

BEARD & UBER-BEARD

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Once upon a time, respectable scholars thought lead could be converted into gold, worried that educating woman harmed their offspring, and maintained that the purpose of the Constitution of the United States was to enrich the framers. A conference marking the anniversary of the publication of such works as *Le Livre des figures hieroglyphiques*¹ or *Sex in Education*² would spend considerable time explaining why previous generations were foolish. The thesis of Charles Beard's *An Economic Interpretation of the Constitution of the United States* presently enjoys approximately the same status as alchemy and medical misogyny. "Today," Richard Hofstadter wrote in 1968, "Beard's reputation stands like an imposing ruin in the landscape of American historiography."³ Gordon Wood states, "Beard's notion that men's property holdings . . . determined their ideas and their behavior was so crude that no further time should be spent on it."⁴ The question of the day is whether Beard and *An Economic Interpretation* are worth studying for reasons other than historic interest.

The overriding conclusion of the symposium is that Charles Beard lives in contemporary scholarship in ways that Nicolas Flamel and Edward H. Clarke do not. Some commentators celebrate the continued vitality of *An Economic Interpretation of the Constitution*. They recognize that Beard was wrong on many specifics, but insist that Beard's emphasis on economic interests provides a foundation for scholarship that uncovers deeper truths

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1. NICOLAS FLAMEL, *LE LIVRE DES FIGURES HIÉROGLYPHIQUES* (1612).
2. EDWARD H. CLARKE, *SEX IN EDUCATION* (1873).
3. RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* 344 (1968).
4. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 626 (1969).

about American constitutional development and contemporary American constitutional politics. Still others regret what they perceive to be the continued vitality of Beardian themes in contemporary constitutional scholarship. In their view, contemporary scholars miss or mischaracterize distinctive features of American constitutional law and politics by remaining too harnessed to Beard's economic determinism.

The papers below highlight how over the past half century the debate over *An Economic Interpretation of the Constitution* has been transformed from a controversy over Beard to a controversy over "uber-Beard." Beard was an historian who claimed in *An Economic Interpretation* that elite economic self-interest explained the movement for the Constitution of the United States, the distinctive features of the Constitution of the United States, and why the Constitution of the United States was ratified.⁵ Beard's later works relied on a similar economic analysis to explain numerous episodes in American constitutional development.⁶ Uber-Beard refers to those Progressive and New Deal scholars who regard various economic interests as the central force in American constitutional development. The scholars who celebrate uber-Beard do so because they believe this focus on interests garners important descriptive insights into and has valuable normative consequences for American constitutional development. Those who worry about the continued influence of uber-Beard are less pleased with the impact of progressive-style social science research, insisting that the over-emphasis on interests unduly discounts the independent influence of ideas on American constitutional development in general and on the particular ways ideas structure those interests that Beard and other scholars thought were the prime movers of constitutional politics.

For most of the twentieth century, historians disputed whether Beard correctly identified the political movements that contested the Constitution in the late 1780s and the motives participants in that struggle had for supporting or opposing ratification. Beard insisted that economic elites structured debate during the framing and ratification conventions. *An Economic Interpretation* concluded,

5. See notes 7, 11–13, 14–17, 19 *infra*, and the relevant text.

6. See CHARLES A. BEARD & MARY R. BEARD, *A BASIC HISTORY OF THE UNITED STATES* (1944).

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

....

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.⁷

By the late 1960s, a strong scholarly consensus developed that Beard was mistaken in his class analysis of the founding era. Robert E. Brown raised sharp questions about Beard's empirical methods.⁸ Forrest McDonald's survey of nearly two thousand framers "found that the differences in the[] property holdings" of Federalists and Anti-Federalists "were negligible."⁹ Debate continues over whether some measure of economic status explains the difference between late eighteenth-century proponents and opponents of the Constitution.¹⁰ Nevertheless, no contemporary scholar claims that Beard in 1913 correctly mapped the lines of conflict.

Beard remains vital because his social scientific approach to constitutional history and the ways in which he sought to demystify the framing have numerous contemporary champions and critics. Beard was a committed "economic determinis[t]"¹¹ who believed that political and constitutional developments were structured by fights over property. *An Economic Interpretation* contended, "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."¹² Ideas and ideologies, in Beard's view, were rooted in class position and were not independent casual influences on human behavior or political development. He criticized previous constitutional histories for

7. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 324 (The Free Press 1986) (1913).

8. ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* (1956).

9. Forrest McDonald, *Introduction* to BEARD, *supra* note 7, at xxx. *See also* FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958).

10. *See* ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* (2003).

11. BEARD, *supra* note 7, at 5.

12. *Id.* at 16.

“[t]he absence of any consideration of the social and economic elements determining the thought of the [framers].”¹³ Beard believed this hard-headed approach to constitutional history knocked the framers off their nineteenth-century pedestals and onto ordinary political terrains. In sharp contrast to some previous histories that saw James Madison and friends as working out the divine will,¹⁴ Beard insisted that proponents of the Constitution were part of a political movement that was no different in kind or motivation than any other political movement that sought to influence American constitutional development. He wrote, “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.”¹⁵ While Beard claimed this observation packed no political punch,¹⁶ the bottom-line message of *An Economic Interpretation* was that contemporary progressives should imitate the framers by interpreting the Constitution in light of the policies that they thought best served their interests rather than imitate the framers by interpreting the Constitution as adopting the policies the framers thought best served the framers’ interests. The 1935 edition of *An Economic Interpretation* concluded,

It is for us, recipients of their heritage, to inquire 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 forms accrue?” By refusing to do this we become victims of history—clay in the hands of its makers.¹⁷

The *An Economic Interpretation of the Constitution* that remains controversial was the first prominent work that studied the Constitution of the United States by employing or purporting to employ modern social science methods. Constitutional studies before Beard tended to be hagiographic and focused on the timeless ideas the author believed motivated the framers. George Bancroft, the most influential constitutional historian of the nineteenth century, interpreted the framing in light of “the movement of the divine power which gives unity to the universe,

13. *Id.* at 9.

14. See note 18 *infra*, and the relevant text.

15. BEARD, *supra* note 7, at *l.*

16. *Id.* at xlii.

17. *Id.* at liii.

and order and connection to events.”¹⁸ Beard anticipated much political science scholarship of the post-World War II era by emphasizing how constitutional forms and practices were more often consequences of interest group politics than the theoretical ruminations of “straight-thinking” men.¹⁹ By focusing on the Constitution’s origins as a means to satisfy particular late eighteenth-century interests, Beard opened the door to reflection on whether the Constitution ought to be reformed in light of present interests.²⁰

Contemporary reactions to Beard and *An Economic Interpretation of the Constitution* are rooted in reactions to the ways in which social scientists began to treat the Constitution and American constitutional development during the Progressive Era. Many papers in this symposium are uber-Beardian, even as they question Beard’s particular thesis. These essays insist the hunt for the interests that structured the Constitution remains vital. That search, the authors claim, reveals important insights into American constitutional development that may influence contemporary theories about the authority and proper interpretation of the Constitution. Other papers in this symposium question both Beard and uber-Beard. These essays contend that Beard and his contemporaries led social scientists and their legal allies down mistaken paths that continue to distort research on the American constitutional experience. Beard still lives, each essay makes clear, though whether continued resurrection or reinterment is the appropriate response remains contested.

I. THE MAKING OF BEARD AND UBER-BEARD

Richard Drake, Ajay Mehrotra, and G. Edward White place Beard and uber-Beard in their historical contexts. Each locates Beard’s work at the birth of twentieth-century social science. Drake looks at the English roots of Beard’s approach to history. Mehrotra examines how Beard was shaped by and shaped the first

18. GEORGE BANCROFT, 6 HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE CONTINENT 414 (1892).

19. BEARD *supra* note 7, at xlili. The classical mid-twentieth century works on interest group pluralism include ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951).

20. See especially SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

modern social science departments at Columbia University. White details Beard's influence on Progressive and New Deal social science analysis of American constitutional development. Beard's work, each essay assumes, was not *sui generis*, but a product of a series of intellectual forces that held sway over the academy in the United States and England long after the specific conclusions of *An Economic Interpretation* were discredited.

Professor Drake focuses on two developments in the British academy at the turn of the twentieth century that structured Beard's scholarship. The first, which Beard absorbed through reading the art critic John Ruskin, was the practice of tying scholarship on political economy and political culture to political reform. "Beard," Drake notes, "found in Ruskin . . . not only a compelling interpretation of modern social problems, but also a call to action."²¹ The second was an emphasis on class as an important factor in historical development and political practice. Beard first became an economic determinist, Drake details, when he was exposed to the influence of British anti-imperialist scholars. The Charles Beard who arrived in England as a young scholar was a jingoist who favored the United States taking up what Rudyard Kipling called the "white man's burden."²² After reading the works of John Atkinson Hobson, Beard turned his analytic eye from race to economic class as the prime historical mover. Inspired by Hobson's analysis of the role big business played in English imperialism, Drake notes, Beard developed "his skepticism about the pretensions of the capitalist status quo" that "propelled him along the path he took as a historian."²³ *An Economic Interpretation* would be to previous constitutional scholarship what Hopson's work on imperialism was to Beard's previous work on turn-of-the-twentieth-century American expansionism.

Professor Mehrotra discusses the American influences on Beard. His essay emphasizes how *An Economic Interpretation* was structured by the founders of modern social science research who found disciplinary homes at Columbia University during the first decades of the twentieth century. Mehrotra declares, "Beard was the product of a unique Columbia tradition of inductive, proto-institutionalist research in political economy—a tradition

21. Richard Drake, *Charles Beard & the English Historians*, 29 CONST. COMMENT. 313, 314 (2014).

22. RUDYARD KIPLING, *The White Man's Burden*, in POEMS 96 (Peter Washington, ed., 2007).

23. Drake, *supra* note 21, at 321.

that at its core sought to meld serious political and historical scholarship with progressive social activism.”²⁴ Beard was joined in this effort to map the material foundations of political development by such luminaries as Thomas Reed Powell, Frank Goodnow, William Ogburn, Franklin Henry Giddings, and John Dewey. These Columbia faculty, Mehrotra notes, were united by a common desire “to replace the dry and arid formalistic ideas and theories of an earlier generation of amateur academics with inductive, empirical knowledge about the realities of lived social experience.”²⁵ Such empirical investigations, these Columbians further maintained, replaced philosophy with economics as the prime mover of political life. Mehrotra points out that throughout his life “Beard acknowledged his debts to [Edwin] Seligman,” a prominent economist at Columbia, and Seligman’s “‘nearly axiomatic’ theory that ‘the economic life is . . . the fundamental condition of all life.’”²⁶

Professor White devotes his essay to uber-Beard. He finds in Beard certain basic themes that resonated throughout the progressive histories of the next half-century and remain vital today. White begins with the common observation that Beard inspired several generations of scholars to emphasize the material determinates of political and constitutional development. Beard and his followers, White points out, characterized “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.”²⁷ This economic determinism was grounded in what White describes as “relentlessly modernist” history.²⁸ Such history takes for granted the human capacity to change the social world for the better. White states, “practitioners presuppose[] that the principal causal agents in history were human beings holding power and exercising their will.”²⁹ Liberal political principles and commitments to the rule of law are epiphenomenal in this world view. Such norms are derived from interests, not ideals that cabin preference seeking.

24. Ajay K. Mehrotra, *Charles A. Beard & the Columbia School of Political Economy: Revisiting the Intellectual Roots of the Beardian Thesis*, 29 CONST. COMMENT. 475, 477 (2014).

25. *Id.* at 488.

26. *Id.* at 503.

27. G. Edward White, *Charles Beard & Progressive Legal Historiography*, 29 CONST. COMMENT. 349, 354 (2014).

28. *Id.* at 357.

29. *Id.*

“[S]ince neither law nor any other putative causal agencies in the universe operated independently of human will,” White states, Beard and his progressive academic progeny held that “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.”³⁰ Human progress was the one matter White’s progressive historians thought out of human control. White regards Beard and his followers as “enthusiasts for leveling.”³¹ That enthusiasm, in turn, encouraged a progressive tendency to write Whig history. Progressive scholarship, White insisted, was motivated by the desire to bring “the true motives of official decision makers to light and remind[] . . . readers that, in the end, those officials’ goals would be thwarted by the inevitabilities of history.”³²

II. INTERESTS AND IDEAS (AND FUNCTIONALISM) IN AMERICAN CONSTITUTIONALISM

Many essays in this symposium discuss or at least touch on Beard’s insistence that economic interests have a far greater impact on political and constitutional development than philosophical ideals. White and Stephen Feldman claim that uber-Beardians fail to understand the normative foundations of the Constitution of the United States. “Far from embracing a ‘progressive’ vision of history and human agency as a causal force driving historical change,” White writes, the framers “feared the unlimited exercise of official power as leading to corruption and tyranny.”³³ “[C]ontrary to Beard’s assertions,” Feldman writes, “the framers also genuinely believed in the virtuous pursuit of the common good.”³⁴ Jonathan Gienapp insists historians should discard the sharp uber-Beardian distinction between interests and ideas. Bartholomew Sparrow, Shannon Bow O’Brien and Mary Anne Case are more uber-Beardian. Sparrow and O’Brien do a Beardian analysis of how the presence of a propertyless class of Americans influenced the framing. Case discusses the constitutional consequences of the economic interest eighteenth-

30. *Id.*

31. *Id.* at 363.

32. *Id.*

33. *Id.* at 365.

34. Stephen M. Feldman, *The Interpretation of Constitutional History, or Charles Beard Becomes a Fortuneteller (with an Emphasis on Free Expression)*, 29 *CONST. COMMENT.* 323, 333 (2014).

century men had in maintaining their economic control over women. Michael Caires suggests that a more functionalist analysis better explains crucial episodes in American constitutional development than either an uber-Beardian focus on elite interests or an anti-uber-Beardian focus on political principles.

Professor Gienapp criticizes the uber-Beardian tendency to discuss interests divorced from the conceptional frameworks in which political actors conceptualize and speak about their desired ends. Beard thought of himself as an empiricist. Gienapp, however, claims that the author of *An Economic Interpretation* was as much in the grip of transcendent ideas about the causes of political behavior as the historians Beard scorned were in the grip of transcendent ideas about political right. Gienapp states, “Beard was an avowed universalist who believed that timeless material interest explained human behavior no matter differences across space or through time.”³⁵ Beard’s consistent assertions that interests were prior to ideas and were the causes of the ideas humans expressed was an unfortunate consequence of this economic determinism. What Beard forgot, Gienapp claims, is that “neither principles nor interests exist independently of the perceptual mode that accounts for them.”³⁶ What people want and think is largely determined by the vocabulary in which they can both conceptualize and express their interests and ideas. The persons responsible for the Constitution could articulate only those interests that eighteenth-century republican and liberal theory claimed governments ought to satisfy. Gienapp writes,

Even if we assumed that the American framers were hopelessly self-interested, it would still be our primary task to reconstitute the conceptual vocabularies that animated them, since those would be necessary to grasp how they gave the world meaning, an understanding from which alone we could make sense of their behavior, behavior which notably involved constructing the United States’ Federal Constitution.³⁷

Gienapp nevertheless finds in Beard’s writings an escape route from the false uber-Beardian ideas-interests dichotomy. Beard emphasized that he was merely following Madisonian understandings of political science.³⁸ Gienapp details how that

35. Jonathan Gienapp, *Using Beard to Overcome Beardianism: Charles Beard’s Forgotten Historicism and the Ideas-Interests Dichotomy*, 29 CONST. COMMENT. 367, 370 (2014).

36. *Id.* at 372.

37. *Id.* at 373.

38. BEARD, *supra* note 7, at 156.

political science was rooted in ideas distinctive to the Enlightenment about how the division of property in a society structured political regimes. When designing constitutional institutions, Madison and his contemporaries adjusted those inherited beliefs to accommodate the more complex forms of property that emerged in the late eighteenth century. “Beard’s great insight,” Gienapp concludes, “was that Madison’s own political science better explained the character of the Constitution than anything else Madison or any of the other delegates declared or sought.”³⁹ That political science, unique to the late eighteenth century, was based on neither timeless political truths nor on the material interests of those who framed the Constitution.

Professor Sparrow and Professor O’Brien are more enthusiastic proponents of an economic interpretation of the Constitution of the United States. Their essay claims to be more uber-Beardian than Beard. “[T]he defect in Beard’s thesis,” Sparrow and O’Brien declare, “may be the opposite from that voiced by his critics: it is not that Beard overplays his hand, but that he understates his case.”⁴⁰ Beard told the story of how during the framing and ratification of the Constitution the interests of persons with more property triumphed over the interests of persons with less property. Sparrow and O’Brien insist that we look as carefully at how the existence of persons with no property shaped the Constitution of the United States. Their essay documents that such persons were a substantial portion of the population when the Constitution was ratified.⁴¹ They detail “the role of this class in the founding and how the presence of this class influenced the text of the Constitution and other founding documents.”⁴² This influence ranged from the “first grievance against the British government in the Declaration of Independence,”⁴³ which referred to royal vetoes of colonial laws forbidding the importation of felons from England to “the (misnamed) Fugitive Slave Clause,” which “applied to indentured servants and felons,”⁴⁴ to the framers’ willingness to rely on state constitutions, which “disenfranchised and discriminated against

39. Gienapp, *supra* note 35, at 380.

40. Bartholomew Sparrow & Shannon Bow O’Brien, *Pulling Punches: Charles Beard, the Propertyless, and the Founding of the United States*, 29 CONST. COMMENT. 409, 410 (2014).

41. *Id.*

42. *Id.* at 412.

43. *Id.* at 418.

44. *Id.* at 420.

poor whites.”⁴⁵ Sparrow and Beard explain that propertyless persons were not simply individuals who shared a common trait, but over time became a class with a politically potent identity. They point out that “this class acquired a shared consciousness. Not one of a working class identity . . . but one of racial supremacy.”⁴⁶ Beard said very little about race, largely missing the enormous impact the substitution of racial identify for class identity had on colonial political development and the constitutional politics of antebellum America.⁴⁷

Professor Case extends the Sparrow/O’Brien concern with the incompleteness of Beard’s class analysis to gender. Her paper discusses Beard’s failure, in Abigail Adams’s words, to “remember the ladies.”⁴⁸ Beard’s lack of interest in male supremacy was an economic as well as a social and cultural omission. Case declares, Beard “did not consider in any detail the possible influence of their personal experience as members of the distinct group of males who had an economic interest, through the laws of coverture, in the labor and property of the women in their families.”⁴⁹ She points out that because many framers derived their fortunes from the women in their family, their male constitution permitted men to control property they did not earn. This material interest alone gave “these framers a direct personal incentive to ‘insist upon retaining an absolute power over Wives’ and their property.”⁵⁰ By not disturbing the balance of power in the family, the Constitution of the United States permitted men to maintain control over the assets of their daughters as well as those of their wives.⁵¹ Nineteenth-century framers were not different than their grandparents, at least when men’s property rights were at issue. Case observes that “congressmen on all sides of the debates over the Fourteenth Amendment hoped that the amendment’s Equal Protection Clause would not be read to disrupt common law coverture or prohibit sex discrimination.”⁵²

45. *Id.* at 429.

46. *Id.* at 428.

47. See especially EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

48. Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 435 (2014).

49. *Id.* at 431–32.

50. *Id.* at 434.

51. *Id.*

52. *Id.* at 440 (quoting Jill Hasday, *Women’s Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715, 1719 (2013)).

Michael T. Caires thinks that some phenomena Beard analyzed are more susceptible to a functionalist analysis than to either an economic or a philosophic approach. Functionalists explain legal development “as a process of incremental, context-specific rule development that over time works itself pure and allows for adaptation as the particular needs of society change.”⁵³ Caires’ study of the changes in the American financial system that took place during the Civil War highlights the differences between this functional emphasis on generalized social interest and an uber-Beardian emphasis on elite economic interests. He reminds readers that Beard applied his economic methods to the entirety of American political and constitutional development. When discussing the constitutional politics of the Lincoln Administration as well as those of the framing, Beard insisted that “[t]he forces of capital and industry use their power to hijack public institutions and realign them to create a political economy conducive to their interests.”⁵⁴ Committed to this economic determinist interpretation of constitutional development, Beard maintained that the Legal Tender Act of 1862 and related measures were enacted because powerful industrialists took advantage of the Civil War to impose their desired policies on the Union.⁵⁵ Caires offers an alternative history of Civil War finance in which the prime mover is economic need. His historical account claims that bank failures and looming economic catastrophe best explain the Legal Tender Act of 1863. “Ultimately,” Caires concludes, “the growth of national monetary power was an effort to reform and stabilize the chaotic currency system of the nineteenth century.”⁵⁶ Neither class interests nor ideas play much of a role in this analysis. Although Beard claimed that bankers and industrialists developed monetary policy to suit their interests, Caires notes that their suggestions were rejected during the Civil War.⁵⁷ His paper does not even discuss the influence of nineteenth-century finance theory on the participants to the debate over legal tender. The government of the United States

53. Shyamkrishna Balganesh, *The Uncertain Future of ‘Hot News’ Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134, 146 (2012). For the classic expression of this position, see *Omychund v. Barker*, 26 Eng. Rep. 15, 22–23 (1744) (“the common law works itself pure by rules drawn from the fountain of justice”).

54. Michael T. Caires, *Rethinking the Second American Revolution: Legal Tender and National Banking in the Civil War Era*, 29 CONST. COMMENT. 511, 512 (2014).

55. 2 CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION: THE INDUSTRIAL ERA* 108 (1927).

56. Caires, *supra* note 54, at 514.

57. *Id.* at 521.

printed money in 1863 because printing money was the best political solution to the economic crisis paralyzing American finance in 1863.

III. INTERPRETING THE CONSTITUTION OF ECONOMIC INTERESTS

Four essays in this symposium discuss uber-Beardian understandings of judicial decisionmaking, perhaps the most important implicit concern of *An Economic Interpretation*. Beard in that work did not comment on theories of constitutional interpretation or constitutional authority, but his introduction allied his scholarship with the dissenting opinion of Justice Oliver Wendell Holmes in *Lochner v. New York*⁵⁸ and such proponents of sociological jurisprudence as Roscoe Pound.⁵⁹ In other works, Beard more openly allied himself with those progressives championing a “living constitution.” “Since most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings,” he wrote in 1936, “it follows that the Constitution as practice is a living thing.”⁶⁰ Saul Cornell maintains that constitutional interpreters who take Beard seriously cannot be originalists, at least as originalism is presently practiced. Case claims that constitutional interpreters who take seriously the absence of women during moments of constitutional creation should not be originalists. Feldman suggests that the Roberts Court is taking Beard too seriously, fashioning a jurisprudence that erroneously assumes the Constitution was primarily concerned with protecting elite property rights. Adrian Vermeule describes how a more uber-Beardian analysis may enlighten judges interested in ensuring their opinions are consistent with the dominant forces in the contemporary American community.

Professor Cornell maintains that Beard discredits contemporary originalism. *An Economic Interpretation* documented the deep conflicts over constitutional meaning that roiled late eighteenth-century constitutional politics. Cornell

58. 198 U.S. 45 (1905).

59. BEARD, *supra* note 7, at 9. See also ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (rev. ed. 1954).

60. Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 31 (1936). For the progressive commitment to a living constitution, see Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997).

maintains these conflicts are papered over by such contemporary originalists as Antonin Scalia. “[O]riginalists,” he charges, “have conjured up a false historical past marked by consensus.”⁶¹ Differences between Federalists and anti-Federalists were as much over the meaning of the language chosen for the constitutional text as over what language should be in the constitutional text. Cornell writes, “[t]he meaning of a phrase such as ‘the right to bear arms’ meant one thing to Daniel Shays and quite another to James Madison.”⁶² These differences extended to interpretive practices. “Should the fully informed reasonable reader we construct,” Cornell queries, “use Federalist interpretive practices or Anti-Federalist ones?”⁶³ These hermeneutical differences doom originalism as a coherent interpretive philosophy. “Given the contentious nature of Founding era legal culture,” which Beard brought to light, Cornell states, “it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 1788.”⁶⁴

Professor Case invokes uber-Beard when making a different critique of originalism. She thinks the original intention of the persons responsible for the Constitution on gender issues is clear, but ought to be disregarded as pernicious. Case notes,

no version of original meaning—not the specific intent of the framers, not the general understanding of the ratifiers, not the original public meaning, not the original expected application, nor any other version of what originalists may say they look to in order to determine the scope of constitutional provisions holds much promise for yielding what Abigail Adams demanded of John—a constitutionally mandated code of laws more “generous and favorable” to women than the one the framers inherited.⁶⁵

Americans ought to abandon any constitutional logic that sanctions maintaining eighteenth-century gender practices. Interpreting the Constitution in light of the late eighteenth century male attitudes toward women, Case declares, perpetuates both the democratic injustice that occurred when women were not

61. Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 *CONST. COMMENT.* 383, 384 (2014).

62. *Id.* at 385.

63. *Id.* at 404.

64. *Id.* at 405.

65. Case, *supra* note 48, at 445.

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allowed to participate in the framing and ratification process as well as the substantive injustices inherent in framing conceptions of gender roles. She states,

Given the historical exclusion of women from decisionmaking . . . in the Republic, . . . [t]o use . . . an interpretive methodology like originalism as a brake on change . . . leaves out those people who were not able to be part of the original process of popular sovereignty and democratic decisionmaking.⁶⁶

Professor Feldman is concerned with the influence Beard may have on contemporary originalists. Beard claimed that the Constitution “is an economic document designed to protect the interests of the wealthy.”⁶⁷ This assertion, Feldman insists, is an erroneous description of the constitutional politics of 1787. The framers were good civic republicans who designed a constitution that they thought facilitated the election of public spirited representatives who sought the public good.⁶⁸ Nevertheless, while Beard’s “economic depiction of the Constitution does not closely fit the framing,” Feldman thinks *An Economic Interpretation* “uncannily fits the Roberts Court’s current interpretation of our constitutional order.”⁶⁹ In his opinion, “the Roberts Court interprets the Constitution as if Charles Beard had been correct.”⁷⁰ Leading members of the Roberts Court claim to be originalists and Roberts Court majorities are more inclined to support business than any previous judicial majority in American history.⁷¹ This combination of constitutional method and result, Feldman argues, serves to make Beard’s interpretation of the framing a contemporary reality. “Beard and the conservative justices,” he writes, “agree . . . that self-interest politically motivates most, if not all, individuals.”⁷² Ironically, Feldman thinks the Roberts Court is actively pursuing the project Beard sought to forestall, with Beard’s aid. To refute Beard, therefore, is to refute the Roberts Court. As Feldman concludes, “If Beard is wrong historically—and he is—then the Roberts Court is wrong, too.”⁷³

66. *Id.* at 453.

67. Feldman, *supra* note 34, at 339.

68. *See supra* note 34, and the relevant text.

69. Feldman, *supra* note 34, at 325.

70. *Id.* at 339.

71. *See* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

72. Feldman, *supra* note 34, at 345.

73. *Id.* at 344–45.

Professor Vermeule suggests that uber-Beardian methods may assist some approaches to constitutional decisionmaking, while casting doubt on rival logics. Neither originalists nor aspirationalists will find attractive a constitution saturated by concessions to a particular interest group bent on achieving very parochial concerns. “It is not psychologically possible to generate large-scale working commitment,” Vermeule notes, “in the service of a regime whose genesis is normatively disreputable, and known by all to be so.”⁷⁴ Vermeule suggests, however, that justices who adopt a Holmesian perspective on constitutional decisionmaking will find uber-Beardian analysis of great value, even if the historical Holmes did not. Holmes insisted that justices act consistently with the dominant opinion in society.⁷⁵ He was committed to a “least cost principle” that regards “political statesmanship” as “choosing the course of action that, at lowest possible cost, adjusts constitutional law and policy to match the ‘actual equilibrium of force in the community – that is, conformity to the wishes of the dominant power[.]’”⁷⁶ Uber-Beardian analysis provides crucial information for such justices. Beard insisted that, as an empirical matter, law reflected the dominant forces in the community. Holmes insisted that, as a normative matter, law should reflect the dominant forces of the community. Beard’s work provides the means for cementing this potential relationship between external empirical work and internal normative work. “External Beardian scholarship,” Vermeule states, “helps to delineate the feasible political options or possibilities for constitutional law, a critical datum from the internal but nonideal perspective of the Holmesian judge.”⁷⁷

IV. IDEAS, INTERESTS AND CONSTITUTIONAL INTERPRETATION

Beard in *An Economic Interpretation* made two claims about ideas and interests. The well known claim, discussed at length in many essays below, is that interests better explain the course of constitutional development than ideas. The lesser known claim is that constitutional commentators should not without compelling evidence interpret crucial episodes in American constitutional development as the triumph of the people of noble ideas over the

74. Adrian Vermeule, *Beard & Holmes on Constitutional Adjudication*, 29 CONST. COMMENT. 457, 460 (2014).

75. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

76. Vermeule, *supra* note 74, at 458.

77. *Id.* at 459.

people of shabby interests. Beard's introduction to the 1935 edition of *An Economic Interpretation* sharply criticized those who "described the struggle over the formation and adoption of the [Constitution] as a contest between sections ending in a victory of straight-thinking national-minded men over narrower and more local opponents."⁷⁸ The central question scholars failed to ask was "[h]ow some men got to be 'national-minded' and 'straight-thinking,' and others became narrow and local in their ideas."⁷⁹ Beard was determined to "redress the balance."⁸⁰ Beard's economic determinism explains why he emphasized the economic interests of both Federalists and anti-Federalists rather than the different ideologies of proponents and opponents of the Constitution. Nevertheless, *An Economic Interpretation* was also structured by Beard's commitment to presuming that all parties to constitutional conflict are moved by the same kinds of concerns. Constitutional politics, in his view, may be a struggle between different interests or a contest of different values, but is unlikely to be a pitched battle between people motivated by high ideals and people out to make a buck.

The prominent works refuting Beard's claims that interests were the prime movers in the debates over the Constitution remained committed to this uber-Beardian notion of balanced analysis. The anti-Federalist revival that took place during the 1950s and 1960s, in particular, illustrates the uber-Beardian foundations of ostensibly anti-Beardian work. The most prominent of these studies, Cecelia Kenyon's *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, claimed that "the ideological context of the Constitution was as important in determining its form as were the economic interests and motivations of its framers."⁸¹ Kenyon maintained that her studies refuted Beard's economic determinism.⁸² If, however, one focuses on the Beardian insistence on using the same mode of analysis for all parties to a controversy, then Kenyon and such scholars as Herbert Storing were engaged in uber-Beardian

78. Beard, *supra* note 7, at xliv.

79. *Id.*

80. *Id.*

81. CECILIA M. KENYON, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, in MEN OF LITTLE FAITH: SELECTED WRITINGS OF CECILIA KENYON 31, 32 (Stanley Elkins, Eric McKittrick & Leo Weinstein, eds., 2002). The other seminal study of anti-Federalist thought is HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981).

82. See KENYON, *supra* note 81, at 31; Gordon S. Wood, *Foreword* to CECILIA M. KENYON, *THE ANTI-FEDERALISTS*, at v-vi (1985).

projects. Beard leveled the field by interpreting Federalist behavior as being as economically motivated as anti-Federalist behavior. Kenyon leveled the field by interpreting anti-Federalist behavior as being as ideologically motivated as Federalist behavior.

Prominent works in social science retain this uber-Beardian bias against interpreting politics as a contest between the party of ideas and the party of interests. Proponents of judicial behaviorism claim justices across the ideological spectrum vote on the basis of their policy preferences rather than on their more legal understandings. The most famous sentence in *The Supreme Court and the Attitudinal Model Revisited* declares, “[s]imply put . . . Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”⁸³ Proponents of more legal or historical institutionalist models of judicial decisionmaking⁸⁴ insist that justices across the ideological spectrum take law seriously when making constitutional decisions. Howard Gillman’s analysis of judicial behavior at the turn of the twentieth century concluded that “the justices were by and large motivated by a principled commitment to the application of a constitutional ideology of state neutrality.”⁸⁵ Studies of Supreme Court practice occasionally detect an imbalance in voting behavior. Gillman believes most justices are motivated by a sincere desire to make good law, but he concludes that the majority in *Bush v. Gore*⁸⁶ was moved by their desire to place George W. Bush in the White House.⁸⁷ Nevertheless, Gillman reached this conclusion only after a book length analysis that reviewed “carefully the records of th[o]se courts and the legal and political justifications offered for their decisions.”⁸⁸

Too many law professors unfortunately remain mired in an anti-Beardian project that contrasts principled judicial decisionmaking to judicial decisionmaking based on raw politics. Herbert Wechsler’s *Toward Neutral Principles of Constitutional*

83. Jeffrey A. Segal & Harold J. Spaeth, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).

84. MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM* 92–95 (2013).

85. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 199 (1993).

86. 531 U.S. 98 (2000).

87. HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* (2001).

88. *Id.* at 2.

Law,⁸⁹ considered one of the most influential constitutional law essays published during the second half of the twentieth century,⁹⁰ epitomizes the continued vitality of nineteenth-century Manichean understandings of constitutional conflict. Wechsler analyzed three lines of cases in which the Supreme Court had declared laws unconstitutional.⁹¹ These cases concerned judicial interpretations of federal powers,⁹² the first amendment,⁹³ and equal protection.⁹⁴ In all three instances, he concluded that the majority opinions striking down the federal or state law in question “were strikingly deficient in neutrality.”⁹⁵ Wechsler never discussed either the judicial opinions or commentary that favored sustaining the measures under constitutional attack. He presumed that justices who deferred to legislative judgments were motivated by law, while consistently finding that justices who declared laws unconstitutional were engaged in pure politics.

A century of scholarship in the uber-Beardian tradition highlights how the kinds of motivations that help explain the behavior of one side to a constitutional conflict typically help explain the motivations of the other side to that conflict. If Federalists were in part motivated by ideological commitments, then research is likely to unveil ideological foundations underlying anti-Federalist behavior. If Justice Scalia’s voting pattern is partly explained by his conservative policy preferences, then research is likely to unveil the liberal policy commitments underlying Justice Ginsburg’s votes. Beard’s particular conclusions may be wrong, but the last hundred years have demonstrated the insights to be gained by scholarship that shares his commitment to balanced treatment of the factors that motivate political and constitutional behavior.

89. 73 HARV. L. REV. 1 (1959)

90. See Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

91. Wechsler, *supra* note 89, at 23–35.

92. *Id.* at 23–24.

93. *Id.* at 24–26.

94. *Id.* at 26–35.

95. *Id.* at 23. See *id.* at 26 (claiming that recent opinions declaring laws unconstitutional on First Amendment grounds lack neutral principles), 29 (claiming that opinions declaring that political parties may not discriminate by race lack neutral principles), 30 (claiming that opinions declaring unconstitutional judicial enforcement of restricting racial covenants lack neutral principles), 32–34 (claiming that opinions declaring unconstitutional school segregation lack neutral principles).