

**Charles Beard, *An Economic Interpretation of the American Constitution*
(originally published 1913)**

Introduction to the 1935 Edition.

This volume was first issued in 1913 during the tumult of discussion that accompanied the advent of the Progressive party, the split in Republican ranks, and the conflict over the popular election of United States Senators, workmen's compensation, and other social legislation. At that time Theodore Roosevelt had raised fundamental questions under the head of "the New Nationalism" and proposed to make the Federal Government adequate to the exigencies created by railways, the consolidation of industries, the closure of free land on the frontier, and the new position of labour in American economy. In the course of developing his conceptions, Mr. Roosevelt drew into consideration the place of the Judiciary in the American system. While expressing high regard for that branch of government, he proposed to place limitations on its authority. He contended that "by the abuse of the power to declare laws unconstitutional the courts have become a law-making instead of a law-enforcing agency." As a check upon judicial proclivities, he proposed a scheme for the "recall of judicial decisions." This project he justified by the assertion that "when a court decides a constitutional question, when it decides what the people as a whole can or cannot do, the people should have the right to recall that decision when they think it wrong." Owing to such declarations, and to the counter-declarations, the "climate of opinion" was profoundly disturbed when *An Economic Interpretation of the Constitution* originally appeared. *[begin page vi]*

Yet in no sense was the volume a work of the occasion, written with reference to immediate controversies. Doubtless I was, in common with all other students, influenced more or less by "the spirit of the times," but I had in mind no thought of forwarding the interests of the Progressive Party or of its conservative critics and opponents. I had taken up the study of the Constitution many years before the publication of my work, while a profound calm rested on the sea of constitutional opinion. In that study I had occasion to read voluminous writings by the Fathers, and I was struck by the emphasis which so many of them had placed upon economic interests as forces in politics and in the formulation of laws and constitutions. In particular I was impressed by the philosophy of politics set forth by James Madison in number X of the *Federalist* (below, page 14), which seemed to furnish a clue to practical operations connected with the formation of the Constitution - operations in which Madison himself took a leading part.

Madison's view of the Constitution seemed in flat contradiction to most of the theorising about the Constitution to which I had been accustomed in colleges, universities, and legal circles. It is true, older historians, such as Hildreth, had pointed out that there had been a sharp struggle over the formation and adoption of the Constitution, and that in the struggle an alignment of economic interests had taken place. It is true that Chief Justice Marshall, in his *Life of George Washington*, had sketched the economic conflict out of which the Constitution sprang. But during the closing years of the nineteenth century this realistic view of the Constitution had been largely submerged in abstract discussions of

states' rights and national sovereignty and in formal, logical, and discriminative analyses of judicial opinions. It was admitted, of course, that there had been a bitter conflict over the *[begin page vii]* formation and adoption of the Constitution; but the struggle was usually explained, if explained at all, by reference to the fact that some men cherished states' rights and others favoured a strong central government. At the time I began my enquiries the generally prevailing view was that expressed recently by Professor Theodore Clarke Smith: "Former historians had described the struggle over the formation and adoption of the document as a contest between sections ending in a victory of straight-thinking national-minded men over narrower and more local opponents." How some men got to be "national-minded" and "straight-thinking," and others became narrow and local in their ideas did not disturb the thought of scholars who presided over historical writing at the turn of the nineteenth century. Nor were those scholars at much pains to explain whether the term "section," which they freely used, meant a segment of physical geography or a set of social and economic arrangements within a geographic are, conditioned by physical circumstances.

One thing, however, my masters taught me, and that was to go behind the pages of history written by my contemporaries and read "the sources." In applying this method, I read the letters, papers, and documents pertaining to the Constitution written by the men who took part in framing and adopting it. And to my surprise I found that many Fathers of the Republic regarded the conflict of the Constitution as springing essentially out of conflicts of economic interests, which had a certain geographical or sectional distribution. This discovery, coming at a time when such conceptions of history were neglected by writers on history, gave me "the shock of my life." And since this aspect of the Constitution had been so long disregarded, I sought to redress the balance by emphasis, "naturally" perhaps. At *[begin page viii]* all events I called my volume "an economic interpretation of the Constitution." I did not call it "the" economic interpretation, or "the only" interpretation possible to thought. Nor did I pretend that it was "the history" of the formation and adoption of the Constitution. The reader was warned in advance of the theory and the emphasis. No attempt was made to take him off his guard by some plausible formula of completeness and comprehensiveness. I simply sought to bring back into the mental picture of the Constitution those realistic features of economic conflict, stress, and strain, which my masters had, for some reason, left out of it, or thrust far into the background as incidental rather than fundamental.

When my book appeared, it was roundly condemned by conservative Republicans, including ex-President Taft, and praised with about the same amount of discrimination, by Progressives and other on the left wing. Perhaps no other book on the Constitution has been more severely criticised, and so little read. Perhaps no other book on the subject has been used to justify opinions and projects so utterly beyond its necessary implications. It was employed by a socialist writer to support a plea for an entirely new constitution and by a conservative judge of the United States Supreme Court to justify an attack on a new piece of "social legislation." Some members of the New York Bar Association became so alarmed by the book that they formed a committee and summoned me to appear before it; and, when I declined on the ground that I was not engaged in legal politics or political politics, they treated my reply as a kind of contempt of court. Few took the position occupied by Justice Oliver Wendell

Holmes, who once remarked to me that he had not got excited about the book, like some of his colleagues, but had supposed that it was intended to *[begin page ix]* throw light on the nature of the Constitution, and, in his opinion, did so in fact.

Among my historical colleagues the reception accorded the volume varied. Professor William A. Dunning wrote me that he regarded it as the "pure milk of the word," although it would "make the heathen rage." Professor Albert Bushnell Hart declared that it was little short of indecent. Others sought to classify it by calling it "Marxian." Even as late as the year 1934, Professor Theodore Clarke Smith, in an address before the American Historical Association, expressed this view of the volume, in making it illustrative of a type of historical writing, which is "doctrinaire" and "excludes anything like impartiality." He said: "This is the view that American History, like all history, can and must be explained in economic terms . . . This idea has its origin, of course, in the Marxian theories."¹ Having made this assertion, Professor Smith turned his scholarly battery upon *An Economic Interpretation of the Constitution*.

Now as a matter of fact there is no reason why an economic interpretation of the Constitution should be any more partisan than any other interpretation. It may be employed, to be sure, to condemn one interest in the conflict of another interest, but no such use of it is imposed upon an author by the nature of the interpretation. Indeed an economic analysis may be coldly neutral, and in the pages of this volume no words of condemnation are pronounced upon the men enlisted upon either side of the great controversy which accompanied the formation and adoption of the Constitution. Are the security holders who sought to collect principal and interest through the formation of a stronger government to be treated as guilty of impropriety or praised? That is a *[begin page x]* question to which the present inquiry is not addressed. An answer to that question belongs to moralists and philosophers, not to students of history as such. If partiality is taken in the customary and accepted sense, it means "leaning to one party or another." Impartiality means the opposite. Then this volume is, strictly speaking, impartial. It supports the conclusion that in the main the men who favoured the Constitution were affiliated with certain types of property and economic interest, and the men who opposed it were affiliated with other types. It does not say that the former were "straight-thinking" and that the latter were "narrow." It applies no moralistic epithets to either party.

On the other hand Professor Smith's statement about the conflict over the Constitution in his *interpretation* of the nature of things, in that it makes the conflict over the Constitution purely psychological in character, unless some economic content is to be given to the term "section." In any event it assumes that straight-thinking and national mindedness are entities, particularities, or forces, apparently independent of all earthly considerations coming under the head of "economic." It does not say how these entities, particularities, or forces got into American heads. It does not show whether they were imported into the colonies from Europe or sprang up as the colonial epoch closed. It arbitrarily excludes the possibilities that their existence may have been conditioned if not determined by economic interpretations and conceptions. Whoever does not believe that the struggle over the

¹ *American Historical Review*, April, 1935, p.447.

Constitution was a simple contest between the straight-thinking and narrower and local men of the respective sections is to be cast into outer darkness as "Marxian" or lacking in "impartiality." Is that not a doctrinaire position? *[begin page xi]*

Not only is Professor Smith's position exclusive. It is highly partial. The men who favoured the Constitution were "straight-thinking" men. Those who opposed it were "narrower men". These words certainly may be taken to mean that advocates of the Constitution were wiser men, men of a higher type of mind, than the "narrower" men who opposed it. In a strict sense, of course, straight-thinking may be interpreted as thinking logically. In that case no praise or partiality is necessarily involved. A trained burglar who applies his science to cracking a safe may be more logical than an impulsive night watchman who sacrifices his life in the performance of duty. But in common academic acceptance a logical man is supposed to be superior to the intuitional and emotional man.

Nor is there exactness in such an antithesis as "straight-thinking" and narrowness. Narrowness does not, of necessity, mean lack of straight-thinking. Straight-thinking may be done in a narrow field of thought as well as in a large domain. But there is a true opposition in national-mindedness and local-mindedness, and the student of economic history merely enquires whether the antithesis does not correspond in the main to an economic antagonism. He may accept Professor Smith's psychological antithesis and go beyond it to enquire into its origins. But in so doing he need not ascribe into its origins. But in so doing he need not ascribe any superior quality of intellect to the one party or the other. To ascribe qualities of mind - high or low - to either party is partiality, dogmatic and doctrinaire partiality. It arbitrarily introduces virtues of intellectual superiority and inferiority into an examination of matters of fact.

In the minds of some, the term "Marxian," imported into the discussion by professor Smith, means an epithet; and in the minds of others, praise. With neither of these *[begin page xii]* have I the least concern. For myself I can say that I have never believed that "all history" can or must be "explained" in economic terms, or any other terms. He who really "explains" history must have the attributes ascribed by the theologians to God. It can be "explained," no doubt, to the satisfaction of certain mentalities at certain times, but such explanations are not universally accepted and approved. I confess to have hoped in my youth to find "the causes of things," but I never thought that I had found them. Yet it seems to me, and does now, that in the great transformations in society, such as was brought about by the formation and adoption of the Constitution, economic "forces" are primordial or fundamental, and come nearer "explaining" events than any other "forces." Where the configurations and pressures of economic interests are brought into an immediate relation to the event or series of events under consideration, an economic interpretation is effected. Yet as I said in 1913, on page 18, "It may be that some larger world process is working through each series of historical events; but ultimate causes lie beyond our horizon." If anywhere I have said or written that "all history" can be "explained" in economic terms, I was then suffering from an aberration of the mind.

Nor can I accept as a historical fact Professor Smith's assertion that the economic interpretation of history or my volume of the Constitution had its origin in "Marxian theories." As I point out in Chapter I of my *Economic Basis of Politics*, the germinal idea of class and group conflicts in history appeared in the writings of Aristotle, long before the Christian era, and was known to great writers on politics during the middle ages and modern times. It was expounded by James Madison, in Number X of the *Federalist*, written in defence of the Constitution of the United States, *[begin page xiii]* long before Karl Marx was born. Marx seized upon the idea, applied it with rigour, and based predictions upon it, but he did not originate it. Fathers of the American Constitution were well aware of the idea, operated on the hypothesis that it had at least a considerable validity, and expressed it in numerous writings. Whether conflicting economic interests bulk large in contemporary debates over protective tariffs, foreign trade, transportation, industry, commerce, labour, agriculture, and the nature of the Constitution itself, each of our contemporaries may decide on the basis of his experience and knowledge.

Yet at the time this volume was written, I was, in common with all students who professed even a modest competence in modern history, conversant with the theories and writings of Marx. Having read extensively among the writings of the Fathers of the Constitution of the United States and studied Aristotle, Machiavelli, Locke and other political philosophers, I became all the more interested in Marx when I discovered in his works the ideas which had been cogently expressed by outstanding thinkers and statesmen in the preceding centuries. That interest was deepened when I learned from an enquiry into his student life that he himself had been acquainted with the works of Aristotle, Montesquieu, and other writers of the positive bent before he began to work out his own historical hypothesis. By those who use his name to rally political parties or to frighten Daughters of the American Revolution, students of history concerned with the origins of theories need not be disturbed.

For the reason that this volume was not written for any particular political occasion but designed to illuminate all occasions in which discussion of the Constitution appears, I venture to re-issue it in its original form. It does not "explain" the Constitution. It does not exclude other explanations deemed more satisfactory to the explainers. Whatever its short-comings, the volume does, however, present some indubitable facts pertaining to that great document which will be useful to students of the Constitution and to practitioners engaged in interpreting it. The Constitution was of human origin, immediately at least, and it is now discussed and applied by human beings who find themselves engaged in certain callings, occupations, professions, and interests.

The text of this edition remains unchanged, although I should make minor modifications here and there, were I writing it anew. Two facts, however, unknown to me in 1913, should be added to the record as it stands. Both were called to my attention by Professor James O. Wettereau, who has made important contributions to the history of the period. On page 93, I state that Benjamin Franklin "does not appear to have held any public paper." Evidence to the contrary is now available. In February, 1788, Franklin wrote concerning the public indebtedness: "Such Certificates are low in Value at present, but we hope and believe they will mend, when our new Constitution of Government is

established. I lent the old Congress £3000 hard money in Value, and took Certificates promising interest at 6 per cent, but I have received no Interest for several years, and if I were now to sell the principal, I could not get more than 3s 4d for the Pound which is but a sixth part."² This adds Franklin to the list on page 150.

The second fact pertains to the formulation of Hamilton's funding system, based on the authority of the Constitution. It was long believed that this system was largely, if not entirely, the child of Hamilton's brain. But two letters found by Professor Wettereau among the Oliver Wolcott Papers in the Connecticut Historical Society indicate an *[begin page xv]* opposite view. Hamilton's First Report on the Public Credit was laid before the House of Representatives on January 9, 1790. In November of the preceding year, William Bingham, "Philadelphia merchant, capitalist, and banker," wrote a long letter to Hamilton, in which he recommended "virtually all of the essential measures subsequently proposed by the Secretary of the Treasury." During the same month of 1789, Stephen Higginson, "mariner, merchant, and broker," of Boston, also wrote a letter to Hamilton advocating measures similar to those laid before Congress by the Secretary of the Treasury, and warning him against the perils of the opposition certain to be raised. Bingham who was actively engaged in speculating in public securities, asked Hamilton to inform him "how far any of my Sentiments coincide with yours." Whether Hamilton replied is unknown at present, but Thomas Willing, Bingham's father-in-law (below, page 108) claimed to have seen Hamilton's "whole price" suggested for funding. The new historical discoveries by professor Wettereau throw light on the spirit of Hamilton's financial system and his connection with the mercantile and banking interests.³

To these notes of confirmation a memorandum of correction should be added. Page 29 may be taken to imply that the "landed aristocracy" of New York was *solidly* opposed to the Constitution, leaving no room for exceptions. Seldom, if ever, is there total class-solidarity in historical conflicts, and Doctor Thomas C. Cochran is entirely right in objecting to the implied generalisation.⁴ He properly calls attention to the fact that "while the 'Manor Lords' feared land taxes they also held public securities to an extent which *[begin page xvi]* made many of the favourable to the establishment of adequate [federal] revenue. Thus while the strength of the Anti-federalists rested on the landed classes, the most powerful of these landlords were often found in the opposition ranks." Hence, although his interpretation is economic, it corrects a generalisation too sweeping in character, and should be properly noted.

Two other *caveats* should be entered. It has been lightly assumed by superficial critics, if not readers of the volume, that I have "accused the members of the Convention of working merely for their own pockets." The falsity of this charge can be seen by reference to page 73 of the original text still standing. There I say clearly: "The only point considered here is: Did they [the members] represent distinct groups whose economic interests they understood and felt in concrete, definite form through

² A.H. Smyth, Writings of Franklin, Vol. IX, p. 635.

³ "Letters from Two Business Men to Alexander Hamilton," by James O. Wettereau, *Journal of Economic and Business History*, Vol III, August, 1931, pp. 667 ff.

⁴ *New York in the Confederation*, p. 17.

their own personal experience with identical property rights, or were they working merely under the guidance of abstract principles of political science?"

It has been lightly assumed that this volume pretends to show that the form of government established and powers conferred were "determined" in every detail by the conflict of economic interests. Such pretension was never in my mind; nor do I think that it is explicit or implicit in the pages which follow. I have never been able to discover all pervading determinism in history. In that field of study I find, what Machiavelli found, *virtu*, *fortuna*, and *necessita*, although the boundaries between them cannot be sharply delimited. There is a determinism, a necessity, in the world of political affairs; and it bears a relation to economic interests; otherwise Congress might vote \$25,000 a year in present values to every family in the United States, and the Soviet Government might make every Russian rich, but this is [begin page xvii] not saying that every event, every institution, every personal decision is "determined" by discoverable "causes."

Nevertheless, whoever leaves economic pressures out of history or out of the discussion of public questions is in mortal peril of substituting mythology for reality and confusing issues instead of clarifying them. It was largely by recognising the power of economic interests in the field of politics and making skilful use of them that the Fathers of the American Constitution placed themselves among the great practicing statesmen of all ages and gave instructions to succeeding generations in the art of government. By the assiduous study of their works and by displaying their courage and their insight into the economic interests underlying all constitutional formalities, men and women of our generation may guarantee the perpetuity of government under law, as distinguished from the arbitrament of force. It is for us, recipients of their heritage, to enquire constantly and persistently, when theories of national power or states' rights are propounded: "What interests are behind them and to whose advantage will changes or the maintenance of old form accrue?" By refusing to do this we become victims of history - clay in the hands of its makers.

Charles A. Beard

New Milford,
August, 1935.

Preface

The following pages are frankly fragmentary. They are designed to suggest new lines of historical research rather than to treat the subject in an exhaustive fashion. This apology is not intended as an anticipation of the criticism of reviewers, but as a confession of fact. No one can appreciate more than I do how much of the work here outlined remains to be done. The records of the Treasury Department

at Washington, now used for the first time in connection with a study of the formation of the Constitution, furnish a field for many years' research, to say nothing of the other records, printed and unprinted, which throw light upon the economic conditions of the United States between 1783-1787.

If it be asked why such a fragmentary study is printed now, rather than held for the final word, my explanation is brief. I am unable to give more than an occasional period to uninterrupted studies, and I cannot expect, therefore, to complete within a reasonable time the survey which I have made here. Accordingly, I print it in the hope that a few of this generation of historical scholars may be encouraged to turn away from barren "political" history to a study of the real economic forces which condition great movements in politics.

Students already familiar with the field here surveyed will discover that I have made full use of the suggestive work already done by Professor Turner, Drs. Libby, Ambler, and Schaper.

[begin page xx]

I am indebted to Mr Merwin of the Treasury Department for his great courtesy in making available the old records under his jurisdiction; to Mr. Bishop, of the Library of Congress, for facilitating the examination of thousands of pamphlets as well as for other favours; and to Mr. Fitzpatrick, of the Manuscript Division, for keeping his good humour while bringing out hundreds of manuscripts which seemed to yield results wholly out of proportion to the labour entailed.

I am under deep obligation to two friends, nameless here, without whose generous sympathy and encouragement, this volume could not have been written.

Charles A. Beard

Washington, D.C.
February, 1918.

Chapter 1.

Historical Interpretation in the United States.

Broadly speaking, three school of interpretation have dominated American historical research and generalisation. The first of these, which may be justly associated with the name of Bancroft, explains the larger achievements in our national life by reference to the peculiar moral endowments of a people

acting under divine guidance; or perhaps it would be more correct to say, it sees in the course of our development the working out of a higher will than that of man. There is to be observed in the history of the struggle for the Constitution, to use Bancroft's words, "the movement of the divine power which gives unity to the universe, and order and connection to events."⁵

Notwithstanding such statements, scattered through Bancroft's pages, it is impossible to describe in a single phrase the ideal that controlled his principles of historical construction, because he was so often swayed by his deference to the susceptibilities of the social class from which he sprang and by the exigencies of the public life in which he played a by no means inconspicuous part. Even telling *[begin page 2]* the whole truth did not lie upon his conscience, for, speaking on the question of the number of Americans who were descendants from transported felons and indented servants, he said that "Having a hand full, he opened his little finger."⁶

Nevertheless, Bancroft constantly recurs in his writings to that "higher power" which is operating in human affairs, although he avoids citing specific events which may be attributed to it. It appears to him to be the whole course of history, rather than any event or set of events, which justifies his theory. "However great," he says, "may be the number of those who persuade themselves that there is in man nothing superior to himself, history interposes with evidence that tyranny and wrong lead inevitably to decay; that freedom and right, however hard may be the struggle always prove resistless. Through this assurance ancient nations learn how to renew their youth; the rising generation is incited to take a generous part in the grand drama of time; and old age, staying itself upon sweet Hope as its companion and cherisher, not bating a jot of courage, nor seeing cause to argue against the hand or the will of a higher power, stands waiting in the tranquil conviction that the path of humanity is still fresh with the dews of morning, that the Redeemer of the nations liveth."⁷

The second School of historical interpretation, which in order of time followed that of Bancroft, may be called the Teutonic, because it ascribes the wonderful achievements of the English-speaking peoples to the peculiar political genius of the Germanic race. Without distinctly repudiating the doctrine of the "higher power" in history, it finds the secret to the "free" institutional development of the Anglo-Saxon world in innate racial qualities. *[begin page 3]*

The thesis of this school is, in brief, as follows. The Teutonic peoples were originally endowed with singular political talents and aptitudes; Teutonic tribes invaded England and destroyed the last vestiges of the older Roman and British culture; they then set an example to the world in the development of "free" government. Descendants of this specially gifted race settled America and fashioned their institutions after old English models. The full fruition of their political genius was reached in the creation of the Federal Constitution.

⁵ *The History of the Constitution of the United States (1882 ed.)*, Vol. II, P. 284.

⁶ *American Historical Review*, Vol II, p. 13.

⁷ Bancroft, *op cit.*, Vol I. P. 6.

For more than a generation the Teutonic theory of our institutions deeply influenced historical research in the United States; but it was exhausted in the study of local government rather than of great epochs; and it produced no monument of erudition comparable to Stubb's *Constitutional History of England*. Whatever may be said of this school, which has as its historical explanation and justification,⁸ it served one exceedingly useful purpose; it was scrupulously careful in the documentation of its preconceptions and thus cultivated a more critical spirit than that which characterised the older historians.

The Third school of historical research is not to be characterised by any phrase. It is marked rather by an absence of hypotheses. Its representatives, seeing the many pitfalls which beset the way of earlier writers, have resolutely turned aside from "interpretation" in the larger sense, and concerned themselves with critical editions of the documents and with the "impartial" presentation of related facts. *[begin page 4]*

This tendency in American scholarship has been fruitful in its results, for it has produced more care in the use of historical sources and has given us many excellent and accurate surveys of outward events which are indispensable to the student who would inquire more deeply into underlying causes.⁹

Such historical writing, however, bears somewhat the same relation to scientific history which systematic botany bears to ecology; that is, it classifies and orders phenomena, but does not explain their proximate or remote causes and relations. The predominance of such a historical ideal in the United States and elsewhere is not altogether inexplicable; for interpretative schools seem always to originate in social antagonisms.¹⁰ The monarchy, in its rise and development, was never correctly understood as long as it was regarded by all as a mystery which must not be waded into, as James I put it, by ordinary mortals. Without the old regime there would have been no Turgot and Voltaire; Metternich and Joseph de Maistre came after the Revolution.

But the origin of different schools of interpretation in controversies and the prevalence of many mere preconceptions bolstered with a show of learning should not lead us to reject without examination any new hypotheses, such as *[begin page 5]* the theory of economic determinism, on the general assumption of Pascal "that the will, the imagination, the disorders of the body, the thousand concealed infirmities of the intelligence conspire to reduce our discovery of justice and truth to a process of haphazard, in which we more often miss than hit the mark." Such a doctrine of pessimism would

⁸ It has been left to a Russian to explain to Englishmen the origin of Teutonism in historical writing. See the introduction to Vinogradoff, *Villainage in England*. W.J. Ashley, in his preface to the translation of Fustel de Coulanges, *Origin of Property in Land*, throws some light on the problem, but does not attempt a systematic study.

⁹ What Morley has said of Macaulay is true of many eminent American historical writers: "A popular author must, in a thoroughgoing way, take the accepted maxims for granted. He must suppress any whimsical fancy for applying the Socratic elenchus; or any other engine of criticism, scepticism, or verification to those sentiments or current precepts or morals which may in truth be very equivocal and may be much neglected in practice, but which the public opinion of his time requires to be treated in theory and in literature as if they had been cherished and held *semper unique et ab omnibus*." *Miscellanies*, Vol I., p. 272.

¹⁰ For instance, intimate connections can be shown between the vogue of Darwinism and the competitive ideals of the mid-Victorian middle-class in England. Darwin got one of his leading ideas, the struggle for existence, from Malthus, who originated it as a club to destroy the social reformers. Godwin, Condorcet, and others, and then gave it a serious scientific guise as an afterthought.

make of equal value for the student who would understand for instance, such an important matter as the origin of the state, Mr Edward Jenk's severely scientific *History of Politics* and Dr. Nathaniel Johnston's *The Excellency of Monarchical Government, especially the English Monarchy, wherein is largely treated of the Several Benefits of Kingly Government and the Inconvenience of Commonwealths. . . . Likewise the Duty of Subjects and the Mischief of Faction, Sedition, and Rebellion, published in 1686.*

It is not without significance, however, that almost the only work in economic interpretation which has been done in the United States seems to have been inspired at the University of Wisconsin by Professor Turner, now of Harvard. Under the direction of this original scholar and thinker, the influence of the material circumstances of the frontier on American politics was first clearly pointed out. Under his direction also the most important single contribution to the interpretation of the movement for the federal Constitution was made; O.G. Libby's *Geographical Distribution of the Votes of the Thirteen States on the Federal Constitution.*

In a preface to this work, Professor Turner remarks that the study was designed to contribute "to an understanding of the relations between the political history of the United States, and the physiographic, social, and economic conditions underlying this history. . . . It is believed that many phases of our political history have been obscured [begin page 6] by the attention paid to State boundaries and to the sectional lines of North and South. At the same time the economic interpretation of our history has been neglected. In the study of the persistence of the struggle for state particularism in American constitutional history, it was inevitable that writers should make prominent the state as a political factor. But, from the point of view of the rise and growth of sectionalism and nationalism, it is much more important to note the existence of great social and economic areas, independent of state lines, which have acted as units in political history, and which have changed their political attitude as they changed their economic organisation and divided into new groups."¹¹

Although the hypothesis that economic elements are the chief factors in the development of political institutions has thus been used in one or two serious works, and has been more or less discussed as a philosophic theory,¹² it has not been applied to the study of American history at large - certainly not with that infinite detailed analysis which it requires. Nor has it received at the hands of professed historians that attention which its significance warrants. On the contrary, there has been a tendency to treat it with scant courtesy and to dismiss it with a sharpness bordering on contempt.¹³ Such summary judgement is, of course, wholly unwarranted and premature; for as Dr. William Cunningham remarks, the validity of no hypothesis can be [begin page 7] determined until it has been worked to its

¹¹ See also the valuable and suggestive writings on American history by Professor W.E. Dodd, of Chicago University; W.A. Schaper, "Sectionalism in South Carolina," *American Historical Association Report* (1900), Vol I; A. Bentley, *The Process of Government*; C.H. Ambler, *Sectionalism in Virginia*. There are three works by socialist writers that deserve study; Simons, *Social Forces in American History*; Gustavus Myers, *History of Great American Fortunes and History of the Supreme Court*.

¹² See Seligman, *The Economic Interpretation of History*.

¹³ Vincent, in his treatise on *Historical Research* (1911), dismisses the economic theory without critical examination.

utmost limits. It is easier to write a bulky volume from statutes, congressional debates,¹⁴ memoirs, and diplomatic notes than it is to ascertain the geographical distribution and political significance of any important group of economic factors. The theory of economic determinism has not been tried out in American History, and until it is tried out, it cannot be found wanting.

Sadly as the economic factors have been ignored in historical studies, the neglect has been all the more pronounced in the field of private and public law. The reason for this is apparent. The aim of instruction in these subjects is intensely practical; there are few research professorships in law; and the "case" system of teaching discourages attempts at generalisation and surveys.¹⁵ Not even the elementary work has been done. There has been no generous effort to describe the merely superficial aspects of the development of private law in the United States. There has been no concerted attempt to bring together and make available to students the raw materials of such a history. Most of the current views on the history of our law are derived from occasional disquisitions of judges which are all too frequently shot through with curious errors of fact and conception.

Nor has England advanced far beyond us in the critical interpretation of legal evolution - its explanation in terms of, or in relation to, the shifting economic processes and *[begin page 8]* methods in which the law is tangled. It is true that English scholars have produced admirable histories of the law in its outward aspects, such as the monumental work of Pollock and Maitland; and they have made marvellous collections of raw materials, like the publications of the Selden society. But apart from scattered and brilliant suggestions thrown off occasionally by Maitland¹⁶ in passing, no interpretation has been ventured, and no effort has been made to connect legal phases with economic changes.

In the absence of a critical analysis of legal evolution, all sorts of vague abstractions dominate most of the thinking that is done in the field of law. The characteristic view of the subject taken by American commentators and lawyers immersed in practical affairs is perhaps summed up as finely by Carter as by any other writer. "In Free, popular states," he says, "the law springs from and is made by the people; and as the process of building it up consists in applying, from time to time, to human actions the popular ideal of standard of justice, justice is only interest consulted in the work. . . . The law of England and America has been a pure development proceeding from a constant endeavour to apply to the civil conduct of men the ever advancing standard of justice."¹⁷ In other words, law is made out of some abstract stuff known as "justice." What sets the standard in the beginning and why does it advance? *[begin page 9]*

¹⁴ The *Congressional Record* requires more care in use than any other great source of information on American Politics.

¹⁵ Attention should be drawn, however, to the good work which is being done in the translation of several European legal studies, the "Modern legal Philosophy Series", under the editorial direction of the Association of American Law Schools. Perhaps the most hopeful sign of the times is the growth of interest in comparative jurisprudence. See Borchart, "Jurisprudence in Germany," *Columbia Law Review*, April, 1912.

¹⁶ For examples of Maitland's suggestiveness, see the *English Historical Review*, Vol IX, p. 439, for a side light on the effect of money economy on the manor and consequently on feudal law. See also the closing pages of his *Constitutional History of England*, where he makes constitutional law in large part of the history of the law of real property. "If we are to learn anything about the constitution, it is necessary first and foremost that we should learn a good deal about the land law. We can make no progress whatever in the history of parliament without speaking of tenure; indeed our whole constitutional law seems at times to be but an appendix to the law of real property" (p. 538). Maitland's entire marvellous chapter on "The Definition of Constitutional Law" deserves the most careful study and reflection. He was entirely emancipated from bondage to systematists (p. 539).

¹⁷ J.C. Carter, *the Proposed Codification of Our Common Law (1884)*, pp. 6-8.

The devotion to deductions from "principles" exemplified in particular cases, which is such a distinguishing sign of American legal thinking, has the same effect upon correct analysis which the adherence to abstract terms had upon the advancement of learning - as pointed out by Bacon. The absence of any consideration of the social and economic elements determining the thought of the thinkers themselves is all the more marked when contrasted with the penetration shown by European savants like Jhering, Menger, and Stammler. Indeed, almost the only indication of a possible economic interpretation to be found in current American jurisprudence is implicit in the writings of a few scholars, like Professor Roscoe Pound and Professor Goodnow,¹⁸ and in occasional opinions rendered by Mr Justice Holmes of the Supreme Court of the United States.¹⁹

What here has been said about our private law may be more than repeated about our constitutional history and law. This subject, though it has long held an honourable position in the American scheme of learning, has not yet received the analytical study which its intrinsic importance merits. In the past, it has often been taught in the law schools by retired judges who treated it as a branch of natural and moral philosophy or by practical lawyers *[begin page 10]* who took care for the instant need of things. Our great commentaries, Kent, Storey, Miller, are never penetrating; they are generally confined to statements of fact; and designed to inculcate the spirit of reverence rather than of understanding. And of constitutional histories, strictly speaking, we have none, except the surveys of superficial aspects by Curtis and Bancroft.

In fact, the juristic theory of the origin and nature of the Constitution is marked by the same lack of analysis of determining forces which characterised older historical writing in general. It may be stated in the following manner: The Constitution proceeds from the whole people; the people are the original source of all political authority exercised under it; it is founded on broad general principals of liberty and government entertained, for some reason, by the whole people and having no reference to the interest or advantage of any particular group or class. "By calm meditation and friendly councils," says Bancroft, "the [the people] had prepared a Constitution which, in the union of freedom with strength and order, excelled every one known before. . . . In the happy morning of their existence as one of the powers of the world, they had chosen justice for their guide; and while they proceeded on their way with a well-founded confidence and joy, all the friends of mankind invoked success on their endeavour as the only hope for renovating the life of the civilised world."²⁰

With less exaltation, Chief Justice Marshall states the theory, in his opinion in the case of *McCulloch v. Maryland*: "The government proceeds directly from the people; is 'ordained and established' in the

¹⁸ Of the newer literature on law, see the following articles by Professor Roscoe Pound: "Do we need a Philosophy of Law?" *Columbia Law Review*, Vol. V, p. 339; "Need of a Sociological Jurisprudence," *Green Bag*, Vol. XIX, p. 607; "Mechanical Jurisprudence," *Columbia Law Review*, Vol. VIII, p. 605; "Law in Books and Law in Action," *American Law Review*, Vol. XLIV, p. 12; Professor Munroe Smith, "Jurisprudence" (in the *Columbia Law Review University Lectures in Arts and Sciences*); Goodnow, *Social Reform and the Constitution*.

¹⁹ Consider, for example, the following remarks by this eminent Justice in his dissenting opinion in the *New York Bakery case*. "The case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Studies* General propositions do not decide concrete cases. The decision will depend on a judgement or intuition more subtle than any articulate major premise. 198 U.S. 75.

²⁰ *Op. cit.* Vol. II, p. 367.

name of the people and is declared to be ordained 'in order to form a more perfect union, to establish justice, insure domestic tranquillity, and [begin page 11] secure the blessings of liberty' to themselves and their posterity. The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. . . . The government of the union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all."²¹

In the juristic view, the Constitution is not only the work of the whole people, but it also bears no traces of the party conflict from which it emerged. Take, for example, any of the traditional legal definitions of the Constitution; Miller's will suffice: "A constitution in the American sense of the word, is an instrument by which the fundamental powers of the government are established, limited, and defined, and by which these powers are distributed among the several departments for their more safe and useful exercise, for the benefit of the body politic. . . . It is not, however, the origin or private rights, nor the foundation of laws. It is not the cause, but the consequence of personal and political freedom. It declares those natural and fundamental rights of individuals, for the security and common enjoyment of which governments are established."²²

Nowhere in the commentaries is there any evidence of the fact that the rules of our fundamental law are designed to protect any class in its rights, or secure the property of [begin page 12] one group against the assaults of another. "The Constitution," declares Bancroft, "establishes nothing that interferes with equality and individuality. It knows nothing of differences by descent, or opinions, of favoured classes, or legalised religion, or the political power of property. It leaves the individual alongside of the individual. . . . As the sea is made up of drops, American society is composed of separate, free, and constantly moving atoms, ever in reciprocal action . . . so that the institutions and laws of the country rise out of the masses of individual thought, which, like the waters of the ocean, are rolling evermore."²³

In turning from the vague phraseology of Bancroft to an economic interpretation of constitutional history, it is necessary to realise at the outset that law is not an abstract thing, a printed page, a volume of statutes, a statement by a judge. So far as it becomes of any consequence to the observer it must take real form; it must govern actions; it must determine positive relations between men; it must prescribe processes and juxtapositions.²⁴ A statute may be on the books for an age, but unless, under its provisions, a determinate arrangement of human relations is brought about or maintained, it exists

²¹ 4 Wheaton, p. 316. No doubt the learned Justice was here more concerned with discrediting the doctrine of State's rights than with establishing the popular basis of our government.

²² S.F. Miller, *Lectures on the Constitution* (1891), p. 71.

²³ *Op. cit.* Vol. II, p. 324.

²⁴ See A. Bentley, *The process of Government*.

only in the imagination. Separated from the social and economic fabric by which it is, in part, conditioned and which, in turn, it helps to condition, it has no reality.

Now, most of the law (except the elemental law of community defence) is concerned with the property relations of men, which reduced to their simple terms mean the processes by which the ownership of concrete forms of property is determined or passes from one person to another. As society becomes more settled and industrial in character, [begin page 13] mere defence against violence (a very considerable portion of which originates in forcible attempts to change the ownership of property) becomes of relatively less importance; and property relations increase in complexity and subtlety.

But it may be said that constitutional law is a peculiar branch of the law; that it is not concerned primarily with property or with property relations, but with organs of government, the suffrage administration. The superficiality of this view becomes apparent at a second glance. Inasmuch as the primary object of a government, beyond the mere repression of physical violence, is the making of the rules which determine the property relations of members of society, the dominant classes whose rights are thus to be determined must perforce obtain from the government such rules as are consonant with the larger interests necessary to the continuance of their economic processes, or they must themselves control the organs of government. In a stable despotism the former takes place; under any other system of government, where political power is shared by any portion of the population, the methods and nature of this control become the problem of prime importance - in fact, the fundamental problem in constitutional law. The social structure by which one type of legislation is secured and another prevented - that is, the constitution - is a secondary or derivative feature arising from the nature of the economic groups seeking positive action and negative restraint.

In what has just been said there is nothing new to scholars who have given any attention to European writings on jurisprudence. It is based in the first instance on the doctrine advanced by Jhering that law does not "grow," but in fact is, "made" - adapted to precise interests which may [begin page 14] be objectively determined.²⁵ It was not original with Jhering. Long before he worked out the concept in his epoch-making book, *Der Zweck in Recht*, Lassalle had set it forth in his elaborate *Das System der*

²⁵ In the preface to his first edition, Jhering says: "Die Schrift, von der ich hiermit die erste Hälfte der Öffentlichkeit übergebe, ist eine Ausläuferin von meinem Werk über den Geist des römischen Rechts. Der letzte Band desselben. . . schloss ab mit einer Grundlegung der Theorie der Rechte im subjektiven Sinn. In der ich eine von der herrschenden abweichende Begriffsbestimmung des Rechts im subjektiven Sinn gab, indem ich an Stelle des Willens, auf den jene den Begriff desselben gründeten das Interesse setzte. Dem folgenden Bande war die weitere Rechtfertigung und Verwertung dieses Gesicht vorbehalten. . . . Der Begriff des Interesses nötigte mich, den Zweck ins Auge zu fassen, und das Recht im subjektiven Sinn drangte mich zu dem im objektiven Sinn, und so gestaltete sich das ursprüngliche Untersuchungsobjekt zu einem ungleich erweiterten, zu dem des gegenwertigen Buches: der Zweck im Recht. . . . Der Grundgedanke des gegenwertigen Werkes besteht darin, dass der Zweck der Schöper des gesamten Rechts ist, dass es keinen Rechtssatz gibt, der nicht einem Zweck, d.i. einem praktischen Motiv seinen Ursprung verdankt".

erworbenen Rechte,²⁶ and long before Lassalle had thought it through, our own Madison had formulated it, after the most wide-reaching researches in history and politics.²⁷

In fact, the inquiry which follows is based upon the political science of James Madison, the father of the Constitution and later President of the Union he had done so much to create. This political science runs through all of his really serious writings and is formulated in its most precise in *The Federalist*²⁸ as follows: "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a [*begin page 15*] uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties. . . the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."

Here we have a masterly statement of the theory of economic determinism in politics.²⁹ Different degrees and kinds of property inevitably exist in modern society; party doctrines and "principles" originate in the sentiments and views which the possession of various kinds of property [*begin page 16*] creates in the minds of the possessors; class and group divisions based on property lie at the basis of modern government; and politics and constitutional law are inevitably a reflex of these contending interests. Those who are inclined to repudiate the hypothesis of economic determinism as a European importation must, therefore, revise their views, on learning that one of the earliest, and certainly one of the clearest, statements of it came from a profound student of politics who sat in the Convention that framed our fundamental law.

The requirements for an economic interpretation of the formation and adoption of the Constitution may be stated in a hypothetical proposition which, although it cannot be verified absolutely from

²⁶ Was ist es, das den innersten Grund unserer politischen und sozialen Kämpfe bildet? Der Begriff des erworbenen Rechts ist wieder einmal streitig geworden - und diesser Streit is es, der das Herz der heutigen Welt durchsittert und die tief inwendigste Grundlage der politisch-socialen Kämpfe des Jahrhunderts bildet. Im Juristischen, Politischen, Oekonomischen is der Begriff des erworbenen Rechts der treibende Springquell all weitem Gestaltung, und wo sich das Juristische als das Privatrechtliche vollig von dem Politischen abzulösen scheint, da ist es noch viel politischer als das Politische selbst, dann da ist es das sociale Element. Preface to *Das System der erworbenen Rechts* by Ferdinand Lassalle.

²⁷ And before Madison's century, Harrington had perceived its significance, H.A.L. Fisher, *Republican Tradition in Europe*, p. 51.

²⁸ Number 10.

²⁹ The theory of the economic interpretation of history as stated by Professor Seligman seems as nearly axiomatic as any proposition in social science can be: "The existence of man depends upon his ability to sustain himself; the economic life is therefore the fundamental condition of all life. Since human life, however, is the life of man in society, individual existence moves within the framework of the social structure and is modified by it. What the conditions of maintenance are to the individual, the similar relations of production and consumption are to the community. To economic causes, therefore, must be traced in the last instance those transformations in the structure of society which themselves condition the relations of social classes and the various manifestations of social life." *The Economic Interpretation of History*, p. 3.

ascertainable data, will at once illustrate the problem and furnish a guide to research and generalisation.

It will be admitted without controversy that the Constitution was the creation of a certain number of men, and it was opposed by a certain number of men. Now, if it were possible to have an economic biography of all those connected with its framing and adoption, - perhaps about 160,000 men altogether, - the materials for scientific analysis and classification would be available. Such an economic biography would include a list of the real and personal property owned by all of these men and their families: lands and houses, with incumbrances, money at interest, slaves, capital invested in shipping and manufacturing, and in state and continental securities.

Suppose it could be shown from the classification of the men who supported and opposed the Constitution that there was no line of property division at all; that is, that men owning substantially the same amounts of the same *[begin page 17]* kinds of property were equally divided on the matter of adoption or rejection - it would then become apparent that the Constitution had no ascertainable relation to economic groups or classes, but was the product of some abstract causes remote from the chief business of life - gaining a livelihood.

Suppose, on the other hand, that substantially all of the merchants, money lenders, security holders, manufacturers, shippers, capitalists, and financiers and their professional associates are to be found on one side in support of the Constitution and that substantially all or the major portion of the opposition came from the non-slave-holding farmers and the debtors - would it not be pretty conclusively demonstrated that our fundamental law was not the product of an abstraction known as the "whole people," but of a group of economic interests which must have expected beneficial results from its adoption? Obviously all the facts here desired cannot be discovered, but the data presented in the following chapters bear out the latter hypothesis, and thus a reasonable presumption in favour of the theory is created.

Of course it may be shown (and perhaps can be shown) that the farmers and debtors who opposed the Constitution were, in fact, benefited by the general improvement which resulted from its adoption. It may likewise be shown, to take an extreme case, that the English nation derived immense advantages from the Norman Conquest and the orderly administrative processes which were introduced, as it undoubtedly did; nevertheless, it does not follow that the vague thing known as "the advancement of general welfare" or some abstraction known as "justice" was the immediate, guiding purpose of the leaders in either of these great historic changes. The point is, that the direct, im- *[begin page 18]* pelling motive in both cases was the economic advantages which the beneficiaries expected would accrue to themselves first, from their action. Further than this, economic interpretation cannot go. It may be that some larger world-process is working through each series of historical events; but ultimate causes lie beyond our horizon.

Conclusions.

At the close of this long and arid survey - partaking of the nature of catalogue - it seems worth while to bring together the important conclusions for political science which the data presented appear to warrant.

The movement for the Constitution of the United States was originated and carried through principally by four groups of personal interests which had been adversely affected under the Articles of Confederation: money, public securities, manufactures, and trade and shipping.

The first firm steps toward the formation of the Constitution were taken by a small and active group of men immediately interested through their personal possessions in the outcome of their labours.

No popular vote was taken directly or indirectly on the proposition to call the Convention which drafted the Constitution.

A large propertyless mass was, under the prevailing suffrage qualifications, excluded at the outset from participation (through representatives) in the work of framing the Constitution.

The members of the Philadelphia Convention which drafted the Constitution were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system.

The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities. *[begin page 325]*

The major portion of the members of the Convention are on record as recognizing the claim of property to a special and defensive position in the Constitution.

In the ratification, of the Constitution, about three-fourths of the adult males failed to vote on the question, having abstained from the elections at which delegates to the state conventions were chosen, either on account of their indifference or their disfranchisement by property qualifications.

The Constitution was ratified by a vote of probably not more than one-sixth of the adult males. It is questionable whether a majority of the voters participating in the elections for the state conventions in New York, Massachusetts, New Hampshire, Virginia, and South Carolina, actually approved the ratification of the Constitution.

The leaders who supported the Constitution in the ratifying conventions represented the same economic groups as the members of the Philadelphia Convention; and in a large number of instances they were also directly and personally interested in the outcome of their efforts.

In the ratification, it became manifest that the line of cleavage for and against the Constitution was between substantial personalty interests on the one hand and the small farming and debtor interests on the other.

The Constitution was not created by "the whole people" as the jurists have said; neither was it created by "the states" as Southern nullifiers long contended; but it was the work of a consolidated group whose interests knew no state boundaries and were truly national in their scope.