CHARLES BEARD & PROGRESSIVE LEGAL HISTORIOGRAPHY

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Last year marked the 100th anniversary of the publication of Charles Beard's *An Economic Interpretation of the Constitution*. When Beard's work first appeared it was generally well received in academic circles, but precipitated an outpouring of protests from members of the general public, including former President William Howard Taft and the then newspaper publisher Warren G. Harding.[1] In the next several decades, however, Beard's claim that those who framed the Constitution were "immediately, directly, and personally interested in" the outcome of their labors at Philadelphia, and were to a greater or lesser extent economic beneficiaries from the adoption of the Constitution,[2] was regarded in historical circles as the best explanation of the framers' motivation. But by 1968 Richard Hofstadter had concluded that "Beard's reputation stands like an imposing ruin in the landscape of American historiography."[3] In the end, Hofstadter believed, Beard "geared his reputation as a historian so closely to his political interests and passions that the two were bound to share the same fate."[4]

Hofstadter characterized Beard, along with Frederick Jackson Turner and Vernon Parrington, as scholars who "explained the American liberal mind to itself in historical terms," who "gave us the pivotal ideas of the first half of the twentieth century," and who "seemed to be able to make American history

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1. Taft suggested to a friend that Beard would have been more satisfied if the Constitution had been drafted by "dead beats, out-at-the-elbows demagogues, and cranks who never had any money." RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS 212 (1968). Harding's paper, the Marion, Ohio *Star*, characterized *An Economic Interpretation* as "libelous, vicious, and damnable in its influence." *Id.*

2. *Id.* at 216 (quoting CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 324 (1913)).

3. *Id.* at 344.

4. *Id.* at 345.

relevant to the political and intellectual issues of the moment."[5] They were "Progressive" historians.

In this essay I want to explore the characterization of Beard as a "Progressive" historian, because I believe that most influential scholarship in legal and constitutional history from the time Beard's *Economic Interpretation* appeared through the 1960s, and beyond, shared Beard's "Progressive" perspective. I begin the essay by describing what Hofstadter found deficient in Beard's approach, and how those criticisms reflected the dominant perspective of framing-era historians by the late 1960s. I then turn back to "Progressive" legal and constitutional historiography itself, outlining its central features and starting premises, which were far closer to those of Beard than to those of his historian critics in the late 1960s and early 1970s. Next I discuss another line of criticism of Beard, one that surfaced on the initial publication of his *Economic Interpretation*, and chart the response to that criticism by scholars who adopted a "Progressive" approach. Finally, I seek to explain why a "Progressive" perspective on American legal and constitutional history, despite its obvious deficiencies, retained its scholarly influence for so long.

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Hofstadter had initially been influenced by Beard, finding *An Economic Interpretation of the Constitution* a book "of profound and decisive importance" "[f]or those of us who came of age in the 1920's or 1930's."[6] But by the 1960s Hofstadter had become disaffected with Beard's approach. The problem, for Hofstadter, lay in Beard's insistence that "[t]here is a dynamic relation between interests and ideas, in which the workings of interests can never be left out of account."[7] Although Hofstadter acknowledged that as a "general proposition . . . ideas and

5. *Id.* at xii.

6. *Id.* at 345. Hofstadter was born in 1916 and read Beard's popular history, *The Rise of American Civilization* (1927), as an undergraduate at the University of Buffalo, from which he graduated in 1936. He then entered a Ph.D. program in history at Columbia, receiving his doctorate in 1942, where he read *An Economic Interpretation of the Constitution.* Hofstadter was active in left-wing politics in the 1930s, joining the Communist Party in 1938 and resigning a year later. For more detail see DAVID S. BROWN, RICHARD HOFSTADTER: AN INTELLECTUAL BIOGRAPHY (2006).

7. *Id.* at 243.

interests [were] somehow associated,"[8] he concluded that treating ideas as inseparable from interests led to several difficulties.

One was that "ideas . . . will somehow be dissolved and that we will be left only with interests on our hands."[9] Hofstadter harbored a "suspicion that Beard . . . [was] looking for a way to explain ideas on the assumption that when they were satisfactorily explained they would be properly subordinated."[10]

Another difficulty was that "interests will be too narrowly construed," resulting in "too much emphasis [upon] the motives and purposes of individuals and groups, not enough on the . . . limitations imposed on men by particular historical situations."[11] Beard did "not seem to have recognized," Hofstadter maintained, "that the way in which men perceive and define their interests is in some good part a reflex of the ideas they have inherited and the experiences they have undergone."[12] Ideas, for Hofstadter, were invariably "repositories of past interests [that] . . . present . . . claims of their own that have to be satisfied."[13] Beard's treatment of "ideas, . . . moral impulses, [and] cultural forces that could not be closely tied to economic origins" was, Hofstadter concluded, "often quite inept."[14]

In sum, Beard's "ideas-interests formula" led him "to leave out . . . the whole area of *experience* in which ideas and interests are jumbled to a degree that the effort to divorce and counterpose them becomes an artificial imposition [on] the realities of history."[15] In Hofstadter's view "the central, formative, shattering, and then reintegrating experience of civic life" for the "generation of the Founding Fathers" was "the Revolution," "which . . . galvanized their inherited store of ideas."[16] Beard's account of the Constitution missed "the moving force of the Revolutionary commitment."[17] For Hofstadter, Beard's choice to emphasize the "sweep of economic forces" not only made him "far less interesting as a historian of ideas," [18] it caused him to characterize

8. *Id.* at 244.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 244–45.
14. *Id.* at 245.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

the relationship between the American Revolution and the framing of the Constitution in too simplistic a fashion.

The passages previously quoted from Hofstadter's critique of Beard reveal that his primary concern with Beard's methodology was what it left out. By insisting that there was an indissoluble connection between interests and ideas, Beard's approach invited the conclusion that interests, in the end, drove ideas, so that ideas eventually disappeared as a force of causal weight in history. As applied to the generation that framed the Constitution, this conclusion appeared counterintuitive. The central theme of the framers' historical experience, Hofstadter believed, was the Revolution, by which he meant not just the war for American independence but the whole complex of ideas and events that inclined British colonists in America, over the last half of the eighteenth century, to consider separating themselves from the British Empire and establishing a new nation with a republican form of government.

Hofstadter found it hard to credit that the "Revolutionary experience" would not have shaped the framing of the Constitution, which was drafted only 11 years after the Declaration of Independence. But Beard's approach, by insisting that the Constitution was created by persons who perceived their economic interests as being threatened by egalitarian and redistributive impulses associated with the Revolution, "[lost] touch with the moving force of the Revolutionary commitment."[19] Beard "seems to have thought of men," Hofstadter suggested,

> as simply *perceiving* their interests and then, rather naturally, drifting into the acceptance or the use of ideas that would further them. He does not seem to have recognized . . . that the way in which men perceive and define their interests is in some good part a reflex of the ideas they have inherited. . . .[20]

By the time Hofstadter's critique of Beard appeared, a line of scholarship emphasizing the singular importance of republican ideas to the framing generation was beginning to gain prominence. Bernard Bailyn's *The Ideological Origins of the American Revolution* was published in 1967; Bailyn's *The Origins of American Politics* in 1968; and Gordon Wood's *The Creation of the American Republic* in 1969. In 1972 Pauline Maier's *From Resistance to Revolution* provided more detail on the evolution of ideas that influenced advocates for American independence, and

19. *Id.*
20. *Id.* at 244.

in 1975 J.G.A. Pocock's *The Machiavellian Moment*, a culmination of work that had begun in the early 1960s, traced the "radical" ideas about sovereignty and governance endorsed by American separatists to English antecedents. In 1972 Robert Shalhope concluded that a new historiographical "synthesis," highlighting the importance of republican theories of government in the revolutionary and framing decades, had emerged.[21] In that "synthesis" there seemed little room for Beardian interpretations. Wood observed that "[i]t seems obvious by now that Beard's notion that men's property holdings, particularly personalty holdings, determined their ideas and their behavior was so crude that no further time should be spent on it." [22]

Wood's comment suggested that to the extent that the "republican synthesis" literature dominated historians' conceptions of the framing era, Beard's work on the framers would be dismissed. But the "republican synthesis" literature eventually came to be seen by some scholars as monocausal or reductionistic,[23] and in 2003 Robert McGuire produced a "new economic interpretation of the United States Constitution" that employed statistical and econometric analysis[24] in the course of arguing that supporters of the Constitution tended to own public and private securities and to live close to navigable waterways.[25] So perhaps we need to take a fresh look at Beard.

My effort here is to look again at Beard through lenses first supplied by Hofstadter: to see Beard as one of the first of a group of twentieth-century scholars who revolutionized the study of American legal and constitutional history, and whose influence is in some respects still felt. I am employing Hofstadter's term "Progressive" as a label for the group, and will be describing their contributions across a range of issues, only a few of which Beard addressed in *An Economic Interpretation of the Constitution*.

21. Robert Shalhope, *Toward a Republican Synthesis*, 29 WM. & MARY Q. 49 (1972).

22. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 626 (1969).

23. Robert Shalhope's *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982), represents a partial response to that reaction.

24. ROBERT A. MCGUIRE, TO FORM A MORE PERFECT UNION 3–13, 33–34, 38–41 (2003).

25. *See, Id.* at 43, 53–54, 65–66, 68–69 tbls.3.5 & 3.6, 74 tbl.3.8, 75, 76 tbl.3.9, 77, 79 tbl.3.10, 81 tbl.3.11, 91–92, 154. McGuire also argued that "delegates who were in personal debt, owned slaves, or represented more isolated backcountry areas generally were significantly less likely to have ratified than were other delegates." *Id.* at 159. He concluded that "had different interests been represented at the state ratifying conventions, there likely would have been no ratification of the Constitution as drafted." *Id.* at 160.

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Elsewhere I have sketched what I consider to be the defining elements of a "Progressive" historiographical stance toward issues in legal and constitutional history.[26] The stance contains five such elements, each of which is related to the others. Not all "Progressive" works of legal history exhibit all the elements, because the elements consist of attitudes toward distinct topics, such as law, judging, controlling themes in history, and the relationship between legal doctrine and its social context, and not all the works address each of those topics.[27]

The defining attitudes of "Progressive" works of legal historiography amount to a set of starting assumptions. Those assumptions are not invariably treated as the equivalent of truth; in some works the author employs historical data in an attempted demonstration of the truth of an assumption. In those same works another assumption may inform the author's analysis but simply be taken for granted. Nonetheless each of the assumptions may be said to implicitly or explicitly reinforce one another.

Initially, I want simply to list the defining elements, without commenting on their relationship to one another or giving them an order of priority. The elements are:

—A characterization of American history, including American legal history, as an ongoing clash between antagonistic "classes" and "interests," with "class" and "interest" being conceived of in economic terms, although reflected in social and political alignments.[28]

—A conception of judging as an instrumental exercise driven by the ideology of the judge, with a corresponding emphasis on the outcomes reached in cases and the short-run political, social,

26. G. Edward White, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145, 1146–48 (2010).

27. I am giving only some examples of works in legal and constitutional history exhibiting a "Progressive" perspective: one could list numerous others. I am assuming that were a work of legal or constitutional history I have labeled "Progressive" to address one of the topics not included in its coverage, the writer's attitude toward that topic would be consistent with the defining elements of "Progressive" legal historiography.

28. Hostadter noted this element in Beard's *An Economic Interpretation*; *see* HOFSTADTER, *supra* note 1, at 209-10, and one can see also see it, in a quite different context, in CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 187, 189–91, 328–34, 337–41 (1914), whose first edition appeared in 1914. Haines's Ph.D. dissertation, published in 1909 as *The Conflict over Judicial Powers in the United States to 1870*, was directed by Beard.

and economic consequences of those outcomes, an emphasis on the social and economic backgrounds, and political affiliations, of judges, and a de-emphasis on the reasoning of judicial opinions, especially insofar as that reasoning assumes that the authority of legal sources can be neutrally discerned by judicial interpreters of those sources. [29]

—A skeptical attitude toward claims that "law" is an authoritative body of rules that can be thought of as independent from the attitudes or goals of those who interpret it, independent from or transcendent of politics, or as timeless and thus not fully dependent on its social context.[30]

—A view of legal decisions, legal principles, and legal rules as "mirroring" their social context, so that changing conditions in society, and changing public attitudes, will inevitably be reflected in changes in the law.[31]

—A belief that the legal rhetoric employed by judges and other officials to justify decisions often serves to obscure rather than to illuminate the true bases of those decisions, so in order to understand the "meaning" of decisions one needs to look elsewhere, such as toward the historical context of the decisions, their political, social, or economic consequences, or the personalities and ideological leanings of the officials who made them.[32]

Next I want to suggest how the elements might be seen as mutually reinforcing. If one begins with a view of American history, and contemporary American culture, as a clash of opposing "classes" seeking to promote their social, political, and economic "interests," it follows, first, that judges and other legal officials, like the rest of the American public, need to be seen as representatives of particular classes, and of particular interest groups, whose attitudes toward public issues will be affected by

29. *See* Max Lerner, *John Marshall and the Campaign of History*, 39 COLUM. L. REV. 396, 406–15, 421–30 (1939); HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 14, 16 (1948); ARNOLD PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW 2 (1960).

30. PRITCHETT, *supra* note 29, at 14–20, 73–75; OSCAR AND MARY HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 at 208–12 (1947); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955 at 35–37, 74–79, 119–21, 213–14, 217 (1955).

31. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

32. HAINES, *supra* note 28, at 252–63, 325–26; CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 166–80, 198–99, 249–57, 265–67, 363, 369–84, 402–03, 426–27, 430–31 (1930); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 360–61, 365–66, 542–43, 548, 557, 559 (1946).

their affiliations. It also follows that responses to *legal* issues will be no different from responses to other issues that affect the public, so one should expect the "class" and "interest group" affiliations of judges to affect their decisions in the same manner that they might affect other public officials or private citizens.

These conclusions suggest that much of the language of the law, which features technical discussions of legal sources that are often unintelligible to persons without legal training, which almost never allude to "classes" or "interests," and which only rarely detail the short-run political, social, or economic consequences of a decision, needs to be ignored or discounted by persons seeking the meaning of legal decisions. Instead contemporary readers of legal decisions need to look elsewhere for that meaning, such as in the practical consequences of the decisions' outcomes, or in the backgrounds and ideologies of the judges who decided them. And readers of historical decisions can look in an additional place, in the social, political, and economic contexts of decisions made in particular eras, for there will be a "fit" between the decisions and the political, social, and economic practices and attitudes of their times.

If legal decisions are understood in this fashion, "law" comes to be seen less as a "mysterious science," unintelligible to those without legal training, or as a transcendent and timeless body of principles, designed for recourse in all situations. Instead law and legal institutions become drawn in to the "Progressive" narrative of American history, so that individual Supreme Courts are described as personifying the views of particular classes or interests, changes in the law are seen as "mirroring" changes in society at large, and there is no meaningful separation of law from politics, law from economics, or law from the social configurations of American life.

It followed from the Progressive narrative's rejection of law as an entity with some degree of autonomy from its social context that Progressives also displayed skepticism toward the construct of a "rule of law" in American culture that transcended and constrained the particularistic attitudes and agendas of legal decision makers. Progressive narrators assumed that humans made laws in accordance with their ideological predilections, which were themselves the products of social, political, and economic conditions and experiences. Since humans made laws, they could unmake them, so, in charting the course of American legal and constitutional history, the central questions for historians were about how existing laws served to further, or stand

in the way of, the political or economic or social "interests" of lawmakers.

The narrative of Progressive legal history was thus relentlessly modernist in its starting premises. Its practitioners presupposed that the principal causal agents in history were human beings holding power and exercising their will. They also presupposed that human "will" was a product of the social experiences of human actors. And since neither law nor any other putative causal agencies in the universe operated independently of human will,[33] legal history was best understood as a series of episodes in which human actors reacted to their social experiences by creating laws and policies designed to further their "interests" as they currently understood them. The fact that legal policies were policies about governance, as distinguished from policies about the economic marketplace or social arrangements or political organization, did not divest them of their human-created, socially contingent, "interested" character.

No single Progressive historian's scholarship addressed all of the defining themes of the genre, but each launched his work from a set of modernist assumptions about causal agency. Beard's *Economic Interpretation* had nothing specific to say about judges or judicial interpretation of the Constitution: his focus was on those who drafted the document, not those who subsequently interpreted it. But it followed from his conclusions about the way the Constitution came into being—as a document designed to promote the economic interests of a majority of its framers—that judicial interpretations of constitutional provisions would emanate from the perceived interests of the interpreters.

The critical step in Beard's analysis of the Constitution's framing was thus one that he did not address, let alone defend. He assumed that it made complete sense to think of the provisions of the Constitution as reflecting, at bottom, the economic interests of one group or another of its framers. His methodology, which included tracking the "interests" of delegates, was predicated on the belief that if one described those interests accurately, conclusions about the motivation of the framers would follow.

33. Such agencies, in "premodern" epistemology, included history as a source of recurrent foundational principles, the figure of an omnipotent deity, and nature, all of which were thought to significantly confine the capacity of humans to "cause" anything. I discuss premodernist epistemology in more detail in G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 5–6, 786–87 (abr. ed. 1991), and the transition from premodernist to modernist theories of causal agency in G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 5–9 (2000).

Although Beard spent a good deal of time tracking interests and distinguishing one set of economic interests ("personalty") from another ("realty"), he spent almost no time supplying arguments in support of his conclusions. On the contrary, he assumed that once a delegate's "interest" was characterized, the only remaining step was to demonstrate how that delegate's interest might (or, in some instances, might not) benefit from replacing the Articles of Confederation government with the Constitution.[34]

At one point Hofstadter, in seeking to explain the initial excitement that Beard's *Economic Interpretation* generated, spoke of the book as having "rescued constitutional scholarship from the atmosphere of mythology and turned it [to] a search . . . for the social and economic sources of the controversy."[35] That comment was ambiguous. Hofstadter might have been suggesting that prior to Beard scholarship on the Constitution had unduly venerated that document, or he might have been suggesting that prior scholarship had been too inclined to focus on the legal text of the Constitution and its interpretations, without examining the social and economic setting in which the Constitution was drafted. Beard had paid some attention to the Constitution's social and economic context: his characterizations of the "interests" of delegates were presented after he had detailed sources of economic conflict in late eighteenth-century America, with holders of public securities being pitted against those whose income was mainly generated from their landownings. But Beard had been disinclined to provide explanations for why owners of "personalty" and owners of "realty," assuming that they had conflicting economic interests,[36] concluded that those interests inclined them to support or oppose the Constitution. Beard thought it sufficient to match up interests with votes, and let the reader conclude that interests drove votes.

I am thus inclined to conclude that much of the excitement initially generated by Beard's *Economic Interpretation*, and much

34. At one point in his analysis of Beard's *Economic Interpretation* Hofstadter cataloged 11 instances in which Beard asserted that those who supported the Constitution were "immediately, directly, and personally interested in . . . deriving economic advantages from the establishment of the Constitution." HOFSTADTER, *supra* note 1, at 215–16 (emphasis omitted). It was apparently enough for Beard to demonstrate that a delegate *had* a particular economic "interest"; the conclusion that the delegate was supporting (or opposing) the Constitution to derive economic advantage naturally followed.

35. HOFSTADTER, *supra* note 1, at 226.

36. Among the criticisms of Beard leveled by Robert Brown was that Beard overestimated the intensity of conflict among economic interests at the time of the Constitution's framing. *See, e.g.*, ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION 185, 193, 197–98 (1956).

of its continued influence in the historical community through at least the 1940s, came from the fact that both Beard and his audiences shared views about the course of history, the nature of historical change, the relationship between law and its social context, and the essence of legal decisionmaking that I have labeled modernist. Beard was one of the early American historians to assert that the framing of the Constitution, like other pivotal episodes in American history, was "really" a clash among competing economic interests, and that law was no different from other dimensions of American life in being profoundly affected by those interests. His audiences took that assertion as presumptively correct, and were impressed that Beard had supplied details from the framing generation.

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Seeing Beard as an early twentieth-century modernist, and Progressive legal historiography as being driven by modernist premises, can thus serve as a partial explanation for the initial impact of *An Economic Interpretation* and its continuing influence.[37] But the modernist and Progressive dimensions of Beard's history do not explain, at least facially, another feature of *An Economic Interpretation of the Constitution*. That feature was noted by Justice Oliver Wendell Holmes when he first read Beard in 1916.[38] I believe it to be the basis of the strongly negative reaction to Beard's work in some sectors of the American public.

Holmes wrote Frederick Pollock in 1916 that he found Beard's claim that "the men who drew the Constitution belonged to the well-to-do classes and had the views of their class" unremarkable.[39] But he added that Beard had also intimated that

37. I am suggesting that the scholarly arguments and conclusions in each of the works cited in notes 28–32, were derived from modernist starting premises.

38. Holmes wrote letters reacting to *An Economic Interpretation* to both Frederick Pollock and Felix Frankfurter in that year. In the letter to Pollock, written on July 12, he noted that he had "taken up *An Economic Interpretation of the Constitution of the U.S.*" Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock (July 12, 1916), *in* 1 HOLMES-POLLOCK LETTERS 237 (Mark DeWolfe Howe ed., 1941). In the letter to Frankfurter, written four days later, he described Beard's book as one that Frankfurter had "recommended and sent." Letter from Justice Oliver Wendell Holmes to Justice Felix Frankfurter (July 16, 1916), *in* HOLMES & FRANKFURTER: THEIR CORRESPONDENCE 1912–1934, at 53 (Robert M. Mennel & Christine L. Compston eds., 1996).

39. Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock, *supra* note 38.

the framers' motives were "self-seeking," and thus somehow disreputable. Holmes characterized that intimation as "a covert sneer."[40] He would later be more explicit to Pollock, writing that he found *An Economic Interpretation* "a rather ignoble . . . investigation of the investments of the leaders, with an innuendo even if disclaimed," and composed of "[b]elittling arguments." [41]

Holmes expressed the same reaction in letters to Harold Laski and Felix Frankfurter. He suggested to Laski that "notwithstanding [Beard's] disavowal of personal innuendo," *An Economic Interpretation* "encouraged . . . the notion that personal interests on the part of the prominent members of the Convention accounted for the attitude they took," thus making the book "a stinker."[42] To Frankfurter, Holmes wrote that "[t]he disclaimed yet ever-present innuendo that they all were influenced by having some stock that would appreciate" was "rather unworthy trifling."[43]

Holmes thus read Beard's work as an example of what early twentieth-century reformers called "muckraking": an effort to expose the baser motives of public officials. That reaction raises two questions that relate to the themes of this essay. First, why did Holmes think that Beard's ascription of economic motives to the framers was intended to "belittle" their support for the Constitution, and was in that respect "ignoble" and "unworthy"? Second, if Holmes was accurate in his conclusion that Beard was seeking to "expose" the framers' attitudes in the fashion of a muckraker, was this goal of Beard's generally shared by Progressive legal historians? In suggesting that political, social, or economic motives lay behind the decisions of legal decision makers, were they also suggesting that those motives were somehow base or sinister?

Holmes seems to have taken Beard's cataloguing of the economic interests of the framers as an effort to expose them as hypocrites, voting for a document that promoted their interests while justifying it on other grounds, or as ignoble public servants, substituting their private concerns for the public good. But in the same letter to Pollock in which he suggested that Beard's

40. *Id*.

41. Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock (June 20, 1928), *in* 2 HOLMES-POLLOCK LETTERS 222–23 (Mark DeWolfe Howe ed., 1941).

42. Letter from Justice Oliver Wendell Holmes to Harold Laski (Nov. 13, 1928), *in* 2 HOLMES-LASKI LETTERS 1109 (Mark DeWolfe Howe ed., 1953).

43. Letter from Justice Oliver Wendell Holmes to Justice Felix Frankfurter, *supra* note 38.

approach included a "covert sneer," he said that no evidence was required to conclude that the framers "belonged to the well-to-do classes and had the views of their class."[44] It was as if Holmes took for granted that members of the framing generation would hold a "class" viewpoint on public issues, but also thought it "ignoble" for a historian to maintain that such a viewpoint actually drove their responses to those issues.

The apparent inconsistency in Holmes's position can be unraveled if one first assumes that all public officials have "interests," but then associates "nobility" in those officials with disinterestedness. In Holmes's terms, delegates to the Philadelphia convention and state ratifying conventions could be expected to have been members of the wealthier classes, and to instinctively hold the views of those classes where an issue had "class" overtones. But at the same time one should expect that public servants would support policies that they believed furthered the welfare of all citizens, even where the policies did not favor their own interests. Those positions could be said to be "disinterested." And they could also be said to reflect a civic-minded ethos of public service.[45]

So when Beard totaled up the economic "interests" of the framers and then suggested that their support for or opposition to the Constitution reflected those interests, he was ignoring the ethos of disinterestedness for public servants. "It cannot be said," Beard wrote, "that the members of the Convention were 'disinterested.'"[46] That was what Holmes found "unworthy" and "ignoble" in Beard's approach. Beard's "covert sneer" came, for Holmes, from Beard's implicitly suggesting that the framers did not give a fig for the ethos of disinterestedness, and unapologetically voted their interests.

Here we get an inkling of what distinguished Holmes's reaction to Beard from the subsequent Progressive historians who

44. 1 Holmes-Pollock Letters, *supra* note 38.

45. At the time of the framing of the Constitution the ability to vote in elections was limited in most states to male "freeholders," those who owned land in fee simple. Periodically, in the late eighteenth and early nineteenth century, state legislatures debated whether to extend the franchise to persons other than freeholders. In those debates some members of legislatures who were freeholders supported extending the franchise. The disinterestedness canon suggested that even though those freeholders recognized that the extension would be against their "interest" in the sense of potentially diluting their voting power, they supported the extension out of civic-mindedness, believing that public officials should be elected by larger numbers of the population, or that voting should be an essential element of civic life in a republic.

46. BEARD, *supra* note 2, at 151.

found Beard's approach inspiring. Holmes took for granted that there were "classes" in American society and that members of those classes reflected their membership in ideological positions. The framing generation, with its repeated talk of the "passions" and "interests" that were endemic in public officials as well as other humans, agreed with Holmes. But Holmes also shared with the framing generation the idea that the appropriate ethos of governance was one that sought to restrain "interested" tendencies in public officials. The Progressives denied that any such ethos existed. The interests and "class views" of officials shaped politics.

To their conviction that political, social, and economic "interests" lay beneath the decisions of public officials, including legal officials, the majority of twentieth-century Progressive historians added another ingredient, an inclination to be "levelers" in the "class conflicts" that defined American history. To the extent that the policies of governing officials favored the wealthy classes over the poorer ones, or the more socially prominent classes over the less socially prominent ones, or entrenched political elites over groups that sought to reform the status quo or gain elite status, many Progressive historians instinctively opposed those policies. Their efforts to demonstrate that particular decisions favored, at bottom, the wealthy, the socially prominent, and the politically entrenched were thus more than modernist-inspired attempts to show that human ideology shaped governance. They were also intended as political critiques of the decisions, which were frequently labeled "conservative," "elitist," or "protective of the status quo."

The "leveling" instincts of many Progressive historians help explain the continued resonance of Progressive legal historiography over several of the decades succeeding the first appearance of *An Economic Interpretation*. By 1912 Holmes, born into a prominent Boston family in 1841, had concluded that "the crowd now has substantially all there is."[47] One can see how someone of his age and background might have reached that conclusion. And leveling tendencies would continue for the next several decades. The last major restriction on suffrage, the

47. By that locution, a favorite phrase of Holmes's, he meant that taxes and economic regulations had sufficiently redistributed wealth that "cutting off the luxuries of the few" would not "make an appreciable difference." Letter from Justice Oliver Wendell Holmes to Harold Laski (May 24, 1919), *in* THE ESSENTIAL HOLMES 142, 143 (Richard A. Posner ed., 1992). Holmes had used the identical phrase in an October 28, 1912 letter to Lewis Einstein, quoted in THE ESSENTIAL HOLMES *supra*, at 141.

exclusion of women voters, would vanish in 1919; labor unions had emerged in the late nineteenth century and collective bargaining had become a policy goal of the federal government by the 1930s; by the 1920s anti-trust laws and social welfare legislation had regulated economic activity and redistributed economic benefits to a degree unanticipated fifty years earlier; by that same decade a mandatory federal income tax had been established; the New Deal, Fair Deal, New Frontier, and Great Society programs could have been seen as progressive exercises in social leveling, economic redistribution, and as efforts to minimize the political strength of entrenched elites.

Looking back from these experiences, Progressive historians could feel as if they were participating in "winner's history." The flow of events in the American past suggested that despite the anti-democratic motives of the framers, American society had become increasingly more democratic, and despite the efforts of late nineteenth- and early twentieth-century public officials to perpetuate the hegemony of entrenched social, political, and economic elites, leveling tendencies had eventually won out. Thus historical scholarship that exposed the inevitably "conservative" and elitist "interests" of officials holding power was offered against the background of successive leveling movements. It both brought the true motives of official decision makers to light and reminded its readers that, in the end, those officials' goals would be thwarted by the inevitabilities of history. Beard's *Economic Interpretation* was a model of that sort of scholarship.

So the Progressive historians were not just modernists. They were, on the whole, enthusiasts for leveling. That tendency gave an edge to their cataloguing of the "interested" dimensions of decsion making by entrenched officials: they believed that in fashioning policies to support their particularistic economic concerns, those officials were typically supporting a "conservative," elitist status quo against leveling threats. The Progressives' recognition that in the end the leveling tendencies won out enabled them to place the officials they studied on the "wrong" side of history. By exposing the "real" motives of influential legal decision makers in American history, Progressive legal and constitutional historians were not seeking to fault their subjects for following their "interests": at bottom, that was what public officials did when making policy. Instead they were seeking to fault their subjects for favoring the status quo when confronted with leveling pressures for change, and demonstrating that in the end their subjects had bet on the wrong side.

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At this point we are in a position to better understand what Hofstadter meant in saying that Beard's work "explained the American liberal mind to itself in historical terms." By "liberal mind" Hofstadter meant the twentieth-century Americans who had supported the Progressive movement, the New Deal, and the successive reform movements through the Great Society. The twentieth-century legal and constitutional historians whom Hofstadter associated with liberalism believed, with Beard, that American history was a clash of "interests," that the interests of legal officials holding power, at any point in American history, were generally aligned with the status quo, and thus the decisions of those officials tended to support that status quo.

Those representatives of the "liberal mind" had also learned, however, that over time in American history leveling tendencies prevailed over tendencies to preserve established social, political, and economic arrangements. They thus not only took Beard's description of the "clash of interests" at the time of the framing as presumptively accurate, they noted that over time the framers' efforts to preserve the wealth and power of certain "classes" were thwarted by events. To them, Beard's *Economic Interpretation* was thus not only accurate but prophetic. That was what Hofstadter meant in saying that twentieth-century liberals had seen Beard as "mak[ing] American history relevant to the political and intellectual issues of the moment."[48] That was why a set of Beard's Progressive successors took it upon themselves to explain American legal and constitutional history in terms that resonated with his vision.

Beard can thus be seen as one of the first of a line of twentieth-century legal historians who combined a belief that interest group affiliation and ideology drove legal decisionmaking with a growing conviction that, over time, leveling tendencies would inevitably overcome the efforts of entrenched interests to resist them. Armed with those assumptions, they set out to recover the "real" motivations of legal decision makers and to place them in a historical narrative featuring the clash of classes and interests. In that narrative they treated the canon of disinterestedness for public officials as illusory and the rhetorical justifications of judges and legislators as surplusage. All of those

48. HOFSTADTER, *supra* note 1, at xii.

tendencies marked them as modernists, twentieth-century liberals, and Progressives in their approach to history.

From the perspective of modernist legal and constitutional historians who read Beard's work in the context of their own experience with American culture and politics, from the First World War through the Great Society, leveling currents did seem to dominate that experience. Each of the established late nineteenth-century features of social and political stratification—race, ethnicity, gender, inherited wealth, affiliation with elite educational institutions—seemed to have disintegrated under the pressure of leveling movements. If one viewed that history through modernist lenses, the contested legal and constitutional issues of the twentieth century appeared as a series of clashes between interests in which, over time, leveling interests prevailed.

But by the late 1960s framing-era historians had come to recognize that although a Beardian approach to history seemed to have much explanatory power for the twentieth century, it seemed to be missing something fundamental in the framing period. For a time Beard's historian critics had granted him his starting premises and quarreled with him over matters of execution. But by the late 1960s Hofstadter and the contributors to the "republican synthesis" had concluded, without explicitly stating it, that Beard's modernist assumptions fit poorly with those of the framing generation because the framers were not modernists. Far from embracing a "progressive" vision of history and human agency as a causal force driving historical change, they feared the unlimited exercise of official power as leading to corruption and tyranny. Far from being advocates for broader and deeper public participation in governance, they equated democracy with licentiousness, demagoguery, and mob rule. They may have believed that at bottom humans were driven by their passions and their interests, but they also believed in an ethos of disinterestedness for participants in public life, not only because they found that ethos consistent with the aspirations of honor and virtue for elites, but because they thought it was necessary to check the baser tendencies of humans.

Beard's *Economic Interpretation* was thus, in the end, anachronistic in its approach to the framing period. In a similar fashion Beard's Progressive successors in the fields of American legal and constitutional history have too readily imposed their modernist preconceptions about history, law, judicial decisionmaking, and constitutional interpretation on events from earlier time periods. As a result Beard's successors produced a

body of scholarship whose explanatory powers lay mainly in the resonance of their starting assumptions to their audiences. Now those assumptions themselves seem the products of past eras, leaving a whole corpus of Progressive contributions to legal and constitutional history ripe for revision. An exciting prospect, but one, with Beard's example in mind, worth sober reflection.