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We are indebted to Professor Wood for a characteristically stimulating lecture.[1] He has a gift for making history an intellectually exciting enterprise and a knack for drawing readers in and inviting us to join him on a voyage of discovery. He flatters his readers by making us feel smarter and more knowledgeable than we really are. He encourages the vain notion that we are equal partners in the quest for historical knowledge, participating with him in reading the sources, connecting disparate phenomena, and drawing certain inferences from the accumulated evidence. The logic and lucidity of his argument enable us to perceive the conclusion even before he formally announces it. We then feel as if we, not the author, have made the critical deduction and as if he is merely seconding our prior discovery. The extent to which Wood creates this illusion of the reader's "smartness" is a measure of his superb craftsmanship as a writer.

In this lecture, as in all his writings, Wood is the consummate historian, wholly dedicated to the principles and values of a discipline that in its grandest aspirations seeks not merely to accumulate knowledge about the past but to promote "historical-mindedness" as a kind of epistemology, a way of understanding reality. Practically every word Wood writes defines what it means to be historically minded, a habit of mind that he acquired as a student of Bernard Bailyn. No one has done more than Bailyn and Wood to educate their fellow historians and the general reading public in developing a sophisticated, historical cast of mind.[2]

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* Editor, volumes 5-9 THE PAPERS OF JOHN MARSHALL, sponsored by The College of William and Mary and The Omohundro Institute of Early American History and Culture. Volume 10 THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, JANUARY 1824-MARCH 1827 is forthcoming from the University of North Carolina Press in the spring of 2000. The author presented this speech as a commentary to Gordon Wood's Oliver Wendell Holmes Devise Lecture, delivered on October 9, 1998, at the Washington and Lee University School of Law.

1. *See generally* Gordon S. Wood, *Origins of Judicial Review Revisited*, 56 WASH. & LEE L. REV. 787 (1999).

2. *See generally* Gordon S. Wood, *The Creative Imagination of Bernard Bailyn*, *in* THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY 16-50 (James A. Henretta et al. eds., 1991).

In revisiting the origins of judicial review, Wood has admirably performed the historian's job of clearing away a pervasive anachronism that has characterized much of the scholarship on judicial review and on the Marshall Court in general. We put too much emphasis on one celebrated case, *Marbury v. Madison*,[3] as the defining moment when the Supreme Court acquired the authority to strike down legislation as contrary to the Constitution. Further, we tend to regard the Marshall Court's practice of declaring laws unconstitutional as prefiguring the modern doctrine of judicial review, a practice whereby the Supreme Court exercises sweeping authority to decide the divisive political, social, and economic questions that dominate our public life. And we are too inclined to credit Chief Justice Marshall in his great nationalizing decisions as anticipating, if not actually creating, the regulatory nation-state that the United States has become.

I am in such complete agreement with Professor Wood that I am hard-pressed to offer a comment that goes beyond an affirming nod. My remarks accordingly will focus on the way a master historian goes about answering the perennially fascinating question of the origins and nature of judicial review. The traditional account, where it has gone beyond *Marbury*, has mainly consisted of collecting the so-called "precedents" of the 1780s and 1790s, along with quotations from the founders, such as Alexander Hamilton's famous No. 78 of *The Federalist*.[4] Such evidence, while illuminating, is for Wood wholly unsatisfactory to explain "something as significant and forbidding as judicial review."[5] He proceeds on the sound assumption that the sources of judicial review "had to flow from fundamental changes taking place in the Americans' ideas of government and law."[6] In other words, what we have been accustomed to regard as causes or sources are in fact symptoms or effects of deeper underlying currents.

Wood then identifies four fundamental alterations in people's thinking about government and law: (1) the redefinition of the "separation of powers," by which judges gained a kind of equivalent status with legislators and executives as representatives or agents of the sovereign people; (2) the embodiment of fundamental law in written constitutions; (3) the "legalization" of fundamental law, the process that "domesticated" the Constitution so that it could run in the court system just like any ordinary law; and (4) the separation of law and politics.[7] I have not discerned any hierarchy of causes in this discussion, that is, any indication that Wood regards one as more important than

3. 1 Cranch (5 U.S.) 137 (1803).

4. THE FEDERALIST NO. 78 (Alexander Hamilton).

5. Wood, *supra* note 1, at 793.

6. *Id.*

7. *See generally id.* at 792-808 (discussing these principles).

another; however, he does allow that the first, the redefinition of the separation of powers, is "perhaps the most crucial."[8] The more important point for Wood is that none of these causes was sufficient in itself to account for the emergence of judicial review. The coalescence of these various elements produced this result; each was necessary but none was sufficient. As one would expect in a historical explanation, Wood adheres to a basic chronological order of presentation, although to be sure these developments overlapped. The legalization of fundamental law and the separation of law and politics were culminating points that occurred in the Marshall Court period.[9]

At no point does Wood contend that judicial review was inevitable, that it had to happen. On the contrary, he expresses wonder and amazement at the emergence of judicial review, almost as if it were a miracle: phrases such as "remarkable transformation"[10] and "momentous transformation"[11] reflect the capacity for surprise that should be second nature to the historian.[12] Wood resists the whiggish tendency to look at the past merely as an anticipation of our present, as if our ideas, institutions, and social forms were the product of the conscious intentions of our forebears. By assuming that the past is not simply the present writ small[13] but a strange and different place, he is able to make us see that judicial review was an extraordinary development that no one could have predicted.

The proper starting point for an inquiry into the origins of judicial review is the colonial period. Under the colonial regime, judges were an extension of royal authority, completely identified with the royal governors. The administration of justice was part of the executive power, and "separation of powers" meant the separation of legislative and executive power. The populace regarded judges with mistrust both because of their connection with the governors and because of their exercise of broad discretionary power in interpreting the multiple and confusing sources of colonial law. Against this background the historian must somehow explain that phenomenon known as "the rise of an independent judiciary" – how the judicial power carved out a separate identity as one of the three constitutional powers of government, how judges acquired their roles as the exclusive interpreters of the laws and as the guardians of the rights of individuals in republican government, and ultimately how unelected judges presumed to disallow laws that popularly elected legislatures had enacted. The emergence of judicial review was not the result of

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8. *Id.* at 793.
9. *Id.* at 801-08.
10. *Id.* at 793.
11. *Id.* at 802.
12. *Id.* at 793 (noting surprise at birth of judicial review).
13. *See id.* at 785 (discussing approaches to historical analysis).

a deliberate design but of a series of gradual and halting steps that Wood has succinctly summarized elsewhere:

> [T]he initial identification of fundamental law with a written constitution, followed by the need to compare this written constitution with other laws, then the lodging in the judiciary of the power of determining which law was superior, which in turn led to the blurring of constitutional and ordinary law in the regular court system that resulted finally in the legal interpretation of fundamental law in accord with what Hamilton . . . called the "usual and established rules of construction" applied to statutory and other ordinary law.[14]

Wood has produced the most elegant and intellectually satisfying account we have of the origins of judicial review. Particularly impressive is the way in which he identifies and explicates the several sources and then shows how they flow together to form the entity that we call judicial review. The structure of the essay artfully conveys a sense of cumulative build-up in which the shape and substance of judicial review becomes progressively clearer with each successive source of illumination. Ultimately, Wood links the particular story of judicial review with the grand theme of his life's work as a historian: "the democratization of early America."[15]

Over the years Wood has perfected and refined his account of the origins of judicial review by integrating his own prodigious knowledge of the sources of early America with the research and insights of other scholars whom he generously acknowledges. In this latest version, the emergence of judicial review appears more explicitly as a by-product of a broader historical process that was occurring on both sides of the Atlantic in the eighteenth century. We now have a clearer understanding that the growing prestige of the judiciary was a reaction to the tremendous upsurge in legislation taking place in Great Britain and in America, particularly after the onset of the Revolution. No longer simply checks on an aggrandizing executive, representative assemblies had become institutions whose chief activity was the enactment of positive legislation to meet the demands of a modernizing society.[16] In England, the swelling parliamentary statute book produced a sustained critique of legislation riddled with gross defects and inconsistencies and brought about a corresponding new respect for judicial interpretation as a means of rationalizing and reconciling legislation to accord with the principles of the common law

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14. Gordon S. Wood, *Judicial Review in the Era of the Founding*, *in* IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? 153, 164-65 (Robert A. Licht ed., 1993).

15. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION ix (1992).

16. *See* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1054-56 (1997) (explaining that most legislation addressed local activities).

and equity.[17] Even in a system that recognized the doctrine of parliamentary sovereignty, there was plenty of room for a robust conception of judicial power, as evidenced by Blackstone in his *Commentaries* and Lord Mansfield as chief judge of the Court of King's Bench.[18]

The same forces were at work in post-Revolutionary America where they produced a similar critique of legislation, none more perceptive than that by James Madison.[19] Madison recognized more quickly than anyone else that the turbulent, faction-ridden, interested politics that characterized the state legislatures was ill-suited to the task of making good laws. Instead, the assemblies enacted a profusion of ill-digested, inaccurate, confusing, and, even worse, unjust laws that threatened the whole experiment in republican government. Madison understood the principal problem of reform to be the checking of legislative power, which he regarded as more than an overmatch for the executive and judicial powers combined.[20] In *The Federalist* No. 48, Madison wrote: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[21] Madison, of course, never conceived of and never fully endorsed the concept of judicial review, but he did envision an enlarged role for the judiciary in helping to ensure that popular government would also be stable and just. He preferred to have wise and good laws framed at the outset by associating the judiciary with the executive as a "council of revision" over pending legislation.[22] In this way the judiciary would give the legislature "valuable assistance . . . in preserving a consistency, conciseness, perspicuity [and] technical propriety in the laws"[23] and would provide "an additional check" against "unwise [and] unjust" legislation.[24]

But the emerging trend toward separating law and politics worked against acceptance of the revisionary power. Instead of prior revision of legislation,

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17. *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 13-19 (1989) (explaining judiciary's reaction to increased legislative activity of Parliament).

18. *See id.* at 31-67, 71-73 (discussing influence of Blackstone and of Mansfield).

19. *See* Rakove, *supra* note 16, at 1051-60 (explaining role of legislation during Revolutionary era and Madison's arguments in support of Council of Revision as proposed in his Virginia Plan of 1787).

20. *See* James Madison, Saturday July 21 in Convention, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 73, 74 (Max Farrand ed., 1937) (referring to legislative branch as "overmatch" for executive and judicial branches).

21. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

22. *See* Madison, *supra* note 20, at 74 (recording Madison's agreement that judiciary should share revisionary power with executive).

23. *Id.*

24. *Id.*

subsequent judicial review of statutes developed, extending the traditional function of statutory construction to include the interpretation and enforcement of written constitutions. From an Atlantic perspective, judicial review can be seen as an American variation on the theme of the enhanced interpretative power of judges. Even without judicial review, it is clear that American judges, like their English counterparts, would play a significant role in controlling legislative excesses and abuses simply by exercising their ordinary adjudicative power.

That American judges were able to go further and to construe constitutions just like any ordinary law was the enduring achievement of Chief Justice Marshall and his court. Wood thus essentially leaves intact the traditional view that Marshall played the pivotal role in establishing judicial review. At the same time, Wood provides an enriched historical context that yields the most satisfactory explanation to date of the nature and significance of that achievement. Marshall, of course, did not invent judicial review, but he was largely responsible for carrying it beyond its original conception as an extraordinary, rarely invoked judicial defense of fundamental law toward the modern notion of judicial exposition of the constitutional text. He possessed a shrewd sense of the possibilities and limits of judicial power. He understood that if judicial review was to become a regular and continuously operating principle of the American constitutional system, judges would somehow have to accommodate it as much as possible to the familiar judicial task of construing ordinary law. Through his efforts to legalize the Constitution and to separate the spheres of law and politics, Marshall did as much as anyone to establish the peculiar American practice of judicial review.

Indeed, as Wood says, "[L]egalizing the Constitution was surely the most important and requisite initial step in making possible judicial review, including modern judicial activism."[25] This, of course, does not mean that Marshall divined the future role of the Supreme Court, that he presciently grasped the full implications of what he and his brethren were doing. To the extent that he nudged history in a particular direction, Marshall did so without conscious intention and without trying to anticipate the future. Rather, he looked to the past to the settlement of 1787-88 for the meaning and intention of the Constitution and to the great tradition of common law adjudication for the exposition of that instrument. He could scarcely have imagined the expansive scope and extent of the power that the Supreme Court wields today.

The Marshall Court was a far cry from today's Supreme Court. Only in form does the modern Court resemble an ordinary court of law. It no longer decides routine private lawsuits but by definition takes on only the weightiest public causes, the decision of which involve the Court in policy-making in

25. Wood, *supra* note 1, at 802 n.75.

ways scarcely distinguishable from legislating. The Fourteenth Amendment and the subsequent application of the Bill of Rights to the states have transformed the Constitution into a far more potent instrument for bringing controversial political and social questions to the bar of the Supreme Court. By contrast, the Marshall Court remained essentially a legal institution, an appellate court for deciding ordinary cases of common law and equity. Constitutional adjudication remained an infrequent, if not an extraordinary exercise of judicial power. To be sure, the Marshall Court had periodic bursts of activity, but it was hardly "activist" in the modern sense. Most of the time it quietly pursued its strictly legal business, far removed from the hurly-burly of politics. Of course, it was during these long periods of quiescence that the Court solidified its institutional identity and authority in a way that conditioned Americans to accept its role in making constitutional law as well.

This view of Marshall may not be the heroic image of the great Chief Justice that late nineteenth-century and early twentieth-century hagiographers promoted,[26] but it does conform to historical reality. Marshall was the beneficiary of a historical process that allowed him to play a pivotal role in the creation of American constitutional law. Another great jurist, one whose devise made this lecture possible, made this point in his remarks commemorating the centennial of Marshall's appointment as chief justice: "A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*."[27] Amid the swelling chorus of adulatory praise that was bestowed on Marshall during the centennial, this comment may appear to be iconoclastic and a trifle querulous. Yet in the same address Holmes went on to affirm his belief "that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall."[28] As we approach the bicentennial of Marshall's appointment, Professor Wood has given us a lecture that is true to the spirit of Holmes's centennial remarks.

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26. *See generally* 1-3 JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES (John F. Dillon ed., 1903); 1-4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916, 1919).

27. Oliver Wendell Holmes, *John Marshall, in* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 129, 131 (1967).

28. *Id.* at 133.