U.S.,* for instance. *Marbury* justifies judicial review in much the same way as *The Federalist* No. 78: the judges apply to the case not their own wills, but merely the popular will embodied in the Constitution. This is the classic democratic defense of judicial review and the Court necessarily returns to it in times of crises, despite the fact that lawyers and law reviews and political scientists (as opposed to the public speech of justices) often operate on the unquestioned assumption that constitutional interpretation, no less than other judicial activity, is essentially a matter of judicial *legislation.* Insofar as that older democratic rationale is reduced to a rhetorical device to be brandished in tense moments, and insofar as the judges have secured a wide scope for legislative activity unintended by the Constitution and its broadest interpreters among the Founders (Hamilton and Marshall), the American regime has been substantially modified. Whether this modification is for better or worse can be decided democratically only if there is a clear recognition of (1) the fact that there has been a change and (2) what that change is. This article has been an attempt to clarify those two points by attending to the change as it occurred in one prominent American political thinker.

[14] Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis, 1962), p. 72.