

their virtue is almost superhuman, they will not invariably be careful to insure that it is only against the guilty that they seek convictions. A state of affairs easily arises where those who belong to some unpopular party or who for some reason are opposed to the government come to feel terror in the thought that the police may at any moment accuse them of some crime and, even if they are lucky enough to be acquitted, they probably suffer financial ruin owing to the suspicion which has fallen upon them. Where this happens, there is no true freedom; and it is pretty sure to happen wherever police power is unchecked. The police in Western nations have not shown themselves very adept at catching genuine political offenders. When there were bomb outrages at the end of the First World War, none of the perpetrators were caught, but two innocent men were put to death and another innocent man, after being sentenced to death, had his punishment commuted to penal servitude for life. This caused the ignorant public to believe in the efficiency of the police. Professor Sharp's book deals with a more recent example of the same pattern. I hope it may awaken the public to the realization that to be accused is not necessarily to be guilty.

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Charles Beard and the Constitution. By Robert E. Brown. Princeton: Princeton University Press, 1956. Pp. vii, 219. \$3.50.

Not very long ago, Charles A. Beard's *An Economic Interpretation of the Constitution*, conceived as an antidote to piety, was itself made sacrosanct by historians. Like all books that rouse and disturb, it met at first with professional hostility; however, unlike most of its kind, it gained professional approval, not from direct confirmation, but from its congruence with prevailing social theories and numerous complementary studies. Beard's main idea—that the Constitution was an economic document put over by economic groups—came into fashion with the larger assumption that the law is a way of defining the property relations of society, and that men seek to rationalize their interests and pursue their interests rationally. Beard's second thesis—that the Constitution was designed to check democracy and was ratified against the wishes of the majority—was in line with studies of that period that showed society rent by class antagonisms (Carl L. Becker), democracy unleashed by revolution (J. F. Jameson), conservatism once again resurgent in the fight for control of the states (Allan Nevins). Beard's own scholarship, however, escaped close scrutiny: it was too massive and seemingly too meticulous to invite a thorough reauditing. When Beard issued a new edition of his work in 1935, twenty-two years after the first printing, he could say that nothing in the interval had happened to make him alter or reinterpret his facts.

Alas! historiography will not admit such a thing as a permanently immune

reputation. Changes in social theory accompanied the rise of dictatorships and the study of mass societies: the new outlook subordinated economics to other less rational motivations and assigned independent value to constitutional legality. Working against the background of world struggle, a new generation of historians, in reviewing the earlier period, was less disposed to find themes of internal conflict. Once its mainstays had been demolished, it was only a matter of time until Beard's book would come under direct fire. This has now happened with the appearance of *Charles Beard and the Constitution* by Robert E. Brown, a chapter-by-chapter, footnote-by-footnote attack on a scholarship once thought to be unassailable.

If Brown's book merely flung another stone at a falling Goliath, it would not deserve much attention. Or (to change the metaphor) if it merely proved that a smaller man perched on a giant can see somewhat farther than his bearer, it would not be very important. Neither image is altogether inapplicable: Brown does argue at tedious length what many historians are taking for granted, and he does take his cues quite often from the man whose work he disprizes. But Brown does more than this. Never leaving his subject, he manages also to transcend it. In denouncing Beard's scholarship, he has fashioned a valuable syllabus on the use of historical methods. In countering Beard's hypotheses, he has given us a view of democracy in America which threatens our most settled notions. Finally, in belaboring Beard's opportunism, he has also written a book which is a symptom and a product of the times.

On the subject of methods, Brown brings two charges against Beard: one, that he distorted evidence by misusing sources and statistics; two, that he based his conclusions on clearly inadequate research. A few examples may illustrate Brown's technique. Apropos the first charge, Brown cites Beard's calculation of the gain expected from the Constitution by the holders of public securities, the most important owners of "personalty." Brown notes that Beard included in his estimate the bonded debt of the states (though the men at the Constitutional Convention opposed their explicit assumption) and that he reckoned the public debt at face value (though Hamilton's redemption on that basis came after the Constitution was written and was not very widely anticipated). The figure Beard thus arrived at—\$40,000,000.00 in profits—was grossly and (Brown implies) intentionally inflated. At the same time, Beard underestimated real estate values in the country, by eliminating improvements in houses and confusing the assessed valuation with the worth of real property on the market. The resultant figure—\$400,000,000.00—underplayed the importance of realty, presumably the better to account for its failure to defeat the Constitution.

There can be no doubt that these and similar instances of dereliction tell very heavily against Beard and damage his reputation as a scholar. But Brown, who compiles particulars like a prosecutor out to get his first conviction, does not see that there may be veracity in the whole work despite the many errors in its parts. Where Beard's statistics are specious, the thesis for which they argue may

be true: the task is to locate that thesis so as to judge the salience of the statistics. But here lies a major problem, for Beard's theses are ambiguously stated. If he was trying to make a psychological point—namely, that the greater the anticipated gain, the stronger the motive for action on the part of the designated beneficiaries—then his case must depend upon his figures and his figures are clearly undependable. But if he was arguing a historical proposition—namely, that the adoption of the Federal Constitution, with its specification of a specie standard, its protection of the sanctity of contracts and its promise of fiscal integrity, had to wait until the economy had matured and capital had been accumulated and invested—then the figures are less than crucial and the proposition may be correct. Or, again, if Beard believed that the interests of personalty were completely at odds with those of agriculture, it is difficult to see how the latter, fully 97 per cent of the economy, could have lost the fight over the Constitution. But if Beard said merely that the moneyed interest, while not diametrically opposed to the landed interest, was much more dynamic and articulate, more alive to its grievances under the Articles, more attuned to opportunities under the Constitution, no particular mathematical ratio would make the hypothesis false. Unfortunately, one can quote passages in Beard's book to justify each of these propositions, for Beard was no more cautious as a logician than as a scholar. But one feels it would have been more worthwhile to try to salvage something from his ambiguities than to build the most incriminating case.

The question, of course, still remains: did Beard have evidence sufficient to support *any* of his hypotheses? Brown, in arguing that he did not, makes a second methodological charge. He notes that Beard himself had designed the research that would fully meet scholarly requirements. To prove that the Constitution was supported by personalty interests, one would at the very least have to know how those interests were spread throughout the country and how each community voted on ratification. To prove the narrower point that personalty inspired the Constitution, one would have to have the complete financial biographies of all political leaders—not only of those who went to Philadelphia, but also of those who sat in the state legislatures, were elected to Congress under the Articles and took part in the ratifying conventions. Beard very frankly admitted that he did not have most of this evidence, that he would have to rely on scattered samples of opinion, on a few secondary studies of the voting pattern and on data concerning only the holdings of the fifty-four men at the Convention. Even the latter, he knew, would not be conclusive, for it drew on refunding operations recorded after the writing of the Constitution. Nevertheless, having admitted that his hands were practically empty, Beard presented his readers with strong conclusions. With no proof whatever that the Founding Fathers owned public paper at the time they wrote the Constitution, and without any reliable listing of their other holdings, he concluded that they represented or were allied with the interests of personalty. Without any detailed knowl-

edge of the economic interests of the voters (and misled by a secondary source as to the significance of the geographical division), he concluded that poor farmers and debtors were generally in opposition to the Constitution. Knowing next to nothing about property ownership in America, he assumed that most adults were disfranchised by the property qualification for voting, and—quite gratuitously—that those who were disfranchised would have voted “nay” if they could.

Every historian who cares about method—and that means every historian who seeks honesty in his craft—will deplore Beard’s imprudent tendency to run for a touchdown without the ball. Yet something remains to be said in Beard’s behalf. First, it is worth pointing out that the lacunae that existed in Beard’s knowledge still exist among historians today. For example, we still know very little about the distribution of property holdings in the American colonies and states in the eighteenth century. Only recently have the ample and available tax records of Virginia been tapped by historians for this purpose. That in 1913 Beard did not know enough is regrettable but not altogether surprising; that he admitted as much is creditable and should have provoked redress; that patches of ignorance still remain is the part that is truly appalling. Secondly, Brown does not endeavor to explain how a book, admittedly incomplete, could have come to be accepted as authoritative. Surely this points to an audience’s readiness to believe as well as a writer’s wish to deceive. Finally, Beard is not the only one who jumps too soon to conclusions. Brown also rushes in where scholarship has not fully trod.

The most glaring evidence of this is his contention, his main substantive contribution to this field, that most free male Americans of adult age already possessed the franchise, and that the Constitution was accepted—actively and to a greater degree passively—by an overwhelming majority of the people. Quite aware that there were freehold requirements, Brown nevertheless contends that political democracy was achieved through the broad distribution of property which rendered that test ineffectual. The author holds that when the truth of his contention is accepted, the bulk of Beard’s argument collapses. For then it becomes clear that the state legislatures, elected by and presumably representative of a broad electorate—which means an electorate consisting mostly of farmers—would not have sent to Philadelphia delegates in favor of personalty. Then, too, it becomes clear that the failure of the authors of the Constitution to include a suffrage provision did not stem from any bias against democracy, for they sent the issue back to the states where voting rights were extensive. Then, finally, it becomes clear that the small number of voters on the ratification issue did not stem from disfranchisement, much less from Federalist machination, but from a widespread indifference to the outcome which was itself a form of passive approval. To Brown, the existence of a democratic suffrage is the answer to Beard’s suggestion that conspiracy and political trickery pushed the Constitution across.

But is Brown's contention true, and if true, is it so significant? The present state of research advises us to go warily. According to Professor Chilton Williamson, who is in the process of studying the suffrage very carefully, an examination of the tax lists in 1776 shows that anywhere from 50 per cent to 85 per cent of the adult males (white) could meet the freehold requirement. Granting a more liberal distribution of property subsequent to that date, it would still appear that the suffrage differed in various states, ranging from extensiveness in Massachusetts (a state which Brown has studied) to limitedness in Virginia, where Jefferson's estimate that half the potential voters were disqualified has been upheld by a recent study. Doubtless the total number of disqualified voters was not as great as has been commonly supposed; but the fact that in some states the number was probably large, and the fact that a democratic freehold requirement and universal manhood suffrage are by no means the same, point to sins of omission in the Constitution, and the size of the task that awaited the equalizing spirit of Jacksonianism. But even if Brown's contention were true, it would not demonstrate the existence of democracy or prove that the Constitution was democratic. Oligarchic control is not inconsistent with a very broad suffrage, and may in certain cases thrive upon it. The conditions for the concentration of political power are an inert and indifferent mass, a socially superior elite, high property qualifications for holding office and unequal opportunities for education—conditions that were amply met in late eighteenth century America. Furthermore, one has only to compare the Federal Constitution with the Pennsylvania Constitution of 1776, which provided for almost universal manhood suffrage, a unicameral legislature and fixed terms for judges, to see that there were democratic options available which the Founders refused to accept. For all their rhetorical references to the "people," the men at the Constitutional Convention were of the ruling elite; however responsible, far-sighted and public-spirited, their version of the good society was bound to be essentially conservative. They were creatures as much of their class as of their times.

To quarrel with Brown on this matter is not to hold the Beardian view that the Constitution was blatantly opposed to the popular will. There is no doubt that the conservative features of the Constitution pained Beard and his generation far more than they pained the people of the time. A largely agrarian society exhibits considerable cohesion among its classes and considerable conservatism in its masses: Brown is probably correct in surmising that the Constitution's protection of property was one of its most popular features. Even the economic clauses that seemed to Beard so predatory did not cause much popular resentment. At any rate, the debates over ratification seem to indicate that fear of political tyranny, not of economic oppression, was uppermost in the minds of the opponents; while the references made to economics did not plead for justice to the poor, but stressed the sectional partiality of the commerce clause and the danger of double taxation—objections that would occur to men of substance. In dramatizing the struggle, Beard was contemporizing history and came close

to being anachronistic. It is essential to point out that these farmers were not angry populists, these Anti-Federalists were not progressives, these personality interests were not as notorious as the financial interests of the house of Morgan.

But there is equally a danger, which Brown does not avoid, of reading into that period the acquiescences of today. As indebtedness grows widespread in our economy and money-lending ceases to be a form of villainy, as prosperity spreads to a broader base and corporate power becomes deodorized, the tendency is to study the past complacently, to deny the reality of interests, to reduce political conflicts to the meaningless play of factions. The perils of present-mindedness, when the present happens to be today, are exemplified by Brown's approaches to the economic clauses of the Constitution. It would seem that because they cannot be explained by his frame of reference, they had to be explained away. These clauses had to do with the value of money and the payment of debts—concrete issues of long standing. But Brown dismisses the Constitutional ban on paper money by saying that this medium could still circulate, though not as legal tender! The obligation of contracts clause is minimized by the remark that it applied only retroactively. On the connection between the Shays debtor rebellion and the power of the President to suppress disorder, he has nothing to say. In general, his ideological commitment is an important corrective of the earlier view. But to bring once more to this period the transient taint of one's own times is discouraging to those who seek in history the makings of a cumulative subject.

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Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beitrage zur Rechtsquellen- und Interpretationslehre (Principle and Norm in the Judicial Development of Private Law: A Comparative Inquiry into the Problems of the Sources of Law and Their Interpretation). † By Joseph Esser. Tuebingen, Germany: J. C. B. Mohr (Paul Siebeck), 1956. Pp. xx, 394. DM 41.50.

What are the constituent elements of a legal system? Does it consist exclusively of the rules of law which have found expression in precedents or statutes and which provide, more or less clearly, how particular questions are to be decided? Or are there additional elements which have gone into the making of a legal system? Such additional elements unquestionably exist. Without them the sum total of the rules of law of a given community would constitute a shapeless congeries rather than a system. But they are difficult to define. Maitland has pointed out the significance of a taught tradition. But what does such

† Volume I, *Inquiries into the Comparative Theory of Law and the Methodology of Comparative Law*. Published by the German Society of Comparative Law, Section on Basic Research.