

The First Economic Analyst of Law?

OUR DEBT TO CHARLES BEARD

S. SLONIM

FRAMERS' CONSTRUCTION/BEARDIAN DECONSTRUCTION

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UNTIL CHARLES BEARD published his *An Economic Interpretation of the Constitution of the United States* (1913), the standard account of the Founding Era was that the Framers acted out of idealism – a disinterested, public-regarding impulse to promote the democratic ideal of majoritarian rule for which the Revolution was fought and the Republic was founded.¹ Beard challenged this idealistic view of the Framers' behavior and offered a more realistic account. Relying principally on Treasury records showing that many of the Framers owned public debt whose value was significantly enhanced by the Constitution's ratification, he theorized that the Framers were distrustful of democracy and were motivated less by selflessness than by a desire to protect

from political exaction the property of the elite class to which they belonged by ensuring that an elite minority would retain control of the federal government.

In its strongest form, the Beard thesis accuses the Framers of actively conspiring to subvert democracy. A weaker version, the so-called "neo-Beardian" view, suggests that the Framers' motives were at least complex if not impure and that an appreciation of their personal and class-based interests helpfully informs any inquiry as to the true though perhaps unstated objectives (e.g., an anti-populist desire to temper the excesses of democracy) that shaped their drafting decisions at the Convention.

But whichever take on Beard one prefers is

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¹ The classic exposition of the idealistic view is John Fiske, *The Critical Period of American History* (1888).

almost beside the point. Evidence that either version is correct would raise doubts about whether judges should accord much deference to the Framers' supposed original intentions – or even to the text of the Constitution itself. Why accept as authoritative the Framers' professed statements of intention at the Convention or in their later writings such as *The Federalist Papers* if their true motives were left unstated? And why obey a document whose adoption was motivated less by statesmanship than by greed or elitism? At the very least, the Beard thesis calls into question the sense of using originalism and textualism as theories of constitutional interpretation.² Which may explain why Beard is anathema to conservatives, while liberals for the most part

embrace him.³

When it first appeared, the Beard thesis quickly displaced the idealistic view and became the accepted wisdom (among Progressives, anyway) both in the academy⁴ and beyond.⁵ And while the original version of the thesis later fell into disrepute,⁶ its neo-Beardian variations continue to have strong defenders in the academy – albeit some detractors too.⁷

One of the Beardians' toughest critics in recent years has been Shlomo Slonim, a legal historian at Hebrew University. In the last two decades, Slonim has written several articles debunking Beardian and neo-Beardian hypotheses about the Framers' motives and intentions.⁸

2 While textualist originalists care only about the Constitution's objective original meaning and not about the Framers' subjective intentions, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (1997), they like other originalists must still explain what legitimizes the constitutional invalidation of democratically enacted legislation.

3 For conservative anathema, see Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 *Geo. Wash. L. Rev.* 50, 52 (1987) (noting Beard's "glaring errors" and "strongly disagree[ing] with Beard's normative conclusions"). For liberal approval, see Mark V. Tushnet, *The Constitution as an Economic Document: Beard Revisited*, 56 *Geo. Wash. L. Rev.* 106, 111 (1987) ("Basically, of course, Charles Beard had it right"; "the Beardians ... basically had it right").

4 On Beard's intellectual influence, see Max Lerner, *Ideas are Weapons: The History and Uses of Ideas 152-69* (1939); Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington*, ch. 6 (1968).

5 Consider the approving view of Justice Holmes, who told Beard that he found the book illuminating. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* viii-ix (2d. ed. 1935) (discussing in a new introduction the reaction to the book's first edition). This sentiment was not shared, however, by Holmes's colleagues on the Supreme Court or by ex-President Taft, who "roundly condemned" the book upon its publication. *Id.*

6 Forrest McDonald, *We the People: The Economic Origins of the Constitution* (1958) (analyzing the property holdings of the 1,700 delegates who voted at the state ratifying conventions and demonstrating that the economic differences between those for and against the Constitution were negligible); Robert E. Brown, *Charles Beard and the Constitution: A Critical Analysis* (1956) (similarly analyzing the Framers' holdings). But see Robert A. McGuire & Robert L. Ohsfeldt, *Economic Interests and the American Constitution: A Quantitative Rehabilitation of Charles A. Beard*, 44 *J. Econ. Hist.* 509 (1984) (finding robust statistical correlations between economic interests and delegate voting patterns at the Philadelphia and state conventions).

7 Defenders include Tushnet, *supra* note 3; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969). Detractors include Arthur M. Schlesinger, Jr., *A Life in the 20th Century: Innocent Beginnings, 1917-1950 at 159* (2000) (observing that "the imposing Beardian edifice is today in ruins").

8 Shlomo Slonim, *Motives at Philadelphia, 1787: Gordon Wood's Neo-Beardian Thesis Reexamined*, 16 *Law & Hist. Rev.* 527 (1998); Slonim, "Beard's Historiography and the Constitutional Convention," in 3 *Perspectives in American History 173-206* (1987); Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 *J. Am. Hist.* 35 (1986).

While most of Beard's critics have challenged his assumptions about the Framers' motives through more careful analysis of the property holdings of the Constitution's ratifiers,⁹ Slonim has taken a different tack. His critique of the Beard thesis is that it relies almost entirely on extrinsic historical evidence such as property records and is not supported by evidence of what transpired at the Convention itself – the constitutional provisions initially proposed, the debates concerning and votes taken on each, and the drafting histories of the provisions that finally were adopted.¹⁰ This is no coincidence in Slonim's view, since there is much in Madison's *Records* of the Convention that rebuts rather than confirms Beard's hypothesis. Based on contrary evidence from the *Records*, Slonim has argued that the Framers did not act at the Convention out of class-based self-interest but rather out of loyalty to the states from which they came, and that the critical struggles at Philadelphia in 1787 were not between the economic classes but rather between the large and small states.¹¹

Slonim's analyses of the Convention are

well-known to specialists in the history of the Constitution¹² and often relied upon by legal scholars.¹³ Now that they have been published in book form, they doubtless will reach an even broader audience.¹⁴

I

Framers' Construction is organized in three parts. Part I challenges and ultimately rejects both versions of the Beard thesis after analysis of the *Convention Records* and other historical material relevant to the core constitutional provisions on which the thesis relies. Part II extends this *Records*-centric approach to explain other provisions of the Constitution on which Beard and his successors have not focused. Part III offers in place of the Beardian view an alternative account of the key political forces that shaped the decisions taken at the Convention.

In the first two chapters of Part I (which is titled "Beardian and Neo-Beardian Theses"), Slonim attacks Beard's historiography. Instead of drawing inferences as Beard and others have done from the Framers' and the

9 E.g., McDonald, *supra* note 6 (finding that most of those who voted to ratify the Constitution at the state level did not hold significant amounts of public debt).

10 This information is all readily available in Madison's records of the Convention, which are collected in Max Farrand (ed.), *The Records of the Constitutional Convention of 1787* (1937). See also Max Farrand, *The Framing of the Constitution of the United States* (1913), which was available when Beard published the first edition of his book.

11 Shlomo Slonim, *Securing States' Interests at the 1787 Constitutional Convention: A Reassessment*, 14 *Studies in American Political Development* 1 (2000).

12 See, e.g., Gordon S. Wood, "Motives at Philadelphia": A Comment on Slonim, 16 *Law & Hist. Rev.* 553 (1998) (respectfully disagreeing with Slonim's federalism thesis); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 406 n.45 (1996) (praising Slonim's as "[t]he best account of the creation of the electoral college"); Rakove, *The Madisonian Moment*, 55 *U. Chi. L. Rev.* 473, 490 n.38 (1988) (agreeing with Slonim's analysis of Beard's use of Madison).

13 Recent instances include John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 *Va. J. Int'l L.* 163, 197 n.82 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 *Sup. Ct. Rev.* 1, 21 n.22, 50 n.81; Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 *Harv. L. Rev.* 2526, 2528 nn. 9 & 19 (2001).

14 Though jacket cover blurbs are sometimes little more than hype, it is worth noting the unusually generous endorsement of Gerald Gunther, who calls Slonim a "remarkable independent thinker" and his book a "must read."

state ratifiers' property records, Slonim examines the Framers' actual words and deeds concerning several features of the Constitution – the Electoral College, the separation of powers, bicameralism, the constitutional amendment process, staggered elections for the Senate, and life tenure for judges – on whose supposedly anti-democratic character Beard's thesis depends.

Using the Framers' speeches at the Convention, their points of contention and agreement, their votes, the textual changes they proposed, rejected, and eventually adopted, and their public and private writings during and soon after the Convention, Slonim presents his case that neither fear of democracy nor a desire to protect property (either their own or that of the elite class) significantly influenced the Framers' behavior and thinking at the Convention. On the issue of the Electoral College, for example, Slonim marshals evidence that its establishment had nothing to do with denying the masses control over the electoral process. The motive was rather to preserve in the procedure for choosing a President the identical small/large state balance as would prevail in the Congress, while at the same time preventing faction from playing a role in the President's selection by not having Congress itself make the choice. Similarly, regarding the Constitution's somewhat cumbersome amendment process, Slonim points out that the Articles of Confederation were even more difficult to amend. In comparison to what preceded it, the Constitution's amendment process was if anything relatively *pro*-democratic. And finally, Slonim observes that the separation of powers, bicameralism, staggered elections for the upper legislative chamber, and life tenure for judges were already widely in use in 1787 as existing features of several state constitutions and thus

could not have been, as Beard contended, the product of an elaborate plot that was hatched at the Convention.

The third chapter of Part I is probably the book's most interesting and definitely its most lively. In it, Slonim takes on historian Gordon Wood, whom he describes as a neo-Beardian. Wood considers Beard's approach insufficiently nuanced but agrees that the Framers had anti-democratic motives. The Convention, Wood maintains, was a process in which the Framers sought through various mechanisms (principally through Madison's failed proposal for Congressional veto power over state law but also through other constitutional limitations on the domain of state law¹⁵) to keep in check the democratic forces that had been released by the Revolution and were becoming increasingly powerful at the state level. In Wood's view, the Framers' (or, more precisely, the Federalists') goal was not only to remedy defects in the Articles of Confederation but also to keep local populism at bay.¹⁶

Slonim disagrees. He thinks that the Framers' apparent intentions as recorded in Madison's *Records* did not mask an anti-democratic conspiracy to rein in the states. Rather, he thinks they were (as they said repeatedly at the Convention) primarily motivated by a desire to strengthen the national government by improving upon the Articles of Confederation, which had paralyzed the nation and were plainly defective. In making his case against Wood, Slonim painstakingly examines Wood's historical evidence (mainly the correspondence of several prominent Founders, including Washington, Jefferson, Madison, Randolph, Mason, and Jay), finding it insufficiently rooted in the Convention *Records* and Wood's interpretation of it highly

¹⁵ E.g., U.S. Const., Art. I, sec. 10 (taking away from states the ability to coin money and impose duties on imports).

¹⁶ See generally Wood, *supra* note 12; Wood, *supra* note 7, at 626.

speculative. Slonim acknowledges that Madison strongly favored a national legislative veto that would have significantly curtailed the powers of the states. But Slonim insists that this was neither Madison's nor the other Framers' principal aim, especially since Madison's legislative veto proposal ultimately was rejected and "[t]he final constitutional document was a far cry from Madison's original conception" (p. 119).

Chapter 3 closes with a response by Wood to Slonim's critique, and Slonim's reply. Each man restates and defends his substantive positions and, more pointedly, offers his view of the other's fine personal qualities but defective scholarship. (Wood calls Slonim "literal-minded" (p.126), while Slonim calls Wood's thesis "imagined" (p. 142).) This exchange is academic discourse at its most entertaining and revealing.

The four chapters comprising Part II (titled "Constitutional Themes") deal only with the Framers' construction of certain constitutional provisions and not with their Beardian deconstruction. But they are similar to Part I in offering an internal, *Records*-based analysis. In chapter 4, Slonim concludes that the Founders did not regard "extrajudicial activities"¹⁷ as constitutionally improper (though perhaps

ethically ill-advised); in chapter 5, that a broad reading of "self-defense" under Article 51 of the UN Charter to include a right of preemptive attack is constitutionally preferred;¹⁸ in chapter 6, that the current practice of according to "congressional-executive agreements"¹⁹ the same status as treaties is contrary to the original intent behind the Constitution's treaty clause; and in chapter 7, that the Framers' fear of foreign influence informed many of the debates and drafting decisions at the Convention.²⁰ Though Part II (and particularly chapter 5) is excellent, I shall have little else to say about it because it strays from the book's central theme, which is to debunk and offer an alternative to Beard.

Part III (titled "The Federal Impulse at Philadelphia") returns to this central theme by asking: if Beard and the neo-Beardians are wrong, then what indeed were the Framers' primary intentions? What indeed were the driving forces behind their decisions at the Convention? Slonim addresses these questions in his two concluding chapters.

In chapter 8, Slonim examines "The Philosophy of a Dissenting Father," George Mason, who was one of three delegates in attendance at the close of the Convention who declined to sign the document. Notwithstanding Mason's

17 By extrajudicial activities, Slonim means the performance by a sitting federal judge of non-judicial functions in the service of the executive branch of government. Examples include Jay's service as Ambassador to England while he was also Chief Justice, Chief Justice Marshall's stint as Secretary of State, Justice Jackson's service as a prosecutor at Nuremberg, and Chief Justice Warren's heading of the commission to investigate President Kennedy's assassination. A more recent example not considered by Slonim is the special panel of federal judges that performs the executive function of appointing and overseeing Independent Counsels. See *In re Complaint Against Circuit Judge Richard D. Cudahy*, 294 F.3d 947 (7th Cir. 2002).

18 Narrowly reading Article 51 to forbid preemptive strikes, Slonim argues, would lead to the anomalous result that the United States is bound by treaty not to attack preemptively, even though its states have a constitutional right to do so. U.S. Const., Art. I, sec. 10, cl. 3 (reserving to each state the right to "without the Consent of Congress ... engage in War" if it is in "imminent danger" of attack).

19 A congressional-executive agreement is an executive agreement between the United States and a foreign nation that has been approved by a simple majority of both houses, as distinct from a treaty, which for ratification requires a two-thirds vote by the Senate.

20 E.g., those regarding the prohibition against federal office holders accepting gifts or titles from a foreign state, the citizenship and residency requirements for eligibility to hold elective office, the executive veto, and the impeachment power.

dissent from the Constitution's final form, Slonim argues that Mason's views (his strong belief in democracy, in balanced republican government, and in liberal egalitarianism), as reflected in his speeches and votes at the Convention, were emblematic of the views of a majority of the Framers. (To make the point in contemporary political terms, one might think of Mason as the Convention's "median" Framers.) If Slonim is right that Mason's pro-democracy beliefs were broadly shared among the Framers, then it is unlikely that all along they really were working against democracy, as Beard and the neo-Beardians have suggested.

The ninth and final chapter ("Securing States' Interests at the 1787 Convention: A Reassessment") presents Slonim's final refutation of the Beard thesis. He offers evidence (from the Framers' statements in both the *Records* and their post-Convention correspondence) that the main dispute at the Convention was not about property or democracy at all but rather concerned the allocation of federal power among the larger, smaller, and slave states. This struggle manifested itself not only in the debates on the issue of representation which ended in the Connecticut Compromise and the three-fifths rule, but also in the debates and outcomes on other key issues that affected state sovereignty by defining the scope of federal power and deciding who would wield it. These include the decisions to enumerate the federal powers with specificity, to reject a national legislative veto, to empower the Senate to withhold advice and consent on treaties and appointments, and to establish the Electoral College. On each of these decisions, suggests Slonim,

"pro-state forces played a major role" (p. 277) which "reflected the determination of states-minded delegates to ensure a role for the states in the operation of the national government" (p. 278).

II

If Slonim is right that the preservation of states' rights was the most significant factor affecting the Framers' behavior, then his federalism thesis is indeed an attractive alternative to the Beardian account of the Convention. But while this view is persuasive, it is not beyond challenge.²¹

First, Beard did have a point that Slonim cannot really refute: why trust the Framers? Slonim thinks it wrong to "attribute other motives to [the Framers] when the records of their private correspondence and the deliberations at Philadelphia are open for all to inspect" (p. 120) and the statements made in those records were "unguarded" (p. 142). But why not attribute other motives?²² Why assume that the Framers were candid either with each other or in their correspondence? Surely the Framers did not always speak or commit to writing their most private thoughts. If there was a conspiracy, the Framers undoubtedly would have taken great pains to conceal it. And it would have been a simple matter for Madison, had he been a co-conspirator, to omit any evidence of a conspiracy from his *Records*.

Still, while we cannot be sure that the Framers' apparent high-mindedness was genuine, we equally cannot be sure that they were disingenuous. The truth probably lies

21 Apart from its substantive contestability, a methodological criticism of Slonim's approach is that he ascribes to Madison greater influence over his peers than perhaps is warranted. See Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611 (1999). But as Kramer shows, most every historian of the Founding Era has done that, including Wood. *Id.* at 617.

22 Macey, *supra* note 3, at 71 n.92 ("there is no reason to believe the Framers should be taken at their word when they say that they designed the Constitution to benefit the new Republic rather than themselves").

somewhere in between, which perhaps justifies Beard's skepticism about Madison's *Records* and his preference for relying on more objective historical evidence such as property records for hints about the Framers' motives.

A further point in Beard's favor is that his work is less important for what it says about the Framers' intentions than for what it suggests about the Constitution's effects. Even if the Framers did not consciously intend to curtail democracy in its purest form, did not their work have this effect? Whether intended or not, did not the Constitution's ratification benefit creditors as a class by enhancing the value of pre-ratification debt? Existing critiques of Beard, including Slonim's, do not foreclose these possibilities. Nor could they, for on these "macro" legal-economic-historical issues, Beard likely was correct.

Yet it is difficult to fault Slonim for ignoring the issue of effects and instead confining his attention to the Framers' publicly-stated intentions. A *Records*-confined inquiry like Slonim's is sensible if one believes that the Constitution's "public justifications" are of greater interpretive significance than its drafters' actual intentions.²³ Exposing Beard's internal misreading of the Convention is also a useful way to corroborate the work of other historians who have found different reasons

to doubt Beard's claims.²⁴

Though Slonim's narrowly circumscribed focus is not unreasonable, there are some scholars who recognize that Beard's possible failure as an empiricist does not imply that he also failed as a theorist.²⁵ One such scholar from my own field of law and economics is Jonathan Macey, who concedes that Beard's model, while less sophisticated than modern economic analyses of the Constitution, still occupies the same theoretical terrain. Macey also credits Beard with anticipating many of the insights about the Constitution that scholars of public choice would later elaborate.²⁶ And though Macey strongly disagrees with Beard's normative conclusions, he shares Beard's "core premises about the features that cause a constitution to be an economic document" – that is, its use of the separation of powers to curb interest group rent seeking.²⁷

I would add to Macey's observations that Beard showed superb economic insight in identifying competing interest groups (e.g., debtors versus creditors, holders of personality versus holders of realty) that had a disproportionately large stake in the Convention's outcome and in correctly perceiving the causal relationships between the structure of government and the content of law on the one hand, and the content of law and asset

23 Cf. Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 *Ohio St. L. J.* 1 (1999) (proposing a "public justification" limitation on the types of legislative history that courts should use in statutory interpretation).

24 E.g., McDonald, *supra* note 6.

25 See Pope McCorkle, *The Historian as Intellectual: Charles Beard and the Constitution Reconsidered*, 28 *Am. J. Leg. Hist.* 314, 363 (1984) (lamenting that Beard has been "unjustifiably kicked around as a cranky old populist muckraker" rather than "honored as a thinker"); Clyde W. Barrow, *More Than a Historian: The Political and Economic Thought of Charles A. Beard* 256 (2000) (suggesting that "few other thinkers ... occupy a comparable niche in American political thought").

26 On the theory of public choice, see Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991); Symposium on the Theory of Public Choice, 74 *Va. L. Rev.* 167 (1988).

27 Macey, *supra* note 3, at 52. The normative difference between Macey and Beard is that Macey applauds as "public-regarding" the Constitution's checks on interest group rent seeking, whereas Beard objects to them on the ground that they are anti-democratic. *Id.*

values on the other. I would further add that, at a more rarefied level of theory, Beard's *Economic Interpretation* was an important step along the path to a full-fledged application of economics to law, a path predicted but not taken by Beard's contemporary Holmes.²⁸

Regrettably, Macey's generous attitude toward Beard is not shared by other law and economics scholars. Even though Beard was arguably the first American scholar to apply economics to law,²⁹ he has never been recognized for that achievement. Nowhere is Beard mentioned in the field's foundational works. Not in Posner's great treatise,

Economic Analysis of Law (which devotes an entire chapter to constitutional law), or in his article defining law and economics as a discipline,³⁰ or even in *The New Palgrave Dictionary of Economics and the Law*, whose three massive volumes contain not a single reference to Beard.³¹ The field's undisputed doyen, Posner, to my knowledge has cited Beard only twice, each time disavowing him and once citing him only because he had to (in a paper given at a symposium on a chapter of Beard's *Economic Interpretation* that grudgingly begins with two dismissive sentences about Beard before moving on to

28 Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("For the rational study of the law ... the man of the future is ... the master of economics"). Beard admits to owing his novel economic approach in part to Holmes. Beard, *supra* note 5, at 8-9 ¶ n.1 ("no effort has been made to connect legal phases with economic changes. ... [A]lmost 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") (footnotes omitted) (quoting Holmes's famous reference to Herbert Spencer's *Social Statics* in his dissent in *Lochner v. New York*, 198 U.S. 45 (1905)).

29 Identifying the first economic analyst of law is tricky. I cautiously say *American* scholar because it is sometimes suggested that Jeremy Bentham (and other Europeans such as Adam Smith and David Hume) earlier applied economics to law. Richard A. Posner, *Economic Analysis of Law* 25 n.2 (5th ed. 1998) (referencing Bentham's "[i]mportant work on the economics of criminal law"); Heath Pearson, *Origins of Law and Economics: The Economists' New Science of Law, 1830-1930* (1997) (arguing that 19th and early 20th century European scholars anticipated much of modern law and economics). In my view, these Europeans are not law and economics scholars *per se*, since their interests were normative rather than descriptive, and unlike Beard they did not use economics as a tool of legal interpretation. But anyway, they were not American.

Alternative American candidates such as Charles Francis Adams, Henry Carter Adams, and Robert Hale either came later than Beard or employed a purely normative mode of analysis. On the Adamases, see Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 Stan. L. Rev. 993, 997 (1990) (suggesting that two normative works, an 1876 essay by Charles on railroad regulation and an 1886 speech by Henry titled "Economics and Jurisprudence," were the earliest American contributions to law and economics); but see Pearson, *supra*, at 17 n.29 (finding Henry's speech purely normative and more advocacy than scholarship). On Hale, see Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998) (suggesting that Hale, who received his Ph.D. in economics in 1918, was the first economic analyst of law). Interestingly, Fried seems not to consider Beard a law and economics scholar, *id.* at 45, 237 n.84, and Hovenkamp and Pearson, who do not even mention Beard, apparently agree. See also Neil Duxbury, *Patterns of American Jurisprudence* 114, 322 (1995) (viewing Beard as a political scientist rather than lawyer-economist; arguing generally that legal-economic theories "were merely sketched or suggested rather than explored" in pre-1960s writings, such as Martin W. Littleton, *Law and Economics* (1911) and Eugene Allen Gilmore, *The Relation of Law and Economics*, 25 J. Pol. Econ. 69 (1917)).

30 Richard A. Posner, *The Law and Economics Movement*, 77 Am. Econ. Rev. Papers & Proceedings 1 (1987).

31 Peter K. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (1998).

other subjects, never to return).³²

Neglect of Beard is not limited to general works in law and economics. Citations to Beard are also absent from scholarship that applies economics to the Constitution. An astonishing recent example is an otherwise fine book by Robert Cooter, a past president of the American Law and Economics Association, that claims in its preface to be “a systematic account of constitutional law and economics as it exists today”³³ yet fails to mention Beard even once. Is it not extraordinary that in a book about the economics of the Constitution that cites an eclectic mix of nearly 400 scholars the author could feel intellectually indebted to Engels, Habermas, Kafka, Veblen, and Wittgenstein (along with many others who never applied economics to the Constitution) but not to Beard? If Cooter had the space to cite Shakespeare’s *Henry IV*, the Beatles’ *Magic Mystery Tour*, and even a quip by Nikita Khrushchev, then surely there was space enough to mention Beard.

So why has Beard been overlooked by modern economic analysts of law? Perhaps it is due to the oft-heard accusation that Beard

was a Marxist (which, incidentally, he denied),³⁴ or because he was “merely” a historian who never earned a degree in economics or law, or because he was a cynical conspiracy theorist. Or maybe it is because some of his empirical claims are arguably false, or because his conception of economic self-interest is so narrow that his work is not really economics at all. These last two suggestions are the nominal reasons that Posner gives for disassociating himself from Beard. He notes that Beard’s empirical claims have been discredited. And he suggests that Beard’s analysis is “economics” in only the most narrow sense and is therefore markedly distinct from modern law and economics scholarship.³⁵

Whatever the reason, I think that shunning Beard is a mistake. Beard’s political orientation and lack of degrees in law and economics are not relevant to the value of his work. That he may have erred empirically perhaps makes Beard a failed historian but surely has no bearing on his importance as a theorist. His scandal mongering should hardly shock economists, the Oliver Stones of social science, who themselves are well-accustomed to attacking

32 Richard A. Posner, *The Constitution as an Economic Document*, 56 *Geo. Wash. L. Rev.* 4, 4 ¶ n.2 (1987) (“There was a time when an ‘economic’ theory of the Constitution meant the theory, expounded years ago by Charles Beard, that the purpose of the Constitution was to redistribute wealth from the poorer segments of society to the upper class, to which the Framers belonged. This was an extremely narrow view, both of economics (implicitly viewed as the unmasking of exploitation) and of the Constitution, and is now discredited.”) (citing McDonald but ignoring the rehabilitative econometric study by McGuire ¶ Ohsfeldt, *supra* note 6); William M. Landes ¶ Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J. L. ¶ Econ.* 875, 888 n.32 (1975) (calling Beard’s *Economic Interpretation* “a controversial book” and observing that “Beard’s analysis has been sharply criticized”). Another of Posner’s articles, *Against Constitutional Theory*, 73 *N.Y.U. L. Rev.* 1 (1998), mentions Beard’s name but does not cite or discuss his work. Even outside the realm of law and economics, Posner does not give Beard his due. See Richard A. Posner, *Public Intellectuals: A Study in Decline 194-206*, tbl. 5.1 (2001) (omitting Beard from a list of 546 public intellectuals that includes many lesser figures who do not as easily meet the list’s objective selection criteria).

33 Robert D. Cooter, *The Strategic Constitution* xxi (2000).

34 Beard, *supra* note 5, at xii (denying that his “volume on the Constitution had its origin in ‘Marxian theories.’”). See also Macey, *supra* note 3, at 52 n.8 (doubting that Beard was either a Marxist or a Progressive).

35 See note 32, *supra*.

venerable icons and institutions.³⁶ Beard's perhaps crude conception of the Framers' objectives is easily defended as a relaxable simplifying assumption. Including altruism or statesmanship in the model might well have altered Beard's conclusions. But his choice to model self-interest more narrowly was perfectly reasonable, not only for a historian in 1913 but even for an economist today.³⁷


In truth it is not Beard who is narrow, but rather those who define law and economics so as to exclude him. Posner is right about many things, but I find his treatment of Beard unduly harsh. However one may feel about Beard's normative conclusions, it is difficult to see any harm in recognizing his remarkable intellectual leap from an economic interpretation of history to an economic interpretation of law. Indeed, an embrace of Beard would do law and economics some good as it would show that the field is truly as value neutral as it claims by being broad enough to include in its ranks a Progressive historian and reputed Marxist.



Framers' Construction is a valuable critique of Beard's claims about the Framers' intentions

and presents a convincing case against neo-Beardians such as Gordon Wood. It also offers powerful evidence that the main struggle at the Convention was not between the economic classes but was rather over the degree to which states' rights would be preserved in the various provisions of the Constitution impinging on state sovereignty.

Notwithstanding Slonim's assessment, Beard's *Economic Interpretation* remains a work of great intellectual importance that contributed significantly to the development of law and economics as a discipline by for the first time applying economics to the interpretation of a legal text. The field should look beyond Beard's possible empirical errors and alleged Marxism and acknowledge its intellectual debt to him. As Martha Nussbaum has observed, law and economics sometimes takes credit for the insights of others.³⁸ As to Aristotle, Nussbaum probably overstates the point. But a claim of under-attribution resonates in the case of Beard, whose book by its very title proclaims itself an economic analysis of law.

So let us not forget the rightful place of Beard's *Economic Interpretation* in the law and economics canon. We in law and economics, even more so than the historians, at least owe Beard a footnote. 

36 Consider the New York Times op-ed columns of noted Princeton economist (and quasi-Beardian?) Paul Krugman, which often voice deep suspicion about the motives of government officials and the veracity of their public statements.

37 Much to Gary Becker's chagrin. Gary S. Becker, Nobel Lecture: The Economic Way of Looking at Behavior, 101 J. Pol. Econ. 385 (1993) (complaining that other economists too narrowly define self-interest in their modeling assumptions).

38 Martha C. Nussbaum, Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics, 64 U. Chi. L. Rev. 1197, 1198 n.1 (1997).