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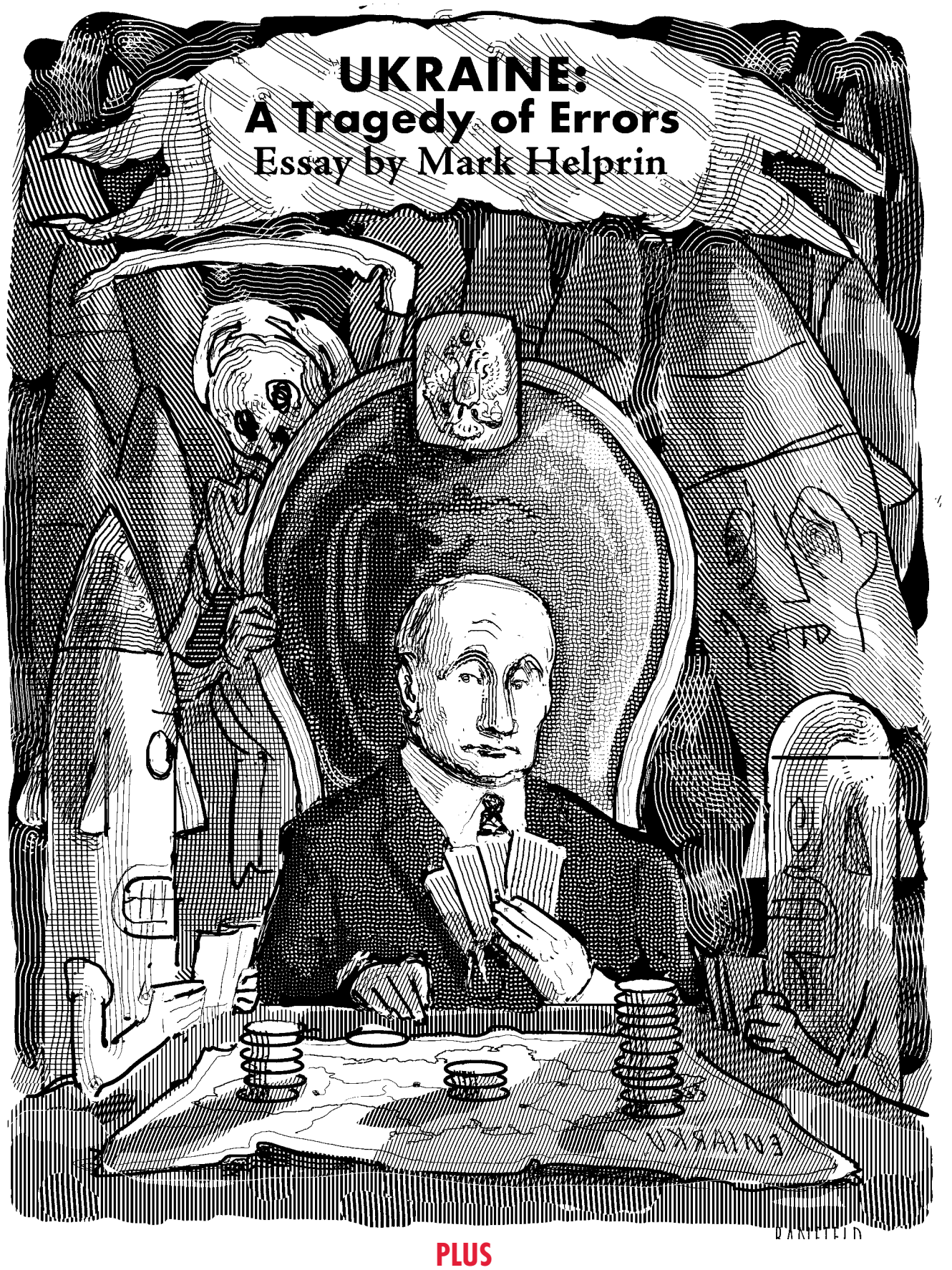

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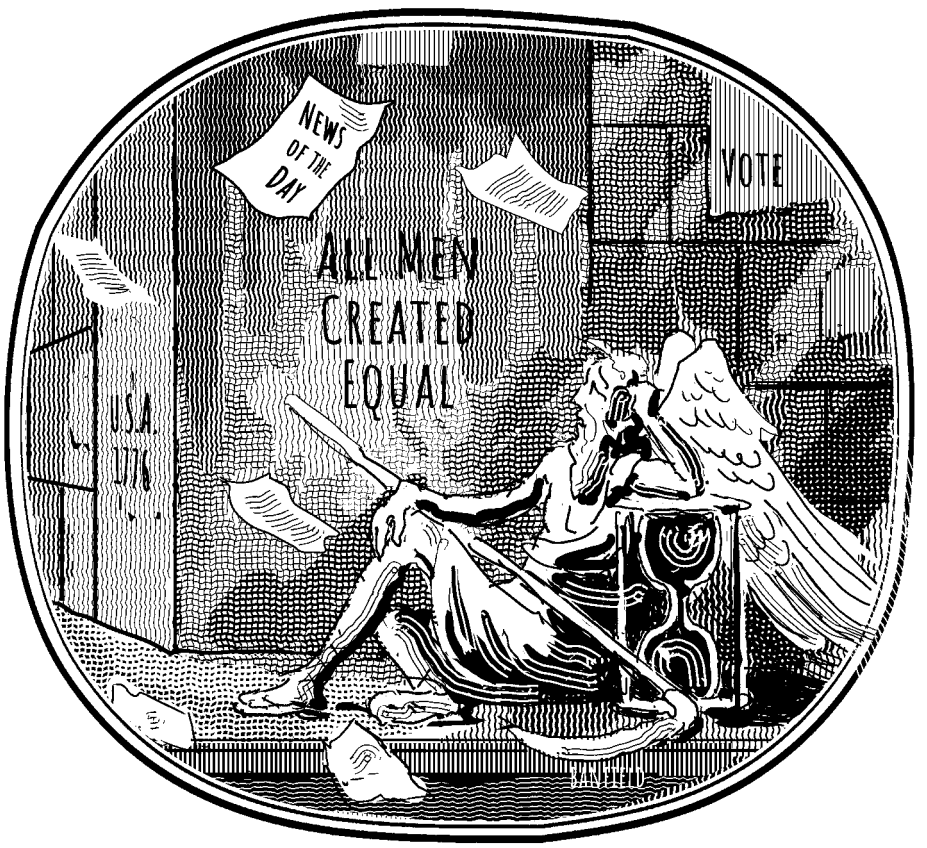
Book Review by Edward J. Erler

The Pastness of the Past

Power and Liberty: Constitutionalism in the American Revolution, by Gordon S. Wood.
Oxford University Press, 240 pages, $24.95



Gordon S. Wood's *Power and Liberty: Constitutionalism in the American Revolution* is the kind of book that the most recognized members of academic disciplines are privileged to publish. The Alva O. Way University Professor and Professor of History Emeritus at Brown University is, of course, widely considered the leading authority on the early American republic, and *Power and Liberty* is, he notes, "largely a distillation of my fifty years of work on the…history of constitutionalism in the Revolutionary era."

In our age of woke history, Wood is to be commended for aiming to write "as impartially and as truthfully as possible." "Without a commitment to objective truth and the pastness of the past," he cautions, "the history of a nation becomes distorted, turns into politics by other means, and ends up becoming out-and-out partisan propaganda." Wood has been among the 1619 Project's highest-profile critics.

He is a charming, and disarming, writer whose reliance in large measure on original sources is also to be applauded. But his use of original sources can be deceptive. He is prone to quoting brief snippets, many of which he takes out of context. A more fundamental problem in his scholarship was ably identified in these pages by Steven Hayward ("The Liberal Republicanism of Gordon Wood," Winter 2006/07), who observed that "Wood's approach to the founding…is closed to the possibility that the founders might have discovered some political truths that transcend time and space. The ideas of the founding cannot guide us today, he suggests, because they are ideas from the past, and the past, being different from the present, is irredeemably alien."

And in *Power and Liberty* Wood writes that he "makes no claim to possessing any final truth.… [I]nterpreting and reinterpreting the constitutional history of the era of the founding will continue just as long as the republic endures." For Wood, no era has a monopoly on truth. Truth is merely the epiphenomenon of the era that produced it. It has no relevance for any other era except as a historical artifact.

This is particularly true of "Wood's disregard of the Declaration [of Independence]," as Hayward put it, adroitly remarking that his presentation "is akin to an account of Christianity that left out…the doctrine of salvation by grace." In a 1994 interview printed in the *William and Mary Quarterly*, Wood was candid: "We know it did not mean that blacks and women were created equal to white men (although it would in time be used to justify those equalities too). It was radical in 1776 because it meant that all white men were equal." By following Stephen Douglas and Roger Taney's interpretation of the founding charter instead of Abraham Lincoln's, Wood is not so far from the 1619 Project after all.

And yet wood asserts in *Power and Liberty* that "[t]he Revolutionary era was the most creative period of constitutionalism in American history and one of the most creative in modern Western history." What's more, the "debates and documents—and those who engaged in the debates and created the documents—have an immediacy, a present-day relevance for Americans, that is extraordinary. *The principles embodied in these documents seem to have a quality that transcends time and space*" (emphasis added). *The Federalist*, for example, has ac-

quired "a quasi-sacred character" even though its essays were "polemical pieces dashed off in defense of the new Constitution." Wood must have taken Hayward's charge of historicism to heart. He echoes the language of transcendent principles, except he applies it not to the Declaration, but to the Constitution! Yet even the "quasi-sacred" *Federalist* identifies the principles of the Constitution as the Declaration's self-evident truths. (See, for example, *Federalist* No. 40.)

Wood, I believe, is wary of recognizing the Declaration's unchanging natural rights as the basis of the American Founding because, for all his talk of the Revolution being the most creative period of American constitutionalism, he ultimately believes the Revolution was a disaster for America's constitutional development.

Colonial America was well on its way to developing an aristocracy in which personal and individual interest were subordinated to the common good or to the public interest. Office-holding was based on what Wood calls a "monarchical" model in which, for all practical purposes, offices were occupied by members of the gentry and became inheritable along family lines. Without the Revolution, this development might have continued, and something like an aristocratic republic in a British commonwealth system might have taken hold, governed by the English common law.

Colonial society was held together by kinship, patriarchy, and patronage—all elements destroyed by the Revolution. The Revolution unleashed egalitarianism, and with it individualism and selfishness. Wood's ideal—classical republican virtue and its disinterested devotion to the common good—dissolved into the commercial scramble that the "middling classes" saw as their way of co-opting the privileges of the gentry. The "middling" were "men of narrow souls [having] no natural interest in the society"; they were "self-serving, ignorant, [and] illiberal," in Wood's revealing description. In other words, deplorables.

The revolution replaced patriarchy and patronage with the consent of the governed as the legitimating source of political power. This allowed the "middling" to enter the public realm through elections, a realm that had previously been denied them. After the Declaration was signed, newly created state governments were dominated by legislative branches populated by the newly liberated and newly elected "middling" ranks who had none of the gentry's *noblesse oblige*. They were suspicious of executive power and the monarchical model. "[E]xcessive democracy" frequently ignored the public good and even the state constitutions, which had been designed to use the separation of powers to check legislative overreach. The Revolution "released the aspirations and interests of tens upon tens of thousands of middling people—commercial farmers, petty merchants, small-time traders, and artisans of various sorts—all eager to buy and sell and get rich." Middle-class lawmaking had created chaos in the states.

Wood claims that by 1786 James Madison realized that "appealing to the people had none of the beneficial effects good republicans had expected." It is true that Madison was a severe critic of state governments. His complaints in *The Federalist* are well known: that state governments are "too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of minor parties, but by the superior force of an interested and overbearing majority." Madison was firmly convinced that state constitution-makers had paid far too little attention to the republican form of government, believing the greatest abuse of power proceeded from executive power rather than legislative power. Madison discerned that the greatest danger of abuse in popular government was from the legislative power, the branch of government closest to the sovereign power of the people.

An extended republic, he argued—encompassing a multiplicity of competing interests with an effective separation of powers, fortified by checks and balances—was the greatest check on the abuse of legislative power. None of the state governments had adequately addressed these dangers and every one was at risk of lapsing into anarchy. No amount of reform of the existing Articles of Confederation could adequately meet the exigencies facing the country. A radical reform was necessary: a new national government with sufficient power to provide for the "safety and happiness" of the people (the ends of government identified in the Declaration of Independence). It would be a limited government of delegated powers that could rule directly over individuals with respect to the accomplishment of those limited powers. All genuine governments must have the power to rule over individuals without the interference of intermediary powers. Weak government was itself the greatest danger to the security of rights and liberties; an energetic government with adequate power was the remedy.

Wood, by contrast, believes that the Articles could have been amended and that doing so would have avoided the problems ushered in by the new Constitution. With a written Constitution regarded as fundamental law, legislatures were free to act as long as the fundamental law was not violated. At the same time, the fundamental law itself was immune to the same kind of judicial construction that jurists could apply to ordinary laws. For Wood, the Constitution addressed the right problem, but in the wrong way. A written Constitution considered to be superior to ordinary acts of legislation inhibits further constitutional development. "Reinterpretation," to use his word, by an activist judiciary free to revive the English common law, which was once the great hope of the aristocratic republic, could now be brought to bear to cure the defects of "excessive democracy." But the distinction between fundamental law and ordinary law would need to be erased first.

Here wood crosses the bright line he initially drew between the "pastness of the past" and "propaganda." He claims that early challenges began to erode the idea that the Constitution was fundamental law, until the distinction between fundamental law and ordinary law was abolished altogether. Improbably, he draws his proof from Chief Justice John Marshall's decision in *Marbury v. Madison* (1803), writing that in "Marshall's words, it was 'emphatically the province and duty of the judicial department to say what the law is,' treating the Constitution as mere law."

Wood finds this statement "immensely important" because, he claims, it "gave special constitutional authority to American judges." It meant that "law had to be expounded and interpreted and applied to particular cases" and "made American judicial review possible." In other words, if the Constitution was not fundamental law but merely ordinary law, judges would have greater leeway in expounding and interpreting the Constitution, opening the door for the so-called "living constitution" dreamt up by Progressives a century later.

But Wood bowdlerizes Marshall's meaning. In his decision, the Chief Justice first recognizes:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from

> which they proceed is supreme, and can seldom act, they are designated to be permanent.

Marshall is expounding the social compact theory of the Declaration of Independence, in which the just powers of government derive from the consent of the governed, the sole source of legitimate power in republican government. Only the people in its power to alter or abolish government has the power to offer a new model for what it has established as fundamental.

Marshall continues:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society.…
>
> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? … This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon.… It is emphatically the province and duty of the judicial department to say what the law is.

(I ask the reader's pardon, but if I'm going to fault Wood for quoting snippets, I don't want to be guilty of the same.) These passages above make it impossible to believe that Marshall understood the Constitution to be other than fundamental law deriving its authority from the principles of the Declaration. The idea that he collapsed the distinction between fundamental and ordinary law is simply false.

In order to argue that the constitution should be interpreted according to the principles of the English common law, Wood points to an obscure 1806 case involving the jury trial of eight shoemakers for conspiracy to engage in illegal price fixing. The trial was held in the Philadelphia Mayor's Court, which was not a court of record. The only report of the trial consists of incomplete shorthand notes by a Jeffersonian printer (who may have been biased against it since the trial was seen as a victory for Federalists), which he later published. Moses Levy, the recorder, presided over the trial. Wood quotes from Levy's remarks to the jury before they began deliberation. But as a matter of law none of the trial's proceedings has any value as precedent, especially the recorder's charge to the jury. Wood seems to think that the remarks somehow represent a rising tide of opinion that the common law could be used to counter democratic excess.

Levy argued that legislative acts are only temporary measures created by members who are subject to perpetual change, whereas the common law is based on ancient precedents and customs and is therefore an invaluable basis for stability. The common law, whose "rules are the result of the wisdom of the ages," could provide "sound discretion" to rapidly changing modern circumstances. Because the common law is an unwritten code, he continued, it is therefore adaptable and able to meet various exigencies that written constitutions cannot.

Wood must be aware that both Thomas Jefferson and James Madison argued that the United States did not adopt the common law for the entire nation. As Jefferson expressed it in a letter to Edmund Randolph in 1799, the United States

> associated as a nation, but for special purposes only…to wit, for the management of their concerns with one another & with foreign nations, and [since] the states composing the association chose to give it powers for those purposes & no others, they could not adopt any general system [of law], because it would have embraced objects on which this association had no right to form or declare a will.… So that the common law did not become, ipso facto, law on the new association; it could only become so by a positive adoption, & so far only as they were authorized to adopt.

Madison made a similar declaration the following year in the Report of 1800, adopted by the Virginia General Assembly.

As a matter of constitutional construction, a general rule was adopted by courts in subsequent years specifying that anything contained in the common law that violated the principles of the Declaration of Independence was repealed by the Revolution, and in those states that continued the common law it remained valid until repealed by positive legislation. If judicial review as we know it today depended on abolishing the distinction between fundamental and ordinary law, it did not begin with *Marbury v. Madison* but with the much later Progressive assault on the Constitution.

Once the Supreme Court reversed its earlier decision in *Lochner v. New York* (1905) with its ruling in *West Coast Hotel v. Parrish* (1937)—dubbed the "switch in time that saved nine" because the about-face staved off President Franklin Roosevelt's court-packing scheme—the Constitution became indistinguishable from developing constitutional law. Chief Justice Charles Evans Hughes, writing for the 5-4 majority, bowed to the new standard of historicism, writing that "[l]iberty in each of its phases has its history and connotation." In other words, liberty was once thought to be a natural right; now it begins a new epoch, a new era, subordinated to the ever-changing demands of the "welfare of the people."

Eventually, with the expansion of the administrative state, the United States entered the post-constitutional era we find ourselves in today, in which the Constitution itself has been discarded in favor of administration. Even the Supreme Court was only too willing, in *Chevron v. National Resources Defense Council* (1984), to defer openly to administrative agencies' supposed legal and political expertise. The Constitution was consigned into the "pastness of the past," as Gordon Wood would put it, to take its place as a relic of some previous era.

Edward J. Erler is professor emeritus of political science at California State University, San Bernardino, a senior fellow of the Claremont Institute, and the author, most recently, of The United States in Crisis: Citizenship, Immigration, and the Nation State *(Encounter Books).*