Chapter IX

IDEAS ON JUDICIARY: THE BALANCE WHEEL OF THE GOVERNMENT
The economic and social programme supported by Wilson was an attempt to meet the needs of the time, while keeping within the limits of the constitutional powers of the government. In enacting legislation regulating corporations, banking, inter-state commerce, and labour conditions, Congress took major steps in the expansion of the functions of the federal government. Whether or not these new laws were actually constitutional and workable, however, rested primarily with the decisions of the judiciary.

In test cases, the Supreme Court found a number of these reform measures unconstitutional or unenforceable. In other cases, however, the Court upheld the extension of governmental powers. The moderately liberal opinions of the justices thus permitted a somewhat freer interpretation of the Constitution, while acting as a check upon the decisions of the Congress.

Although the Supreme Court did not uphold all the measures Wilson had supported, its check upon the extension of the executive and legislative power was in accordance with Wilson's own view of the proper role of the judiciary. In Constitutional Government in the United States he had declared that the federal judiciary is the "balance wheel" of the whole_
system, the one effective restraint on the irresponsibility of
the other branches of the government. (1) He maintained that
the judiciary could exercise a great deal of power through
its interpretation of the Constitution:

With a fine insight into the real character of
the government which they were constructing,
the Convention provided that its judiciary
should be placed, not under the President or
the houses, but alongside of them, upon a footing
of perfect equality with them. (2)

Wilson felt that placing the balance in the hands of the
judiciary was a unique aspect of the United States Constitu-
tional system and perhaps one of the keys to its success.
In this way the United States Constitution safeguarded
individual privilege as well as government prerogative. The
judiciary was "meant to maintain that nice adjustment between
individual rights and governmental powers which constitutes
political liberty." (3)

Wilson contrasted the power of the Court and the basis
for the power in the United States and the English system.
He said, ". . . the English Courts have no authority to check
the law-making organs of the government even though they
override Magna Carta and the Bill of Rights in the statutes

(1) Woodrow Wilson, Constitutional Government in the
United States (New York, 1917) 142. Hereafter cited as
Constitutional Government.


(3) Constitutional Government, 143.
which they enact." (4) Such a check on Parliament has never been necessary for English common law has "been a mirror of opinion and of social adjustment and has been made in its development to fit English life like a well-cut garment." (5) One may well ask why a judicial balance was selected by the writers of the American Constitution. Wilson stated that it was necessary because, unlike the British Parliament, the powers of the legislature were laid down in the Constitution, itself a legal document and thus to be interpreted by a legal body. The judiciary, also, provides a means of balancing the powers of the states and the powers of the Federal government:

It is thus that they are the balance-wheel of the whole system, taking the strain from every direction and seeking to maintain what any unchecked exercise of power might destroy. They are at once instruments of the individual against the government, of the government against the individual, of the several members of our political union against one another, and of the several parts of government in their legal synthesis and adjustment. (6)

The responsibility of maintaining this effective organ of balance resides with the people who indirectly appoint the members of the Court. Wilson stated that "the only absolute safeguards of a constitutional system . . . lie in the character, the independence, the resolution, the right purpose of the men who vote and who choose the public servants of whom the government is to consist. . . . The courts are the

(4) Ibid., 144.
(5) Ibid., 145.
(6) Ibid., 149-60.
people's forum; they are also the index of the government's and of the nation's character." (7)

Wilson saw the Court not merely as an interpretation of justice but as an instrument of the nation's growth. He did not feel that it was the duty of the Court to judge Congressional or Presidential actions. However, he believed the Court's duties were in a certain sense political, for it would be tragic if they were to interpret "the Constitution in its strict letter, as some proposed, and not in its spirit. . . . (8)

Wilson believed the Constitution was to be looked upon as "the charter of a living government, the vehicle of a nation's life. . . ." (9) If interpreted strictly "it would have proved a strait-jacket, a means not of liberty and development, but of mere restriction and embarrassment." (10)

He believed the United States looked for two types of statesmanship in its Courts—statesmanship of control and statesmanship of adaptation. He believed that the latter was a characteristic of all great systems of law. Wilson said, "we have been singular among the nations in looking to our courts for that double function of statesmanship, for the means of growth as well as for the restraint of ordered

(7) Ibid., 166-7.
(8) Ibid., 167.
(9) Ibid.
(10) Ibid., 167-8.
It would seem rather remarkable that the Court has been such a successful system of balance. Wilson believed that its success has been chiefly due to the leadership of John Marshall, chief justice during President Jefferson's administration. 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." (12) Every generation of judges since Marshall has recognized that it was the judiciary more than Congress or the President, who gave the "federal government its scope and power." (13)

How has the judiciary used its powers? In Wilson's judgment the Courts have never been merely reactionary. However, he believed that they have sometimes interpreted the law as they wished. Perhaps a more severe criticism is that they have, in critical times, been too complacent and allowed Congress free rein to interpret its own powers as it wished. He specifically mentions that the Court neglected to take positive action following the Civil War. As a result he felt that many difficult questions arising out of that war were never settled. It might be appropriate to add here that the

(11) Ibid., 168.
(12) Ibid.
(13) Ibid.
Supreme Court never did take any positive action until much later in regard to one major problem arising out of the Civil War—Negro rights.

Wilson believed that public opinion was the "coordinating force" (14) in the American system of government. Thus one immediately questions the relationship courts have to opinion. Wilson believed this was a difficult question but stated that judges are a product of their times and cannot shut public opinion out of their courtrooms. If they did so, it might sometimes lead to adverse consequences, as in the case of the Dred Scott decision. Commenting on the decision in his History of the American People Wilson wrote, "the Supreme Court of the United States uttered, through Mr. Taney, its Chief Justice, an opinion which went even beyond the Kansas-Nebraska Act in its radical rejection of the Missouri Compromise." (15) Wilson concluded that "Those who were seeking to prevent the extension of slavery into the Territories were thus stigmatized as seeking an illegal object, and acting in despite of the Constitution." (16) The total nullification of the controls on slavery that the decision implied was, in his opinion too "radical" a course and one that was bound to

(14) Ibid., 171.


evoke widespread opposition and defiance and dangerously divide the country. "Judges," Wilson wrote subsequently, "should . . . prove themselves such men as can discriminate between the opinion . . . which springs . . . from the enlightened judgment of men of thought and good conscience, and the opinion of desire, of self-interest, of impulse and impatience." (17)

Because the Government is one of men as well as laws, Wilson saw the necessity of guarding the Courts against corrupting influences and securing them against the arbitrary authority of the administrative heads of the government. "Both the safety and purity of our system," he declared, "depend on the wisdom and the good conscience of the Supreme Court." (18) Wilson observed that the effectiveness of the judiciary, even more than that of the other branches of the government, is dependent upon the character of its members:

It is easier to form programs than to exercise a wise and moderate control, and the tasks of the courts calls for more poise, nicer discriminations of conscience, a steadier view of affairs, and a better knowledge of the principles of right action, than the task of Congress or of the President. (19)

Since changing interpretations of the Constitution will continue to expand governmental powers, Wilson maintained, it

(18) Ibid., 158.
(19) Ibid.
is very necessary to appoint men of the highest integrity to judicial posts. Wilson himself favoured the appointment of liberal-minded judges, men whose interpretations of the Constitution would look forward and not backward. Yet he cautioned that this forward movement must be essentially conservative—conservative "not of prejudices, but of principles. . . ." (20) Although Wilson was anxious to have a more liberal judiciary, he opposed any attempt to change the character of the Court by recalling conservative judges and appointing liberal men in their place. In Wilson's opinion, the method of recall interfered with the independence, dignity, and freedom of the judiciary, which he considered essential to the stability of the State. (21)

During Wilson's own administration, the problem of selecting a man for the Supreme Court arose three times. In appointing justices to fill the vacancies, Wilson attempted to choose men with liberal views who would view constitutional questions in terms of contemporary conditions. Though one of the justices disappointed Wilson's hopes, the other two helped to inject a new spirit of concern for human rights into the Supreme Court.

(20) Ibid., 194.

Wilson's first appointment, James Clark LeReynolds of Tennessee, was the one which failed to fulfill the President's expectations. LeReynolds, who was appointed on 19 August, 1914 had been Attorney-General in Wilson's cabinet. LeReynolds was a Southerner and a traditional Democrat. He had distinguished himself during the trust-busting activity of the Roosevelt administration, acting as special counsel to the government in the prosecution of the tobacco trust. He performed the service with vigour and ability, and when the Supreme Court ordered the dissolution of the combination, LeReynolds' reputation for progressiveness and sound judgment seemed assured. It was on the strength of this reputation that he found a place in Wilson's cabinet, and when opportunity arose the President offered him a judicial appointment.

The appointment of LeReynolds was opposed by a number of Senators who felt that the Attorney-General had acted too cautiously in the New Haven Merger Case. In 1903 J. P. Morgan had gained control of the New Haven, a prosperous, well-managed railroad. In course of years they had gained monopoly over every form of public transportation in the New England States, buying control not only of competing railroads but also of inter-urban trolley systems and steamship lines. In their drive for power they had virtually bankrupted the New Haven. Anti-trust proceedings were held against the New York, New Haven and Hartford Railroad monopoly of the transportation facilities of New England and on the directors for criminally
conspiring to violate the Sherman Act. Instead of working for criminal prosecution of the railroad combination, McReynolds had tried to dissolve it. His primary aim, he had contended, was to protect the stockholders against financial disaster; furthermore, he had opposed the intervention of the Interstate Commerce Commission in the matter because they examined officials of the railroad who could later claim immunity in court. (22) Finally, however, McReynolds' nomination was confirmed on 29 August. Only one Democrat, Senator James M. Vardaman of Mississippi, a consistent opponent of the administration, voted against the appointment. Evidently, however, some liberal senators remained un convinced of McReynolds' progressivism.

While respecting McReynolds' intellectual honesty, Wilson watched with a sense of lost opportunity the reactionary course which the new justice pursued. He is said to have remarked that he considered this appointment "a great mistake" of his administration. (23) As Josephus Daniels observed, Wilson had expected McReynolds to be a legal "trust-buster," but all tendency in that direction seemed to have exhausted itself in the prosecution of the tobacco trust case. (24)

(22) Arthur S. Link, Woodrow Wilson: The New Freedom (Princeton, 1956) 425-6. McReynolds was one of those who had introduced the resolution under which the Interstate Commerce Commission was authorized to investigate the New Haven Affair.


In cases in which the majority of the Court upheld laws involving shorter hours, minimum wages, employers' liability, and child labour, McReynolds was ranged with the opposition. One of the cases in which McReynolds dissented was Bunting Vs. State of Oregon, (25) The decision hinged on the question of whether the Oregon labour law was primarily an hours law or a wage law. According to the majority of the Court, the main intention of the law was to protect the health of workers by providing that 'No person shall be employed in any mill, factory or manufacturing establishment in the state more than ten hours in any one day...'. (26) However, since the law specified that it was permissible to employ workers overtime in case of emergency, provided that they were paid time and one-half, McReynolds interpreted the law as being primarily a wage law.

McReynolds also dissented in the case of Wilson Vs. New, (27) which involved the constitutionality of a federal law establishing an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and fixing a scale of minimum wages for these workers. He dissented again in the case of Mountain Timber Company Vs. State of Washington, (28)

(26) Ibid., 43a.
and the Arizona employers' liability case (29)—both involving workmen's compensation. The Arizona law held that in certain hazardous occupations employers are liable for payment of compensation to injured workers, even when the accident or injury has been in no way the fault of the employer. In McReynolds opinion this law violated the employers' fundamental rights. He wrote a vigorous dissent:

... I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization. Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter, and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government. (30)

In the case of Hammer vs. Dagenhart, (31) involving the Child Labor Act of 1916, McReynolds voted with the majority who rejected the measure as unconstitutional. Virtually the only measures of the Wilson programme with which he was in sympathy were tariff revision and control of monopoly.

While the strict constitutional interpretations of McReynolds disappointed the President, (32) the broad outlook

(30) Ibid., 450-1.
(32) Life and Letters, VI, 113.
of his second appointee, Louis D. Brandeis, was more than gratifying. Brandeis, whom Wilson nominated for the Supreme Court in January 1916, was a man who had worked hard in order to make himself financially independent so that he might use his legal talents in any case that appealed to him as right and just. He had spent the greater part of his career as an 'the people's attorney,' serving without remuneration, and fighting to prevent big business from engulfing the individual. (33) He had defended before the Supreme Court the constitutionality of laws limiting the hours of work for women, which had been passed by the states of Oregon, Illinois, Ohio and California. In the case of *Puller v. Oregon* (34) he submitted a brief omitting legal precedents and principles, and devoted mainly to an expose of factory conditions under which women worked. The Court admitted the brief as evidence that it was 'the first case presented on the basis of authoritative data.' For the first time the arguments and briefs broadened the air of reality. (35)

Justice Holmes had once said that "for the rational study of the law . . . the man of the future is the master of economics." (33) Brandeis qualified in this respect to an

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(33) Ibid.


extraordinary degree, for he studied the economic, political, and social aspects of every case he undertook.

On numerous occasions Brandeis had proved of invaluable assistance to Wilson. The President had intended to include him in the Cabinet either as Secretary of Commerce or Attorney-General, but had yielded at the time to the tremendous pressure that had been brought to bear upon him to forego the appointment. (37) The death of Justice Lamar made it possible for Wilson to nominate Brandeis for the vacancy, and to thus infuse a large measure of liberal thinking into the only mildly progressive Court.

In the Senate there was a barrage of opposition to Brandeis' appointment. The Committee of the Judiciary held hearings to consider the nomination. (38) The Committee received a communication signed by seven past presidents of the American Bar Association. (39) Brandeis was charged with a disregard of ethical standards in his professional relations and with lack of judicial temperament. After the hearings had ceased, and the Senate Committee had deliberated for some time, a request was sent to the President asking for the reasons which had actuated him for naming Brandeis to the Court. In

(37) Life and Letters (Garden City, 1931) III, 450.


(39) The communication was signed by William Howard Taft, Simon E. Baldwin, Francis Rawle, Joseph H. Choate, Elihu Root and Moorfield Storey.
his reply Wilson expressed his admiration for Brandeis and indicated that he had no intention of withdrawing the nomination. He declared that he had made the appointment because he knew Brandeis to be "singularly qualified by learning, by gifts, and by character for the position."

Wilson pointed out that the charges against Brandeis had been investigated long ago and found to be without justification. These charges, he said, had proceeded mainly from those "who hated Mr. Brandeis because he had refused to be serviceable to them in the promotion of their own selfish interests, and from those whom they had prejudiced and misled." The President declared that when he had sought the counsel of Brandeis, he had found it "singularly enlightening, singularly clear-sighted and judicial, and, above all, full of moral stimulation."

He reminded the Committee that in the opinion of the late Chief Justice Fuller, Brandeis was the ablest man ever to appear before the Supreme Court of the United States. In conclusion, the President wrote that he could not speak highly enough "of his impartial, impersonal, orderly, and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions and insight into their spirit. . . ." He praised "his knowledge of modern economic conditions and . . . the way they bear upon the masses of the people. . . . This friend of justice and of men will ornament the highest court of which
we are all so justly proud."

(40) From the letter on Brandeis one can see what qualities and background Wilson regarded as desirable in a prospective appointee to the Supreme bench. Despite this opposition, the Senate confirmed the nomination on 5 June 1916, and Brandeis became the first American Jew to be elevated to the bench.

Wilson made his final appointment to the Supreme Court in naming John Hessin Clarke. In doing so he was following a procedure which was not very popular—that of elevating federal district judges to the Supreme bench. Clarke was a mild progressive, who had been connected with the reform movement in Ohio, specifically with the campaign for short ballot.

Like Brandeis, Clarke took the position that the Court must not dictate to the legislature. He also took a moderately liberal view of constitutional interpretation, and generally could be found on the side of those who stressed broader humanitarian views rather than a narrow constitutional construction. He resigned from the Court in 1922, in order to devote his time and energies to the cause of world peace, and to the United States' acceptance of the League of Nations and the world court. Wilson, who was no longer in office, wrote to him expressing both regret and a sense of foreboding:

Like thousands of other liberals throughout the country, I have been countning on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow. . . . The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the common people's sense of justice and cause a revulsion against judicial authority which may seriously disturb the equilibrium of our institutions, and I see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action. (41)

Probably a good deal of Wilson's feelings about the Supreme Court were due to the Court's decision on his legislative programme. On the whole, the economic measures of Wilson's administration fared better in the Court than did the social legislation. (42) Even on economic legislation, however, the rulings of the Court somewhat limited the scope of the acts passed by Congress.

In an article in the North American Review in 1903, Wilson had argued that the federal government had expanded its powers too far, and was infringing on state jurisdiction. (43) During every session of Congress, he said, attempts were being made to carry the implications of the commerce power "beyond the utmost boundaries of reasonable and honest inference." He proceeded to discuss the problem of child labour as a case in point:

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(41) Life and Letters, VI, 117.

(42) Brushaber v. Union Pacific Railroad Co., 240 U.S., 1-26 (1916). The constitutionality of the income tax provision of the Underwood Tariff Act was sustained.

(43) PPW: College and State (New York, 1925) II, 33-53.
If the power to regulate commerce between the States can be stretched to include the regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country. The only limitation Congress would observe, should the Supreme Court assent to such obviously absurd extravagances of interpretation, would be the limitation of opinion and of circumstance. (44)

Interestingly enough, the Supreme Court's decision on the Keating-Owen child labour law expressed the view that Wilson himself had held in 1908. The bill excluded from interstate commerce the products of any factory which employed children under fourteen years of age, or allowed children between fourteen and sixteen to work at night, or for longer than eight hours.

By the time he was President, however, Wilson had completely reversed his opinion on the matter and was a strong supporter of the Keating-Owen bill. Wilson changed his view because the bill was a test of the administration's progressivism, and the independent progressives considered the bill very important. He believed that his party's most important task was to stay in power. This was possible only by exacting constructive progressive legislation. The Keating-Owen bill marked the high peak of Wilsonian progressivism.

When the constitutionality of the act was questioned and it came before the Court in the case of *Hamer v. Dagenhart*,

(44) Ibid., 37.
the Court ruled that the law was unconstitutional, (45) using the same argument that Wilson had used in 1908. The Court decided on 3 June 1918 that the law trespassed upon the powers reserved to the states under the Tenth Amendment, and exceeded the limit of Congressional power over interstate commerce. It was a five to four decision with Justice Holmes writing a strongly worded dissent:

Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. ... The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command. (46)

When the Pure Food law was tested in the Supreme Court, it was not declared unconstitutional, but it was found to be too imprecise to be enforceable. In the Doctor Johnson cancer cure case the Court held that Johnson could not be prosecuted for making fraudulent claims as long as the labels on his product did not misstate the ingredients in the package. (47)


In *U.S. v. Lexington Mill and Elevator Company*, the government charged that the addition of a poisonous substance to flour to give it an artificial whiteness constituted adulteration within the meaning of the law. But the Court decided that adulteration must be carried to the point where it actually disguised the defects of the food or where the use of poisons made the product deleterious to the consumer. (48) In using the phrase, "which may prove harmful to health," Congress had not made the law sufficiently definite to enable the Court to render a decision more in the public interest. An amendment clarifying the point at issue was in order. The Sherley Amendment, broadened the original act to include false and fraudulent claims as to the effectiveness or curative properties of the product, as well as to the nature of its ingredients. The amendment was unanimously upheld by the Court in 1916.

While the most important decisions during Wilson's administration were those involving the legislative power of Congress, one important decision dealt with the exercise of executive power. (49) The case did not reach the Court until several years after the close of Wilson's term of office, but it involved his action in removing a postmaster of the first class without the advice and consent of the Senate. The


(49) Lyon v. United States of America, 272 U.S., 52-235 (1923).
official had been appointed under an act of Congress which provided for his removal by the President with the consent of the Senate. The extent of the President's removal power had been debatable ever since the foundation of the government. In this instance the government maintained that the legislative requirement for advice and consent with respect to the removal of an officer was invalid, since under Article 2 of the Constitution the President's power of removal is full and complete. The majority opinion sustained the executive contention. But two of Wilson's own appointees, McReynolds and Brandeis, dissented on the ground that the President's action had been outside his constitutional powers.

On the whole, it is clear that this period of Supreme Court history was one of growing awareness on the part of the justices to social problems of the time. On the part of all but the most reactionary there was a desire to uphold state experimentation, keeping federal legislation as much as possible within the bounds of accepted judicial canons.

Wilson recognized that throughout the country there was a growing desire for social justice as well as legal justice. He attempted, as far as he was given the opportunity, to awaken the legal thought of the nation from its narrow devotion to principles and precedents to a more enlightened concept of its duty. (50) He stated, "So long as we have written constitutions

(50) Poli: Collere and State, II, 245-68.
courts must interpret them for us, and must be the final tribunals of interpretation." (51) His appointment of L. D. Brandeis was a major step toward the creation of a more liberal court. In accepting the nomination as Democratic candidate for President, F. D. Roosevelt paid tribute to the leadership of Wilson and expressed gratitude that such men as Brandeis were still in office, ready to further the cause of social justice.

Wilson's main concern as President was, as stated in the beginning of the chapter, to implement various economic and social legislations. He thus was interested in a Court which had the imagination and understanding necessary to relate these programmes to constitutional provisions—a Court containing men who would give a "liberal and enlightened interpretation" of the law. He, therefore, seemed to accept without criticism the essential set up of the Courts, and was only interested in filling any vacancies, occurring during his administration, with men of liberal views. He felt that the ultimate task of the nation was to maintain a "true balance between law and progress." The nation should not be desirous of those things "which cannot be secured by the just and thoughtful processes which have made our system, so far, a model before all the world of the reign of law." (52)

(51) Ibid., 248.
(52) Constitutional Government, 172.
In Wilson's opinion the most distinctive feature of the American constitution is that it is law, paramount, supreme law, and hence subject to interpretation by the Supreme Court in cases properly brought before it. Thus judicial review is an implied power; it is implied from and is incidental to the power to interpret law and decide cases. Chief Justice Marshall's theory was that judicial review is less a necessary adjunct to the written constitution than a supplement to popular government. His argument was that judicial review is a means of safeguarding and upholding the constitution. The Court is simply exercising a power granted by the Constitution, namely the judicial power. Wilson also held the view that at least in theory the effect of judicial review is not to elevate the Court over the legislature, but rather to make the power of the people superior to both.