

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

## Chapter 1

### Historical Interpretation in the United States

Broadly speaking, three school of interpretation have dominated American historical research and generalisation. The first of these, which may be justly associated with the name of Bancroft, explains the larger achievements in our national life by reference to the peculiar moral endowments of a people acting under divine guidance; or perhaps it would be more correct to say, it sees in the course of our development the working out of a higher will than that of man. There is to be observed in the history of the struggle for the Constitution, to use Bancroft's words, "the movement of the divine power which gives unity to the universe, and order and connection to events."

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

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

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

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

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

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

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

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

But the origin of different schools of interpretation in controversies and the prevalence of many mere preconceptions bolstered with a show of learning should not lead us to reject without examination any new hypotheses, such as the theory of economic determinism, on the general assumption of Pascal "that the will, the imagination, the disorders of the body, the thousand concealed infirmities of the intelligence conspire to reduce our discovery of justice and truth to a process of haphazard, in which we more often miss than hit the mark." Such a doctrine of pessimism would make of equal value for the student who would understand for instance, such an important matter as the origin of the state, Mr Edward Jenk's severely scientific *History of Politics* and Dr. Nathaniel Johnston's *The Excellency of Monarchical Government, especially the English Monarchy, wherein is largely treated of the Several Benefits of Kingly Government and the Inconvenience of Commonwealths. . . . Likewise the Duty of Subjects and the Mischief of Faction, Sedition, and Rebellion, published in 1686.*

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

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

Although the hypothesis that economic elements are the chief factors in the development of political institutions has thus been used in one or two serious works, and has been more or less discussed as a philosophic theory, it has not been applied to the study of American history at large - certainly not with that infinite detailed analysis which it requires. Nor has it received at the hands of professed historians that attention which its significance warrants. On the contrary, there has been a tendency to treat it with scant courtesy and to dismiss it with a sharpness bordering on contempt. Such summary judgement is, of course, wholly unwarranted and premature; for as Dr. William Cunningham remarks, the validity of no hypothesis can be determined until it has been worked to its utmost limits. It is easier to write a bulky volume from statutes, congressional debates, memoirs, and diplomatic notes than it is to ascertain the geographical distribution and political significance of any important group of economic factors. The theory of economic determinism has not been tried out in American History, and until it is tried out, it cannot be found wanting.

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

Nor has England advanced far beyond us in the critical interpretation of legal evolution - its explanation in terms of, or in relation to, the shifting economic processes and methods in which the law is tangled. It is true that English scholars have produced admirable histories of the law in its outward aspects,

such as the monumental work of Pollock and Maitland; and they have made marvellous collections of raw materials, like the publications of the Selden society. But apart from scattered and brilliant suggestions thrown off occasionally by Maitland in passing, no interpretation has been ventured, and no effort has been made to connect legal phases with economic changes.

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

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

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

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

With less exaltation, Chief Justice Marshall states the theory, in his opinion in the case of *McCulloch v. Maryland*: "The government proceeds directly from the people; is 'ordained and established' in the name of the people and is declared to be ordained 'in order to form a more perfect union, to establish justice, insure domestic tranquillity, and secure the blessings of liberty' to themselves and their posterity. The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. . . . The government of the union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all."

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

fundamental rights of individuals, for the security and common enjoyment of which governments are established."

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

In turning from the vague phraseology of Bancroft to an economic interpretation of constitutional history, it is necessary to realise at the outset that law is not an abstract thing, a printed page, a volume of statutes, a statement by a judge. So far as it becomes of any consequence to the observer it must take real form; it must govern actions; it must determine positive relations between men; it must prescribe processes and juxtapositions. A statute may be on the books for an age, but unless, under its provisions, a determinate arrangement of human relations is brought about or maintained, it exists only in the imagination. Separated from the social and economic fabric by which it is, in part, conditioned and which, in turn, it helps to condition, it has no reality.

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

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

In what has just been said there is nothing new to scholars who have given any attention to European writings on jurisprudence. It is based in the first instance on the doctrine advanced by Jhering that law does not "grow," but in fact is, "made" - adapted to precise interests which may be objectively determined.<sup>25</sup> It was not original with Jhering. Long before he worked out the concept in his epoch-making book, *Der Zweck in Recht*, Lassalle had set it forth in his elaborate *Das System der erworbenen Rechte*,<sup>26</sup> and long before Lassalle had thought it through, our own Madison had formulated it, after the most wide-reaching researches in history and politics.

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

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

The requirements for an economic interpretation of the formation and adoption of the Constitution may be stated in a hypothetical proposition which, although it cannot be verified absolutely from ascertainable data, will at once illustrate the problem and furnish a guide to research and generalisation.

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

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

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

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

### ***Conclusions.***

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

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

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

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

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

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

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

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

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

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

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

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

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