

About the Economic Imprint of the American Constitution, cross-reading of Charles Beard

By Violaine Delteil, Senior Lecturer in Economics, Sorbonne Nouvelle University
and Lauréline Fontaine, Professor of Constitutional Law, Sorbonne Nouvelle University

First published in 1913, *An Economic Interpretation of the Constitution of the United States*¹ almost immediately became a classic among American historians and politicians. The work of Charles A. Beard was to be republished every year until the Second World War. From the first edition of their *Interpretation of American History. Patterns and Perspectives* in 1967 and into the 2000s, American historians say that Beard's book *was perhaps the most influential work in American history*². Also historian, John Patrick Diggins believes that *An Economic Interpretation ... is one of the most provocative and controversial books ever written by an American historian*³. A 1938 survey of American intellectuals conducted by the New Republic newspaper in 1938 on the books that influenced them most ("Books That Changed Our Minds") placed Charles Beard's work second only to that of the founder of American institutionalism, economist and sociologist Thorstein Veblen, *The Theory of Leisure Class*, published in 1899, and ahead of the works of Sigmund Freud and John Dewey⁴. Presenting the survey, Max Lerner said that *An Economic Interpretation ... was one of those legendary books, more discussed than read, better known for its title than for its analysis*⁵. The work, Max Lerner continues, by its title in particular, had founded a "beardian" approach to historical writing but was more inspiring than founding⁶. In any case, the constant practice of dialogue between disciplines earned Beard the rare double honour of being appointed president of the *American Political Science Association* (1925-26) and the *American Historical Association* (1933). In 1944, he even appeared on the cover of *Life* magazine with the following headline: "*Charles Beard and 'the Republic'*".

Yet, as Richard Hofstadter noted, Charles Beard (1874-1948) was the subject of one of the most "spectacular" reversals of opinion by American intellectuals in the twentieth century, presenting Beard's work as one of the most imposing "ruins" of American historiography⁷. In these last writings published at the end of the Second World War, Beard attacks American standards other than that of the Constitution, foremost among them President Roosevelt's⁸. In particular, it castigates the militaristic and imperialist drift of the latter, its economic causes (strategy aimed at making people forget the social and economic failures of the *New Deal*, influence of the

¹ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, Mac Millan, 1913. References to the pages of the book are here made in the body of the text itself and from the electronic edition proposed by Gary Edwards in 2001: <http://people.tamu.edu/~b-wood/GovtEcon/Beard.pdf>.

² F. G. Couvares, M. Saxton, G.N. Grob, G. A. Billias (eds.), *Interpretation of American History. Patterns and Perspectives*, Vol. 1: *Through Reconstruction*, 7th ed., 2000, p. 178.

³ J. P. Diggins, "Class, Classical, and Consensus Views of the Constitution", *University of Chicago Law Review* 55, no. 2 (1988): 555-70.

⁴ P. McCorkle, "The Historian as Intellectual: Charles Beard and the Constitution Reconsidered", *The American Journal of Legal History*, Vol. 28, No. 4 (Oct., 1984), pp. 314-363.

⁵ M. Lerner quoted by P. McCorkle, *ibid.* p. 314. See also M. Lerner, "Charles Beard's Political Theory", in H. K. Beale (ed.), *Charles A. Beard: An appraisal* (1954), New-York, Octagon Books, 1976, p. 25.

⁶ P. McCorkle, *op. cit.* p. 315.

⁷ R. Hofstadter, *The Progressive Historians: Turner, Beard and Parrington*, New York, Alfred A. Knopf, 1968, p. 220. By the same author and on Beard, see "Beard and the Constitution: The History of an Idea", *American Quarterly*, Vol. 2, No. 3 (1950), p. 195-213.

⁸ *President Roosevelt and the coming of the war* (1941); *A Study in Appearances and Reality* (1948).

interests of the military-industrial complex), and its international implications. It also worries in an anticipatory manner about the rise of the “consumer society”, and the development of an American corporate capitalism increasingly inclined to transform the whole world into an investment field, without consideration for the collateral social and cultural damage⁹. Beard's criticism obviously did not fit well with the patriotic triumphalism of the end of the war, when America saw and celebrated itself as a democratic and liberating power for the people. Pope McCorkle rightly notes that the discovery of the Nazi crimes and the triumph of American virtue meant that most American intellectuals - and identically on the European continent - had lost their critical instincts with regard to the Constitution, which thus regained “its intellectual stature as the prime symbol of the pragmatic political genius that saved America from the ideological temptations of the political left or right”¹⁰. The reproach made to Charles A. Beard not only for being overly critical of US foreign policy but also for appearing indifferent to Hitler's crimes, will ultimately compromise his reputation¹¹. Beginning in the 1950s, his critics criticized the validity of his work, with a series of studies that reconsidered the scientific bases and virtues of his analysis¹². Beard, who, with his wife, Mary Ritter Beard, gave Americans one of the nation's greatest historical murals and a huge bookstore hit, *The Rise of the American Civilization* (1927)¹³, will be brought into lasting disrepute.

While a whole generation of historians and wise citizens will have been grateful to him for introducing realism into the history of the United States, many will not forgive him for lifting a second time the veil of economic motivations on the romantic narrative of the American nation. Critics will seize *An Economic Interpretation ...* to disqualify Beard and relegate him to the infamous, or almost infamous, rank of “Marxist” historians, a label that Beard, allergic to partisan membership (including the socialist party with which he will work), has always defended.

In the 1960s, the intellectuals of the “new left” also tried to distance themselves from Beard by explicitly stating their desire to go “beyond” the party¹⁴. Periodically still today, works of criticism¹⁵ but also of re-evaluation¹⁶ or rehabilitation of his thesis¹⁷ appear in American journals. One could speak of a “neo-Beardian” line, represented, for example, by Michael Parenti, an American historian, political scientist and cultural critic, described as progressive,

⁹ R. Drake, *Charles Austin Beard. The Return of The Master Historian of American Imperialism*, Cornell University Press, 2018, p.264.

¹⁰ P. McCorkle, “The Historian as Intellectual...”, *op. cit.*, p. 316.

¹¹ *Ibid.* p.317, referring in particular to the preface of H. Beale, in H. Beale (ed.), *Charles A. Beard: An Appraisal*, University of Kentucky Press, 1954.

¹² See mainly R. E. Brown, *Charles Beard and the Constitution: A Critical Analysis of “An Economic Interpretation of the Constitution”*, Princeton University Press, 1956, et Forrest Mc Donald, *We The People: The Economic Origins of the Constitution*, University of Chicago Press, Chicago, 1958.

¹³ While remaining very consensual for its social milieu - the fate of black or Indian minorities was largely ignored - the book underlined with force and originality for the time the weight of economic and cultural factors in American history (see E. Nore, *Charles A. Beard: An intellectual Biography*, Southern Illinois University Press, Carbondale, 1983, p. 119).

¹⁴ The “Beyond Beard” movement is described by Pope McCorkle in his above-mentioned article (p. 317 note 20).

¹⁵ See also recently, J. C. Pope, S. Treier, “Voting for a Founding: Testing the Effect of Economic Interests at the Federal Convention of 1787”, *The Journal of Politics*, Vol. 77, No.2 (2015), p. 519-534.

¹⁶ See for example H. K. Beale (ed.), *Charles A. Beard: An Appraisal, op. cit.*; C. M. Kenyon, « *An economic interpretation of the constitution after Fifty years* », *The Centennial Review*, Vol. 7, No. 3, *History Issue* (1963), p. 327-352.

¹⁷ See for example R. A. McGuire and R. L. Ohsfeldt, “Economic Interests and the American Constitution: A Quantitative Rehabilitation of Charles A. Beard”, *The Journal of Economic History*, Vol. 44, No 2 (1984), p. 509-519; R. Mc Guire, *To Form a More Perfect Union. A New Economic Interpretation of the United States Constitution*, Oxford University Press, 2003.

who, in a work published in 1980 questioning the democratic character of the constitution, had a contribution entitled “The constitution as an elitist document”¹⁸. Like Beard's book, Parenti's contribution relies heavily on an analysis of the founding fathers' statements. Proof also that his memory is still very important among historians, several scientific events were organized in 2013 on the occasion of the centenary of the publication of *An Economic Interpretation...*, and a new monograph on the ideas developed by Charles A. Beard was published in December 2018 by historian Richard Drake¹⁹. 315 pages devoted to the man whose *Law and Liberty* site wondered in 2014 whether he was a living legend or an archaic icon²⁰.

A first element of answer to this question may come from the fact that a search on the American portal “Jstor” brings up more references on “Charles A. Beard” since his death in 1948 (nearly 3500, of which a little less than a third between 1990 and 2020), than before his death (nearly 2000). Even though the number of journals has increased in recent decades compared to the first part of the 20th century, and even though Richard Drake himself states that Charles Beard was established as an absolute counterexample of the historical method in American universities in the 1960s²¹, the historian with 11 million copies sold²² has remained a reference, either to be inspired by it or to reject it.

Charles Austin Beard has proved to be a human and scientific personality both enigmatic and controversial, and his work is equally so. In short, what makes Beard successful at one time disqualifies him at another. Where he is popular, elsewhere he is unknown. Historians honor or honor him, jurists debate or ignore him. If he seems to be widely included today in the category of progressive thinkers of the early 20th century, the reality of the reception of Beard's work is particularly difficult to establish. It is impossible to put a clear and definitive label on Beard's thesis, as on his thinking in general throughout his career, except perhaps, in the case of *An Economic Interpretation...*, to have read it in its entirety²³. He was defending himself - and largely rightly so - as a Marxist²⁴. And curiously, while Beard's work does not strictly speaking contain any economic analysis, it is now mentioned on the American page of Wikipedia devoted to the current of *Constitutional Economics* initiated by the very liberal James Buchanan, as “The generally accepted birth of constitutional economic analysis of US Constitution”²⁵.

Beard's thesis consists only - but fundamentally - in presenting the American constitution of 1787 as an “economic document”: his analysis is in this sense both original and innovative, but questions its method, its perspective and its unsaid facts (1). His strategy is to silence the

¹⁸ M. Parenti, “Constitution As An Elitist Document”, in R. A. Goldwin, William A. Schambra (eds.), *How Democratic Is the Constitution?*, Aei Press, 1980, p. 39.

¹⁹ R. Drake, *op.cit.*

²⁰ H. Belz, “Charles Beard: Living Legend or Achaic Icon?”, *Liberty and Law* website, Oct. 2014 (<https://www.lawliberty.org/2014/10/10/charles-beard-living-legend-or-archaic-icon>).

²¹ Richard Drake, *op. cit.*

²² See. P. Kennedy, “Charles Austin Beard’ Review: The Enemy of Empire”, *Wall Street Journal* website, 29 March 2019 (<https://www.wsj.com/articles/charles-austin-beard-review-the-enemy-of-empire-11553870831>)

²³ See. R. Hofstadter, “Beard and the Constitution...”, *op. cit.*

²⁴ See also A. Bloom in 1987: “What began in Charles Beard's Marxism and Carl Becker's historicism became routine”, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished The Souls Of Today’s Students*, Simon & Schuster, p. 29.

²⁵ https://en.wikipedia.org/wiki/Constitutional_economic: Jonathan Macey believes that the *Law and Economics* studies - to which he himself belongs and from which the “*Constitutional Economics*” current originated - and the less sophisticated Marxist analyses actually rest on the same foundations: “at the core their theories are identical. Like the Marxists, law and economics theorists view the Constitution as a forum for the expression of a political equilibrium among competing, powerful special interest groups”, Jonathan Macey, “Competing Economic Views of the Constitution”, *Faculty Scholarship Series*, 56, p. 52.

economic context of the American revolution and the writing of the constitution, but also the one existing at the time of the publication of his work, when he intervened in the midst of a controversy on the conditions of the interpretation of the constitution with regard to local and national economic choices (2). Founded on the autonomy of politics and rights vis-à-vis economic interests, the constitutionalist doctrine could only accept Charles Beard's thesis in a limited, even anecdotal way, since it is so far at odds with its original dogma (3). The evolutions of capitalism, which was to be organized on a transnational scale under the viaticum of globalization, would both confirm some of Beard's hypotheses and call for other interpretations of the constitutional phenomenon, which the idea of “economic constitution” was shaking up more than it seemed at first sight (4).

1. Beard's original thesis: the constitution is an “economic document”

Beard's thesis in *An Economic Interpretation* ... attacks head-on the founding myth that the Constitution was written by “all the people” (p. 13) and was likely to provoke an outcry. He argues that the Basic Law is an “economic document” (title of chapter 6 of the book), which the delegates to the Convention of Philadelphia were, “with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system” (p. 161), and that then the people were not “the original source of all political authority exercised under it” and “founded on broad general principles 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” (p. 13).

Beard's work thus attacks very directly the national mythology that has culminated since the end of the 19th century, in which the Constitution is glorified as “the most wonderful work ever struck off at a given time by the brain and purpose of man”, as Gladstone wrote in 1878²⁶.

The assertion that the fundamental law is an “economic document” is not entirely original (see below the intellectual origins of Charles Austin Beard). But the thesis stands out by the rather categorical and provocative way²⁷ in which the author states it. “The Constitution was not created by ‘the whole people’ as the jurists have said”; “*it was the work of a consolidated group whose interests knew no state boundaries*” (p. 161). Or else: “*it was an economic document drawn with superb skill by men whose property interests were immediately at stake*” (p. 95). It also stands out for the impressive amount of evidence it mobilizes, drawn from a sum of archives as telling as they are composite, to shed light on the economic motivations that would have guided the lawyers responsible for writing and ratifying the fundamental law. Finally, the thesis is supported by the literal reference to the writings of the constituents, Madison in mind, which show that the latter had not remained insensitive to the interference of economic interests, and to the antagonisms between the latter.

The manifestations of the constitution as an “economic document”

²⁶ W. E. Gladstone, “Kin beyond the Sea”, *North American Review*, Vol. 127, (sept-oct. 1878), pp. 179-212, p. 185.

²⁷ He thus confided to his friend Max Farrand, also a historian of the American constitutional revolution: “I was more belligerent than was necessary and overemphasized a number of matters in order to get a hearing that might not have been accorded a milder statement”: *Charles A. Beard to Max Farrand*, May 5, 1913, DC 572-Correspondence A-F, Folder 21: Farrand, Max (Huntington Library), 1913-36, CABP (quoted by Ajay K. Mehrotra, “Charles A. Beard & the Columbia School of Political Economy: Revisiting the Intellectual Roots of the Beardian Thesis”, *Constitutional Commentary*, Vol. 42 (2014), p. 500).

For Beard, the pragmatism of the social sciences is a promise against the presumption of the instrumentalization of science: the researcher's aim must be to collect material evidence, from raw material that must do without commentary at the risk of tainting the impartiality of the demonstration. Beard defends this almost raw delivery of archives so that “the student may draw his conclusions independently” (p. 137).

To accomplish this work, Beard will plunge (with a delight he does not hide from the reader) into an impressive amount of documents, extracted from patrimonial, financial, electoral, editorial archives, which he will bring out of their silence. Among his finds are the registers of the federal treasury department and those of the various state funds. It is from these meticulously collected sources that he will compile a patrimonial inventory of each of the key figures in the writing and ratification of the Constitution, listing for each of them the possessions and changes in heritage and portfolio (land, real estate, debt, slaves, capital invested in factories, navigation, etc.). But Beard does not limit himself to a simple heritage inventory, and proposes - which will make the originality of chapter 5 - a succession of economic biographies of the constituents which gives some flesh to the heritage catalogue, and draws a picture of characters that is not without reminding, the realistic and materialist vein of the *Spoon River Anthology* published the following year²⁸... with a little less poetry, though.

Here are two examples of bibliographies through which Charles A. Beard categorizes the heritage of the constituents and explains their vote for or against the constitution²⁹:

Robert Yates, of New York, was born in Schenectady, and received a classical education at New York City. He read law and began the practice at Albany where he soon built up an extensive business. He was made a judge of the Supreme Court under the state constitution of 1777, but his salary was small. "Indeed before the scale of depreciation of continental money had been settled, he received one year's salary in that money at its *nominal* value, the whole of which was just sufficient (as he humorously observed), to purchase a pound of green tea for his wife." He refused to enrich himself by speculating in confiscated estates, a favourite occupation of some of his friends, and "he died poor."²⁶⁸ He opposed the adoption of the Constitution, and apparently took no part in the transactions in public securities; but several members of the Yates family, Richard, Adolphus, and Christopher were large operators.²⁶⁹

²⁸ Edgar Lee Masters, *Spoon River Anthology*, William Marion reedy ed., 1914.

²⁹ From Gary Edwards' electronic edition p. 78 and p. 76.

Washington, of Virginia, was probably the richest man in the United States in his time, and his financial ability was not surpassed among his countrymen anywhere. He possessed, in addition to his great estate on the Potomac, a large amount of fluid capital which he judiciously invested in western lands, from which he could reasonably expect a large appreciation with the establishment of stable government and the advance of the frontier.

Perhaps the best way to illustrate his economic interests is to give the data from the schedule of his property attached to his will, drawn up in 1799. He possessed in Virginia, counting the enormous holdings on the Ohio, and the Great Kenhawa, more than 35,000 acres, valued at \$200,000; in Maryland, 1119 acres, at \$9828; in Pennsylvania, 234 acres, at \$1404; in New York, about 1000 acres, at \$6000; in the Northwest Territory, 3051 acres, at \$15,255; in Kentucky, 5000 acres, at \$10,000; property in Washington, at \$19,132; in Alexandria, at \$4000; in Winchester, at \$400; at Bath, \$800. He held *[begin page 145]* \$6246 worth of United States securities; and of this holding he said: "These are the sums which are actually funded; and though no more in the aggregate than 7566 dollars, stand me in at least ten thousand pounds, Virginia money; being the amount of bonded and other debts due me and discharged during the war when money had depreciated in that rate - and was so settled by the public authority." He held \$10,666 worth of shares in the Potomac Company presented to him by the state of Virginia (which he left to establish a national university); \$500 worth of James River Company shares; \$6800 worth of stock in the Bank of Columbia, and \$1000 worth of stock in the Bank of Alexandria. His own slaves were to be emancipated on the death of his wife. His livestock he estimated at \$15,653 - making a grand total at a conservative estimate of \$530,000.²⁵²

Washington was also a considerable money lender and suffered from the paper money operations of the Virginia legislature. He "had bonds and mortgages to 'nigh £10,000' paid off in depreciated paper currency worth at times as little as 2/6 in the pound, and when he attended the federal Convention he was in arrears for two years' taxes through having been unable to sell the products of his farms."²⁵³

If anyone in the country had a just reason for being disgusted with the imbecilities of the Confederation it was Washington. He had given the best years of life to the Revolutionary cause, and had refused all remuneration for his great services. He was paid his personal expenses to the amount of \$64,355.30 in paper that steadily depreciated. M. Otto writing to Vergennes on February 10, 1787, says of Washington's losses: " I have before me a letter of this *[begin page 146]* honoured man in which he complains of being obliged to sell at a rate of twenty for one the certificates which Congress sent to him in payment for the arrearages due him."²⁵⁴

The economic biographies of the constituents that the author endeavours to write over long pages speak volumes about the heritage of the majority of the 55 constituents. They were not only men of law, from urban centres or coastal regions. 40 of them were "probably" (because Beard only has the register of the Treasury Department of 1790) holders of public securities³⁰. In Beard's view, they were speculators who bought securities after having been guaranteed the introduction of the Hamiltonian system of assuming state debts into a federal debt³¹, which in more contemporary terms would have been called insider trading. Beard still counts: 14 of the 55 members speculated on state land, 24 were creditors, (thus involved in lending money against interest), at least 11 were holders of so-called "personal" property (trade, manufacturing, fleet), at least 15 were slave owners³². This recognition is based on the different nature and legal status of the different types of ownership. Personal property, sometimes referred to as movable property, is thus contrasted with real property. They include so-called "tangible" assets (movable in the common sense, but also the fruit of a harvest, for example), and "intangible" assets such as debt securities. Unlike real property, land or buildings, they are

³⁰ "Public securities" are debt instruments issued by a government to finance its expenditures by borrowing on the financial market.

³¹ The Hamiltonian system aimed to mutualize state debts and merge them into a single federal debt.

³² The slave was considered an extension of the land - real estate - belonging to his master.

characterised by their mobile nature. In the 18th century, movable property, particularly intangible property, began to generate a significant and clean economy (the circulation of capital), the nature of which therefore made their actors the bearers of interests that were proper and distinct from the owners of real property.

Beard thus argues, with lengthy evidence to support his argument, that the supreme text is the result of the economic interests of the majority of the 55 constituents, most of whom are not only men of law. For a majority of them, they are also industrialists, merchants and even more numerous owners of state securities, interested in having the Constitution protect their interests and resources. For Beard's analytical materialism and historical realism, the motivations of the 55 constituents are above all a reflection of the material possessions of each of the actors involved (rather than doctrines or ideologies to which he gives little weight and little autonomy with respect to material realities), having varying interests in the establishment of a federal government with a unified monetary and fiscal regime, regulations (maritime trade, limitation of competition or foreign monopolies, anti-trust, speculation on Western lands, etc.), and a strong interest in the creation of an independent state.), or even a federal debt - which was not created until 1790.

Chapter 5, which presents these patrimonial biographies of the constituents, has been the most commented on, both for its originality and for the demystifying charge it places on the intentions of the founding fathers. The economic biographies of the delegates to the State Conventions, who were called upon to vote on the ratification of the Basic Law, also supported the hypotheses concerning the motivations of the constituents. Thus he wrote in the conclusion of Chapter 10: "The State conventions do not seem to have been more 'disinterested' than the Philadelphia convention" (p. 146). The delegates in favour of the Constitution are similarly recruited from the ranks of the holders of "movable property" (creditors, holders of State securities; industrialists in factories, owners of commercial boats, speculators on Western lands), while the opponents belong mainly to the class of owners of "immovable property" (debtors, indebted small farmers, "manorial lords", slavers from the South).

For both constituents and delegates, the economic determinants of the divide between federalists and anti-federalists are broadly the same. Creditors and in particular holders of state funds had a direct interest in the development of a new institutional order as outlined in the constitution. The latter would ensure greater legal stability, protect property rights³³, introduce regulation of internal (inter-state) trade as well as foreign trade. It would also open up the possibility for the new federal government to mint coins and raise taxes (fiscal resources that would guarantee that holders of state funds would obtain repayment of the debt they bore), as well as the possibility of increasing the military and naval forces³⁴.

Conversely, the interests of debtors and farmers were in favour of the sovereignty left to the States, from which they expected measures likely to alleviate their plight: agrarian protection, the issue of money and inflation (the latter having the virtue of devaluing debt), suspension of tax collection, relaxation of legal procedures for debt collection, even debt cancellation,

³³ The central issue of the protection of property rights by a federal structure disciplining the states is at the heart of the arguments in favour of ratification by the founding fathers. Beard summarizes the two arguments set out in *The Federalist n°10*: "I. A government endowed with certain positive powers, but so constructed as to break the force of majority rule and prevent invasions of the property rights of minorities. II. Restrictions on the state legislatures which had been so vigorous in their attacks on capital" (p. 81).

³⁴ The issuance of fiat money and the imposition of taxes had been prohibited by the colonies under British rule (i.e. the *Currency Act* of 1767) and had been one of the main reasons for the War of Independence. Their federalization was all the more symbolic for the future constitution of 1787.

abolition of debtors' imprisonment, etc., all measures which the transfer of sovereignty to the Confederation was likely to jeopardize.

Animating this portrait gallery, Beard also gives voice to a whole series of actors involved or interested in the ratification (or not) of the constitution: in a choral panorama (but fragmentary in its sources), he gives voice to the expression of fears, demands, as well as to the lobbying attempts and alliances of some of the groups concerned. This text of 12 November 1987, quoted by Beard, is the product of representatives from Connecticut who relayed the interests of the owners of Northern merchant ships, who were campaigning for a federal regulation capable of countering the overwhelming competition from the British fleet in American ports: "In the harbour of New York there are now 60 ships of which 55 are British. The produce of South Carolina was shipped in 170 ships, of which 150 were British. Surely there is not any American who regards the interest of his country but must see the immediate necessity of an efficient federal government; without it the Northern states will soon be depopulated and dwindle into poverty, while the Southern ones will become silk worms to toil and labour for Europe." (p. 30).

The Constitution: the fruit of a battle between two economic elites

For Beard, the battle over the constitution thus pitted two quite distinct economic groups against each other: on the one hand, creditors and holders of powerful personal property interests (industrialists, merchants), and on the other, debtors and farmers (some of whom were in debt). It also sets the interests of capitalism against those of agrarianism, in terms in which economics and politics are combined, with the advocates of commercial expansion (within and outside the states) demanding strong control over the popular will, against the ruralists who favour protective intervention by the states associated with a more egalitarian democracy... who, Beard recalls, narrowly failed to invalidate the constitution and, consequently, the future of the Union of the 13 former united colonies.

Reading Beard's text carefully, he is far from following the Marxist reading grid lent to him by his contemptors. The history of the Constitution cannot be read as a battle between social classes (that of the possessors against the proletarians and others excluded from voting rights). It is much more the result of a struggle between one elite against another (here the capitalists against the agrarian aristocracy), one oligarchy or plutocracy against another, one "constituency" against another.³⁵ The privileged focus does not, however, remove the critical and social dimension that Beard expresses with regard to American democracy.

This economic interpretation of the federalist/anti-federalist cleavage also challenges the official history of the time when Beard took up the pen, according to which the cleavage pitted the (anti-federalist) southern states against the northern and middle states. For Beard, the inter-state divide is coupled with an internal divide within the latter (notably opposing the interests of the big cities to those of the agrarian communes)³⁶. As the author points out in the concluding

³⁵ See R. Drake, *op.cit*, p. 192. It should be noted that Beard, in the political history of the United States that he proposes in the course of his works, systematically tends to minimize the role of disadvantaged social groups. This reading that he assumes is based on the American idiosyncrasy of the abundance of land, the promises of distribution to them and, more broadly, the promises of prosperity, which, according to him, offered a powerful viaticum to neutralize social protest. See in particular *The Rise of the American Civilization* (1927).

³⁶ Many of Beard's critical commentators will credit the author with drawing attention to the anti-federalist vote (and the group's amendments), revealing in particular how it was sometimes fear of dismemberment or exclusion

sentence of the book, “The constitution was not 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” (p.161).

In the background, a critic of representative democracy

A tireless critic of American democracy, Beard seizes upon history to probe its foundations and uncover its original pitfalls. If he mobilizes the motivations of the constituents to challenge the myth of a law that would be the work of the “whole people”, if he also reminds us that the constituents were not elected but appointed by the States, he does not forget to refer to more accounting arguments to describe the reality at the time: Chapter 2 recalls the division of the groups that make up the American population, which meant that a majority of the American population remained excluded from political rights: women, slaves, domestic servants governed by the *indenture*³⁷, as well as men without the ownership criteria that condition the right to vote. Considering it likely that three-quarters of the male and white population did not participate in the election of delegates to state conventions, either out of indifference or because ownership criteria prevented them from taking part in the ballot (p. 120), Beard also recalls in conclusion that, “The Constitution was ratified by a vote of probably not more than one-sixth of the adult males.” (p. 161). The ratio falls to 1/16th of the population if one includes the population excluded from political rights.

If Beard only inventories and names the facts, no doubt to mask his critical, if not normative, aim, he is more explicit about his democratic purpose. In a correspondence with progressive Wisconsin senator Robert La Follette in May 1913, he wrote bluntly: “I do not think it is a question of ‘restoring’ the government to the people; it is a question of getting possession of it to them to the first time”³⁸. In the background, Beard also has in mind the feminist fight for the right to vote, which is still far from being won (in the United States, it will be necessary to wait until 1920 for white women, 1965 for all), and to which his wife Mary Ritter, a militant of the first hour, will have converted him very soon.

In the bubbling bath of progressivism of the time: Beard's intellectual influences

The fact that Beard refrained from making explicit many of his intellectual and political inspirations is a remarkable strangeness that is no doubt not due to chance. Prompt to cite Madison or some of his fellow historians or politicians (see below), he will be much less inclined to refer to his filiations with the jurists or economists whose imprint his text

from the confederation (as in the case of New York State) - rather than acquiescence in the proposed system - that allowed some states to join *in extremis* (Nore, 1983, *op. cit.*).

³⁷ Equivalent to the 'engagementism' of Ancien Régime France, indenture was used to populate the colonies of America by the European colonial powers, as a complement or replacement for slavery that had become illegal. The Indenture was a voluntary and temporary contract of employment for domestic work. Under this contract, the worker (called indentured servant) undertook for a limited period of time (usually 5 to 7 years) to work on the land of a settler or owner in exchange for a material reward supposed to cover his vital needs (without salary) and payment for his transatlantic journey, more rarely, the obtaining of freehold land at the end of the contract. In the seventeenth and eighteenth centuries, nearly half of the Europeans landing in the American colonies were indentured servants. They still represented 5% of the population at the time of the Declaration of Independence in 1776. For an analysis of economic history, see D. W. Galenson, “The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis”, *The Journal of Economic History*, Vol. 44, No. 1 (Mar., 1984), p. 1-26.

³⁸ Quoted by E. Nore, *op. cit.*, p.497.

nevertheless bears the imprint of. What will no doubt be a clever - albeit ultimately futile - way of escaping the labelling (Marxist in particular) and ideological quarrels of his time, will give room for interpretation among those who will start his intellectual biography³⁹.

Born in Indiana, in a land of agrarian populism, Beard was early sensitized to the political issues of his time. Early on, he immersed himself in journalism to assist his father, who ran a local Republican newspaper, and later became editor of the DePauw Methodist University newspaper, where he earned his bachelor's degree (1894-1898). It was in this college, even before he entered Columbia University, that he met his first inspirations: the historian Andrew Stephenson (a specialist in constitutional history), the institutionalist economist John Commons, but also the heterodox political economy and progressive causes of the time (labour mobilization, progressive taxation, etc.), not forgetting the nascent feminism (around Marie Ritter).

As underlined by his biographers, his one-year stay in England at Oxford University as a graduate (1898-1902) was decisive in confirming his willingness to combine historical research and social activism. On this second aspect, the British experience will do more than make him aware of the excesses of industrial capitalism. In 1898, Charles A. Beard was behind the American Walter Wrooman, then in England (a Christian reformist socialist), in the creation of *Ruskin College* at the University of Oxford, dedicated to the training of political leaders from the working class, before actively supporting the creation of similar schools in the United States, including *Ruskin College* in Trenton, Missouri, in 1902.

The next period was when he moved to Columbia University (1902-1915), first as a student and then, from 1905, as a young professor. Columbia was then the beating heart of the social sciences, of the cross-fertilization between disciplines (history, political economy, sociology, law) which came together around the study of the past of institutions, and the role of institutions on human behaviour⁴⁰. The political pragmatism of Frank J. Goodnow, author of *Social Reform and the Constitution* in 1911, cited by Charles Beard in his book (p.12), and the heterodox political economy of Edwin Seligman, also cited by Beard (p.11 and 15), come together. Through Seligman⁴¹ whose influence on Beard will be greater than that of Robinson or Goodnow if we follow the words of his last biographer⁴², Beard discovers the possibility of claiming a historical materialism (Marx's descriptive approach), without endorsing the teleological vision of socialism and revolution (the normative approach). Beard's affiliation to the economist is clearly assumed by Beard, whose title is almost a carbon copy of Seligman's major work, *The Economic Interpretation of History* published in 1902⁴³, although more modest in its use of the article "An" rather than "The". The latter text is quoted twice by Beard, in support of the theory of "economic determinism" of history, of which he claims a fairly broad claim (see pp. 6, 10, 11, and 15). He quotes it as follows: "To economic causes, therefore, must be traced in the last instance those transformations in the structure of society which themselves

³⁹ See mainly E. Nore, "More than an Historian, The Political and Economic Thought of Charles A. Beard", *The Review of Politics*, vol.64, Issue 1 (2002), Cambridge University Press et R. Drake, *op. cit.*

⁴⁰ The State University of New York is also a pioneer in new methods for the social sciences: inductive, quantitative and statistical methods that challenge the theoretical formalism and the deductive method that underlies it.

⁴¹ Edwin Seligman is described as a Marxist historian, part of the "new school" of economists of the 1880s who offered a first academic critique of the then dominant laissez-faire political economy. The latter will be criticized both for its theoretical-deductive method, its essentialization of economic laws deemed immutable and taking as a model the laws of nature, and finally the negation of the contingency of regimes (economic, political, legal) at the time and in the contexts of the time.

⁴² R. Drake, 2019, *op. cit.*, p.18.

⁴³ E. Seligman, *The Economic Interpretation of History*, Columbia University Press, 1902.

condition the relations of social classes and the various manifestations of social life”⁴⁴ (p.15). The battles of Seligman, an ardent defender of the introduction of a progressive tax, will mark Beard's social reformism initially inspired by the “social-liberalism” of the Englishman John A. Hobson⁴⁵.

For Beard, the Columbia era was therefore a period of great intellectual intensity and also that of his active participation in various think tanks, including the *X Club* (1903-1917), made up of progressive (including John Dewey) and socialist intellectuals and artists, as well as his involvement in the association of socialists (allied with moderate social-democratic opponents) in New York City, the *New York Bureau of Municipal Research*, which he joined when it was founded in 1907⁴⁶. Charles A. Beard is extremely prolific editorially (11 books written alone or in collaboration, an impressive amount of articles and reviews grouped ex post in 6 volumes⁴⁷). Following in the footsteps of his colleague James Harvey Robinson, the bridgehead of the progressive current, he is helping to make the current of “new history” or “historical realism” flourish. He invites historians to position themselves in the field of the interpretation of history, to open a dialogue between past and present, to question the instrumental use of history and its interpretations. “Historical realism” shakes up the classical history of institutions, by inviting us to study the way in which formal rules, far from being immutable, are modified in their effects by the political context and legal practices of the periods after their creation.

Charles A. Beard was also sensitive to the seminal work of institutional economics, pioneered by Thorstein Veblen (author of *Theory of the Leisure Class*, 1899). Like Veblen, but without Veblen's radical criticism⁴⁸, Beard would have been an advocate of a third way beyond capitalism and socialism, which he later called “workers' republic” or “economic democracy”⁴⁹. One can also presume a blind filiation of Beard, in the person of John Commons, although she is not mentioned in any of his intellectual biographies. They met when Beard was still a student and John Commons was already a professor, and they will always maintain their friendship⁵⁰. The proximities between the two authors' reflections are troubling. While Commons did not publish its major works until well after *An Economic Interpretation... (Legal foundations of Capitalism)* was published in 1924, *Institutional Economics* in 1934⁵¹...), one can conjecture that the theses of the former will also inspire the latter. Turning the thesis of the spontaneous creation of institutions on its head, Commons sees conflict as the primary source of institutions. To the mystification of Adam Smith's invisible hand adorned with the virtues of the harmonization of interests, Commons will oppose “the visible hand of the common law courts” (1934, p.162). For the author, the common law proceeds, on the occasion of the arbitration of conflicts, to an “artificial selectivity” and organization of the initially “unorganized” rules stemming from custom or ethics⁵². No wonder then that the two European thinkers cited by Beard (p. 14),

⁴⁴ *Ibid.* p. 3.

⁴⁵ See note 54.

⁴⁶ See on this subject E. Nore, 2002, p.12.

⁴⁷ E. Nore, 1983, p. 86.

⁴⁸ In his major work, *The Theory of the Leisure Class: An Economic Study of Institution* (Macmillan, New York, 1899), Thorstein Veblen emphasizes that the task of a government - which he considers to be controlled by the owners - is to guarantee social order and behind social order, the privileges associated with property rights. He writes bluntly: “modern politics is business politics” (p. 269), and “constitutional government is a business government” (p. 285).

⁴⁹ Beard notably mentions these terms in the critique of capitalism that he develops in his book *America in Midpassage*, published in 1939 (see. R. Drake, *op. cit.*, p. 264).

⁵⁰ See A. J. Mehrotra, *op. cit.* p 482.

⁵¹ J. Commons, *Institutional Economics*, Macmillan, New York, 1934.

⁵² Posing the legal-economic link as central, it will, however, reverse the dialectic of Marx taken up by Beard: for Commons, the basis of society is legal and it is this sphere of law that determines the economic superstructure.

Rudolph von Jhering and Ferdinand Lassalle, were jurists and presented the law as the expression of concrete interests rather than abstract ideas, in contrast to the American thinking of the time⁵³.

The strategic sources chosen by Charles Beard: Madison, father of materialism?

Complementing his often highly accounting sources, Beard also delves into a series of documentary archives, including *The Federalist*, a collection of articles written by Jay, Hamilton and Madison in defense of federalism. Among the contributions (known as the *Federalist Papers*), the most valuable was undoubtedly the one bearing the number 10 written by James Madison, which Beard thus ensured both its discovery and continuity as a major source for the study of the American constitution⁵⁴. Beard also draws on the voluminous correspondence of the founding fathers, both to uncover the differences in political doctrine that run through their camp, and to account for the powerful lobbying exercised by traders and industrialists against the constituents; for example, to suggest - here in a letter to Hamilton - a system for consolidating the public debt that will be found almost identically in the text of the bill⁵⁵.

Unlikely to cite the works that before him had opened the field of an economic interpretation of the Constitution, Beard was much more prolific in reporting the words of one of the founding fathers of American democracy, as well as of political science, James Madison. For Beard, the reference to this haloed figure undoubtedly had a strategic aim. It made it possible to give legitimacy to his own thesis, or at least to protect himself from being received too violently. Madison's comments, which acknowledged that the unequal distribution of property rights was building a society of distinct (one of the dividing lines between creditors and debtors) and potentially conflicting factions, are indeed striking⁵⁶. Taken verbatim by Beard (p. 15), the quotation from *The Federalist* is eloquent:

“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 in 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

⁵³ J. A. Hobson (*John Ruskin Social Reformer*, 1898; *Imperialism*, 1902) also inspires Beard more directly in his critique of the capitalist aims of imperialism, and his critics of the capitalist status quo and the free market as the most powerful obstacle to a truly democratic and common good-oriented society (see R. Drake, *op. cit.*, p. 20, note 55). Hobson will advocate government intervention in the economic sphere to break the diabolical power “to break down the evil power which competitive industry for profit places in the hands of the least scrupulous competitors” (R. Drake, *op. cit.*, p.23, note 61). There is also the school of Italian realism which proposes an anti-democratic interpretation of political regimes: the latter are in fact the fruit of an elitist rule by which elites organized in lobbying come to oppose each other in order to conquer or influence political power (see Mosca, Pareto in R. Drake, *op. cit.*, p. X-XI; see also R. Drake, “Charles Beard and the English Historians”, *Constitutional Commentary*, Vol. 29 (2014), 313.).

⁵⁴ Bruce Ackerman put it this way: “It’s hard to believe today, but Federalist 10 was not then considered one of Madison's major accomplishments - after all, it is only a newspaper article written in haste during New York's ratification campaign”, in “Oliver Wendell Holmes lectures. The Living Constitution”, *Harvard Law Review*, 120, 2007, p. 1796; see also *We The People, Vol. 1. Foundations*, Harvard University Press, 1991, p. 221 et s.

⁵⁵ Letter exhumed by James O. Wetterau, *Journal of Economic and Business History*, Vol III, August, 1931, from p. 667 to which Beard refers p. 5-6.

⁵⁶ Beard's economic biography of Madison reminds us that he was one of the few constituents who did not hold a state title. A quality that makes Beard say that “*Having none of the public securities, Madison was able later to take a more disinterested view of the funding system proposed by Hamilton*”(p. 67).

immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of 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 and party of faction in the necessary and ordinary operations of the government.”

With the same aim, but not without a certain perfidy, Beard will echo the words of John Marshall, historian turned supreme judge, which he sets out opposite (p.150) in order to better highlight the contradictions that bear the mark of the functions of the person concerned: on the one hand, in his *The Life of Georges Washington*, the historian notes the strong opposition of certain States, dictated by the economic motives of their influential populations; on the other hand, in his capacity as supreme judge, he makes a point of recalling, in a decision that he will decide in 1819 (*McCulloch v. Maryland*), the official doctrine: “It is the government of all; its powers are delegated by all; it represents all, and acts for all.”

In the long tradition of economic materialism and class consciousness inaugurated by James Harrington (quoted p. 15)⁵⁷ and James Madison, Beard will also indicate other sources of even more direct and fruitful inspiration for the foundation of these hypotheses. In the writings of Woodrow Wilson first of all who, in 1898, wrote: “The government has, in fact, been originated and organized upon the initiative and primarily in the interest of the mercantile and wealthy classes, the pressure of a strong and intelligent class, possessed of unity and informed by a conscious solidarity of materia interests” (p. 37)⁵⁸. In Orin Libby's work also and especially (1894), *The Geographical distribution of the vote of the Thirteen States on the federal Constitution 1787-8*⁵⁹, which very directly inspired Beard's intuitions and methodology (see p. 11 and especially chapter 10 where he is abundantly quoted)⁶⁰. In it, Libby questioned the classical thesis of an inter-state divide to underline the importance of internal divisions within states between “sections” or economic groups: “interests were agricultural as opposed to commercial, rural as opposed to urban”⁶¹. Libby also pointed out the structuring dimension played by the creditor/debtor conflict on the cleavage between federalists and anti-federalists, mentioning the debtors' preference for the status quo (and the protection of their side by the States: “shield for the debtor classes”⁶²), against the interests of creditors carried by the future Constitution.

⁵⁷ An English philosopher, James Harrington (1611-1677) developed republican conceptions - based in particular on the principle of representation and the elected bicameral chamber - that would inspire modern representative regimes, including the writing of the American Constitution; and see. G. Hughes, “Les origines harringtoniennes de la Constitution américaine”, *E-rea* [Online], 1.2 | 2003.

⁵⁸ W. Wilson (1898), *Division and Reunion*, New York, Longmans 1898, pp. 12-13, quoted by R. Hofstadter, *op. cit.*

⁵⁹ O. Libby, *Geographical distribution of the vote of the Thirteen States on the federal Constitution 1787-8*, (1894), Madison, University of Wisconsin Press. A remarkable work at the time, of which the historian Frederick J. Turner will be the preface and the mediator (see E. Nore, 1983, *op. cit.*).

⁶⁰ Beard will also be influenced by Charles Henry Ambler's work, *Sectionalism in Virginia front 1776 to 1861*, West Virginia University Press, 1910.

⁶¹ Quoted by E. Nore, 1983, *op. cit.* p. 64.

⁶² *Ibid.*

A proto-quantitativist and deterministic method that lends itself to criticism

Sometimes referred to as the first “quantitativist” in the social sciences, Beard will also be the first to fall into the data trap⁶³. Certainly for strategic purposes, Beard seems to reason as if the primary sources could absolve him from the elaboration of a true theorization of the connections between wealth and power, which would have had the merit of giving consistency and credit to the “theory of economic determinism” to which he clearly adheres (see above). His most recent biographers will be quick to point out the weakness of such an analytical framework⁶⁴. Other critics will attack the reckless generalization of the causal links that the book uncovers between economic holdings and constituent votes. Beard had tried to counter this criticism, acknowledging at the outset of his book that he did not have sufficient data to rule on the link between heritage and the vote of state voters (voters of delegates to state conventions), which would have required the economic biographies of the 160,000 citizens involved in the process (p.16).

Shortly after the publication of Beard's book, John Latané used the same records of state funds to demonstrate that voting is determined less by the possession of securities than by the voter's membership in a group (*constituency*)⁶⁵, a proposition that Beard would find convincing and would take up in his next book, *Some Economic Origins of Jeffersonian Democracy*, not without instilling an ex post vagueness in the interpretation of his first analysis⁶⁶.

Methodological criticism has also focused on other forms of approximation that would discredit his analysis: for example, from Orin G. Libby, who criticized Beard for estimating the volume and value of government securities held by actors in 1787 (for which registers were missing for that year) based on the 1790 registers, even though the advent of the Hamiltonian system may have changed expectations and increased the ownership of securities⁶⁷.

If the methodological flaws of *An Economic Interpretation ...* are significant and the criticism in this respect is often quite legitimate, if for the same reasons the notion of “thesis” may seem difficult to accept, the fact remains that what makes the Beardian hypothesis has more than one merit, particularly in terms of the analysis of the constitutional phenomenon. First of all, it opens the legal and formalistic reading of the Constitution to extra-legal interpretations, drawing on both history and economic facts. If, in this respect, the role of economic factors in the uses and interpretations of a constitution is once again being questioned, Charles Beard had already put forward his hypothesis in his study on *The Supreme Court of the United States and the Constitution* published in 1912, and this is what makes it even more interesting, because he perceived the sensitivity of the judges to historical contexts and political stakes⁶⁸. To unfurl the

⁶³ M.-F. Toinet, “A propos de *Une relecture économique de la constitution des Etats-Unis* de Charles Beard”, Communication to the 1st Congress of the *French Association of Constitutional Law*, 1990. We would like to thank Jean-Yves Chérot for providing us with a digital copy of Marie-France Toinet's typed text.

⁶⁴ This critique is notably that of the contemporary authors of Beard. See in particular Ellen Nore, 1983, *op. cit.*, p. 51.

⁶⁵ Attempting to explain why a considerable proportion of titleholders voted against the Hamiltonian system in 1790, Latané wrote in 1914 that these players “*represented the dominant economic interests of their respective constituencies rather than their personal interests*” (quoted by E. Nore, 1983, *op. cit.* p. 64).

⁶⁶ Ch. A. Beard, *Some Economic Origins of Jeffersonian Democracy*, New York, MacMillan, 1914.

⁶⁷ The criticism here comes from Orin G. Libby, *Mississippi Valley Historical Review*, 1 (jun.1914) p. 113-117.

⁶⁸ Ch. A. Beard, *The Supreme Court and the Constitution*, MacMillan, New York, 1912: “Examine the rolls of the conventions that ratified the Constitution after it came from the Philadelphia convention and compare them with

thread of Beardian's intuition, to comment on and contextualize the reception of his work over time, is an invitation to pursue the questions he has had about the links that unite - or, depending on how they are disunited - constitutionalism, capitalism and democracy. Indeed, for Beard, as for the economists with whom he worked and with whom we can see a kinship (Veblen, Hobson, Seligman, etc.), the greed and the search for a valorisation of wealth by a minority of possessors that accompanied capitalism could only pervert democracy, the search for the common good, the less unequal distribution of wealth, the promotion of peace. Under the aegis of a constitution that is deemed to be immutable, judges, when interpreting the constitution, would therefore not only play a passive role in the legal accompaniment of relations between the State and the economy.

2. The double “Beardian silence” on context

Although we cannot be sure that Beard's approach is homogeneous from this point of view, in any case he does not only ignore the economic context of the time of the drafting and ratification of the American constitution, but also the economic, social and legal context in which he himself wrote his work, whereas in both cases this context provides elements of understanding, explanation or discussion of his thesis.

Developments without any historical perspective

In the presentation of the arguments, the lack of contextualization - primarily economic - of Beard's analysis is obvious. Relying on primary sources that in themselves could only offer a heterogeneous and incomplete panorama of the period, Beard failed to broaden the focus to provide the reader with a more substantial perspective on the context in which the actors and groups were evolving, a perspective that would not have harmed the historical materialism of the “New History” he claimed to be part of. However, the context following the Civil War and preceding the Philadelphia Convention, and then that accompanying the campaign to ratify the Constitution (1787-1789), was anything but trivial and neutral with respect to the interests of the elites.

Congress was then totally manipulated by private interests, particularly in the railways or bribes, and partisan corruption gave rise to legislative acts of pure complacency. The political and legal instability of the time - including property rights - favoured certain groups, but severely damaged the business climate, dragging down rates of investment and economic growth. Currency instability was also profound, marked by episodes of inflation - culminating in the hyperinflation of 1779-1781 (resulting from the issuance of money by the Intercolonial Congress, and by states to finance insurrection against British troops, as well as supply difficulties) and currency devaluation. Moreover, the “financial anarchy” is particularly worrying⁶⁹, as the financial crisis is further complicated by the asymmetry between countries⁷⁰. The fall in agricultural prices aggravates the situation of heavily indebted farmers, prompting

the rolls of the legislatures that had been assailing the rights of property. It was largely because the framers of the Constitution knew the temper and class bias of the state legislatures that they arranged that the new Constitution should be ratified by conventions” (p. 79).

⁶⁹ As Libby (*op. cit.*), William K. Boyd (1913) criticized Beard for failing to account for the “financial anarchy” that prevailed at the time, which certainly had had more influence on voter orientation than the risk of depreciation of government securities: see W. K. Boyd, *South Atlantic Quarterly*, 12 (1913), p. 269-273.

⁷⁰ Cowen David J., *The origins and Economic Impact of the First Bank of the United States, 1791-1797*, New York/London, Garland, 2000.

some States to monetize their debt by issuing paper money that is quickly devalued. This crisis is affecting inter-state trade, with some States resorting to customs tariffs to cope with the fall in revenue, which is exacerbating the economic crisis and threatening to break up the confederation⁷¹. The crisis is also fuelling revolts, which will be one of the reasons for the demand of the upper classes for greater power and an anti-inflationary policy enshrined in the constitution⁷². Also passed over in silence by Beard are the economic divergences between States (fiscal and monetary inequalities, trade wars) which will nevertheless draw deep divisions at the time of the constitutional debate as well as in the years that will follow⁷³.

Among Beard's contextual oversights, two points of economic discord, dividing the interests of the elites as well as their doctrines, would have deserved further quotation. The first is Hamilton's plan to federalize state debts (along with the creation of a national bank closely linked to the government), which will (more than Beard shows) divide the founding fathers. In contrast to the transfer of the power to mint money (and to regulate its value and that of foreign currency) to the federal government, which will be enshrined in the constitution, Hamilton's solution of assuming debts in a federal debt will crystallize the oppositions between the constituents as well as between the states. In the constitutional debate, the heavily indebted colonies of the north and the middle faced the refusal of the colonies of the south, which remained much more virtuous in this matter⁷⁴. On the side of the founding fathers, the British-inspired Hamiltonian option was anything but consensual, accused by a majority of wanting to resurrect the British Leviathan in the form of an over-indebted federal government. It would meet with the opposition of Benjamin Franklin, who was in favour of depreciating all debts through inflation, as were Jefferson and Madison, who would become defenders of rural interests, advocates of a modest landowner economy and of debt limitation, as they would be criticized by the *Paper men* and other speculators⁷⁵.

Another deep and enduring fault line that Beard fails to contextualize concerns the constitutional recognition of property rights⁷⁶. While in England at the time the question of both the natural and theological foundations of property rights agitated and pitted thinkers from Locke to Hume and from the mercantilists to the physiocrats⁷⁷, American constituents consider ownership on a case-by-case basis, explaining that initially there is no clause on ownership in general. Section 8 of Article 1 of the Constitution thus gives the United States Congress powers that may affect the free exercise of the right of ownership: “*The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States*”, “*To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*”, or to ensure “*to Authors*

⁷¹ *Ibid.* and L. Desmedt, “Dette et fiscalité des jeunes Etats-Unis : les oppositions entre les Pères fondateurs”, *L'économie politique*, Vol. 61, No. 1 (2014), p.7-20.

⁷² P. Dockès, *Le capitalisme et ses rythmes, quatre siècles en perspective*, Vol. 1, *Sous le regard des géants*, Garnier (Classiques jaunes, Economie), Paris, 2019, p. 239.

⁷³ One probable reason for Beard's relative deadlock would be the desire to avoid the intra-State cleavages - which are at the heart of his demonstration - being re-read solely in the light of the cleavages between States, which are more marked by the historiography of his time..

⁷⁴ A historical episode recalled in 2011 by Paul Volker - former director of the US Federal Reserve - to see in the terms of the Eurozone crisis and debt management, a “Hamiltonian moment” (see L. Desmedt, *op. cit.*; see also L. Desmedt, *La mondialisation sans boussole, L'Economie politique*, No.77, 2018).

⁷⁵ Madison's ideas were very temporarily victorious in the Constitution, since the creation of the federal debt and the creation of a central bank capable of supporting debt management were enacted in 1790 and 1791 respectively.

⁷⁶ This omission is all the more surprising since Beard will have long reflected on the question of ownership, and militated for alternative institutional forms to private property (public property, workers' property). See E. Nore, *op. cit.*, 2002.

⁷⁷ See in particular on this point J. Tully, *Droit naturel et propriété*, coll. Léviathan, Paris, PUF, 1992.

and Inventors the exclusive Right to their respective Writings and Discoveries". An important aspect of ownership at the time is recessed in the article which determines the modalities of proportionality of state representation at the federal level. For the counting of the population, slaves had to be counted at the level of 3/5ths of the free persons, but the debate on the inclusion of slaves in the register of "possessions" was heated and what was called the constitutional "compromise" of the 3/5ths left the right of ownership of slaves in the state⁷⁸, confirmed by other clauses of the constitution⁷⁹. It will take a constitutional revision, that of 1865, for slavery to be officially abolished⁸⁰, followed in 1868 by a revision adding a XIVth amendment by which the right of ownership was for the first time formulated in a general way: "(...). *No State shall (...) deprive any person of life, liberty, or property, without due process of law*". At the beginning of the 20th century, the Supreme Court's interpretation of this amendment created a very tense and long-lasting legal and political climate - until Roosevelt's *New Deal* - which Beard ignores in the presentation of his thesis. Precisely, it is surprising that Beard did not venture into the other side of economic determination, which would have consisted of comparing the new economic and legal rules enshrined in the Constitution with the economic performance of the period that followed. He could probably easily have stressed the structuring role played by the constitution (in particular through the securing of private property rights) on the return to more dynamic and less chaotic growth, and even on the evolution of the assets of the lawyers he had investigated. This questioning would have openly brought him closer to the then nascent "economic institutionalism". But of the link between what the constitution says and the ensuing economic situation, as well as of the economic stakes carried by the necessary interpretation of the constitution, Beard says nothing here, while other of his writings ensure that he has an opinion on the matter.

Debate on the interpretation of the US Constitution ignored

Beard, in fact, declares himself out of the field of controversy, even if he does not deny that he is, almost necessarily, the product of his time⁸¹. When *An Economic Interpretation...* appears, the interpretation of the American Constitution is a sensitive issue because it conditions, on the political and legal level, the legal acceptability of the economic and social policies undertaken by the federal states and the federal government. Since the end of the 19th century, the effects of development and the acceleration of industrialization have changed work, production and its volumes. The economy has also taken a new direction with the rapid expansion of capital movements and the formation of international exchange networks, which the legal guarantees

⁷⁸ In the middle of the 19th century, a lively debate took place between the reading of a pro-slavery constitution and that of an anti-slavery constitution. See more recently the work of Sean Wilentz, who rehabilitates the revolutionary anti-slaveryism of the end of the 18th century, in the lineage of Lincoln and before him of Madison, S. Wilentz, *No Property in Man: Slavery and Anti-Slavery at the Nation's Founding*, Harvard University Press, 2018; see also Caleb McDaniel who believes that the question of whether the Constitution was pro or anti-slavery is insoluble as it covers other specific questions, *The Problem of Democracy in the Age of Slavery, Garrisonian Abolitionists and Transatlantic Reform*, Baton rouge, Louisiana State University Press, 2013.

⁷⁹ Six original provisions of the U.S. Constitution deal with slavery, such as Section 9 of Article I, which states that "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person", or section 2 of Article IV, which provides that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due"

⁸⁰ "Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction".

⁸¹ See the precision in his preface to the 1935 edition, p. IX.

attributed to the development of industrial and intellectual property law have accompanied and encouraged. The period of the turn of the century and the following decade were also emblematic of the new crises of capitalism of large monopolistic industry and high finance⁸². Depression, deflation or stagnation marked the last years of the 19th century, further hardening the living and working conditions of thousands of workers, peasants and the unemployed, whether men, women or children. The monetary crisis of 1893 first of all, which degenerated into a banking crisis, was accompanied by strong social tensions (strikes and insurrections of the unemployed leading to armed intimidation), strengthening radical and populist parties (People's Party, anti-gold standard), such as the combat unions (*Industrial Army*)⁸³. The social conflicts are hardening and clashes cause dozens of deaths punctuating some strike movements. Social and economic criticism develops, both in the press, to which we owe, for example, the idea of “robber barons” to designate those captains of industry who amass capital on the back of labour⁸⁴, and in intellectual and academic circles where the deadly effects of industrialization and economic change are brought to light⁸⁵. The currency crisis also fuelled a battle over the gold standard system, claimed by the Republicans (representing East Coast financial interests), fought by the Democrats, who were also opposed to inflation. Closer to the publication of *An Economic Interpretation...* and even more violent, the crisis of 1907 was to mark Beard's thinking. The crisis was originally a liquidity crisis fuelled by speculators (incidentally revealing the acute problem of the absence of a central bank) which led to bank failures, a credit crunch and soaring unemployment. As a counterpoint, it fuelled an awareness of the role of speculation and financial trusts in exacerbating the crisis⁸⁶, of the exaggerated power of the large private banks - including Morgan, which positioned itself as a “monopolistic private regulator”⁸⁷ - of the power of what public opinion would then call the “plutocracy”, and whose excesses would play a key role in the decision to create the Federal Reserve System (central bank) in 1913⁸⁸.

The urban and workplace violences and social misery that accompany industrialization are also reaching the sensibility of the political world. At the local level first of all, within the framework of federated states, some of which are inclined to set limits on the power of entrepreneurs and industrialists. But, and it is at this point that Beard's contribution is of interest, these state interventions have almost always been declared unconstitutional by the Supreme Court of the United States, from 1897 to 1937, the judicial period to which the famous *Lochner* decision of 1905 gave its name, emblematic of a liberal economic interpretation of the Constitution⁸⁹.

The broadly liberal interpretation of the Constitution began with the *Allgeyer v. Louisiana* decision⁹⁰ where, with the unanimity of the nine judges of the Court, the term “liberty” in the

⁸² P. Dockès, *op. cit.*, p.398-403. See also J. Atack, P. Passell, *A New Economic View of American History*. NY: W.W. Norton, 1994, 2nd ed., p. 714.

⁸³ Crisis including Charles A. Beard was a direct witness in Chicago, where he stayed a few months for a research in practical sociology.

⁸⁴ “*The Robber Baron*”, appeared as early as 1859 in the New York Times.

⁸⁵ See the various figures of the American intellectual current in 1890 and 1920 described as the “progressive era” and which includes economists (Edwin Seligman, John Commons), philosophers (John Dewey), historians (James Harvey Robinson, James Turner), and so on.

⁸⁶ In the 1890s, despite the Sherman Antitrust Act, there was an explosion of concentrations. The “trustified economy” will represent between 50 and 90% depending on the sector at the turn of the century (see P. Dockès, *op. cit.*, p. 401).

⁸⁷ P. Dockès, *op. cit.*, p.403.

⁸⁸ R. F. Bruner, S. D. Carr (eds.), *The Panic of 1907: Lessons Learned from the Market's Perfect Storm*, Hoboken, New Jersey, John Wiley & Sons, 2007.

⁸⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹⁰ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

famous *Due Process* clause of the XIVth Amendment to the Constitution⁹¹ was interpreted in an unprecedented way as including freedom of contract⁹². Its constitutionalization makes it possible in practice to obstruct the law of a state prohibiting foreign insurance companies from doing business in that state if they are not incorporated there, which in practice had the effect of excluding the activity of foreign companies on its territory⁹³. In 1905, the *Lochner* judgment gives full effect to freedom of contract with the following wording: “*There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker*”. No limitation of working hours by decision of the State, therefore. Contractors are thus allowed to make their employees work as much as they wish in order to make greater profits, whether they are bakers (as in the *Lochner* case), ship-owners or industry managers. No minimum wage⁹⁴, no limit on contractual practices prohibiting employees from joining a trade union⁹⁵, no regulation of child labour⁹⁶, etc., were the main effects of the US Supreme Court rulings until 1937⁹⁷.

Abundantly commented on since then, the *Lochner* judgment seems to be the consequence of a specific economic theory⁹⁸, since it leads to the nipping in the bud of almost all attempts by States to draw up economic and social legislation since it would have the effect of limiting contractual and entrepreneurial freedom. As David A. Strauss pointed out, in the competition for the most criticized case among American constitutional scholars, the *Lochner* decision, despite the competition, would likely win first prize⁹⁹. It would thus constitute the “anti-precedent” par excellence. That it expresses an “anti-social” philosophy is little doubt in the context of the times. But, while it should perhaps be recalled that the vision of freedom on which it is based has not disappeared today - or even been reinforced and spread to other countries and courts of law¹⁰⁰ - it should also be noted that the *Lochner* decision and the debates

⁹¹ “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

⁹² *Allgeyer v. Louisiana*, 165 U.S. 578 (1897): “The ‘liberty’ mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned”.

⁹⁴ *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

⁹⁵ *Adair v. United States*, 208 U.S. 161, 178 (1908) et *Coppage v. Kansas*, 236 U.S. 1 (1915).

⁹⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁹⁷ *West Coast Hotel Co. v. Parrish*, 300 US 379 – 1937.

⁹⁸ John Commons will see in the *Lochner* case, which he will comment on, the affirmation of a Supreme Court that he describes as “the first authoritative faculty of political economy in the world's history”, in *Legal Foundations...*, *op. cit.*, p. 7.

⁹⁹ D. A. Strauss, “Why Was *Lochner* Wrong?”, *The University of Chicago Law Review*, 70, 2003, p. 373.

¹⁰⁰ Like the French Constitutional Council which, on 13 June 2013, handed down a decision enshrining the principle of contractual freedom to the detriment of the application of the principle of solidarity which is at the basis of any mutualist system, a system which was concerned by the law whose constitutionality had to be decided or not (2013, n° 2013-672 DC, *Loi relative à la sécurisation de l'emploi*). As Thomas Perroud rightly pointed out, the proximity to the *Lochner* decision is striking. See. Th. Perroud, “Un choix de société du conseil constitutionnel: la liberté contractuelle contre la solidarité”, *JP blog*, February 2017 (<http://blog.juspoliticum.com/2017/02/20/un-choix-de-societe-du-conseil-constitutionnel-la-liberte-contractuelle-contre-la-solidarite/>). From this point of view, the *Lochner* decision is not only of historical interest. In the same way, the principle of the *Allgeyer vs Louisiana* ruling resonates quite strongly in the ruling of the Court of Justice of the European Union of December 11, 2007, *Viking*, case C-438/05 by which the Court declared contrary to the Treaty the invocation of national social law (exercise of the right to strike) which would hinder the principle of free establishment of an entrepreneurial activity in a country of the European Union.

that it gave rise to are part of an older American tradition that highlights the question of the interpretation of legal texts (including the constitution) and the role that judges play in this interpretation¹⁰¹. If the judge's power of interpretation was already discussed in the 19th century, since the Supreme Court had imposed itself as a judge of the constitutionality of rules with the *Marbury vs Madison* decision written by Justice John Marshall¹⁰², then President of the Court, it is, with the *Lochner* decision, the object of a new controversy: the interpretation of the 5 majority judges of the Supreme Court is, in the economic and social context of the time, questionable in the eyes of many contemporaries¹⁰³. The dissenting opinion of minority judge Oliver Wendell Holmes¹⁰⁴ which appears following the judgment, lays the groundwork for a debate. In his opinion, Holmes identifies very clearly the economic and social vision that would be at work among the majority judges, stating that the XIVth Amendment does not validate Herbert Spencer's "Social Static" and that, in any case, the role of the constitution is not to carry a particular economic theory, whether that of industrial "paternalism" or that of "laissez-faire"¹⁰⁵. The reference to Spencer is interesting: known to have initiated the idea later called "social Darwinism" (against Darwin himself, by the way), his book *Social Statics*, one of the first he published in 1850, sees in the reduction of the role of the state to the police and defence against foreigners the best possible social organization. Holmes was right: if interventions on the economy for social purposes were systematically invalidated by the Supreme Court until 1937, the official end of the so-called "*Lochner* era" and of the constitutional obstacle to Franklin D. Roosevelt's *New Deal* policy, the reasons linked to a state's policing mission (public

¹⁰¹ The theme of the interpretation of the Constitution is central in American constitutional law: it often appears at the top of constitutional law textbooks, contrary to the European tradition, which still and essentially has an institutionalist reading of constitutional law.

¹⁰² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The then President of the United States Thomas Jefferson (to whom the judgment was unfavourable) was very critical of the judgment and of John Marshall, see for a complete expression of this criticism his letter to William Johnson of 12 June 1823. (<https://founders.archives.gov/documents/Jefferson/98-01-02-3562>). Voy. aussi "Louis H. Pollak, *Marbury v. Madison: What Did John Marshall Decide and Why?*", *Proceedings of the American Philosophical Society*, Vol. 148, No. 1 (2004), p.1-13.

¹⁰³ See for example E. Freund, "Limitation of Hours of Labor and the Supreme Court", *Journal of Political Economy*, Vol. 13, No. 4 (Sept., 1905), pp. 597-599 (p. 598): "The importance of the decision must, therefore, be sought, not in the enunciation of a new or valuable theory of individual rights – although the emphasizing of the freedom of contract in labor relations as a constitution right is worthy of notice – but in judicial attitude which it represents. The case strongly illustrates the growing assertion of the judicial prerogative to declare laws unconstitutional, because a particular legislative measure does not meet the views of the court as to what is reasonable or necessary regulation. (...) it would be difficult to find an illustration of more offhand and superficial treatment of difficult economic problems than the discussion here presented of the conditions of the baker's occupation" (pp. 598-599). Speaking of the power of the courts in general, and while we are at the beginning of the *Lochner* era, William F. Dodd considers that "The courts have now definitely invaded the field of public policy and are quick to declare unconstitutional almost any laws of which they disapprove, particularly in the fields of social and industrial legislation", "The Growth of Judicial Power", *Political Science Quarterly*, Vol. 24, No. 2 (Jun., 1909), pp. 193-207 (p.194). The American jurist Louis B. Boudin, defending a Marxist approach (he published a study in 1907 entitled *The Theoretical System of Karl Marx in the light of recent criticism*), published in 1911 "Government By Judiciary" (*Political Science Quarterly*, Vol. 26, No. 2 (1911), pp. 238-270), an article in which he endeavoured to show that the Supreme Court, or rather the judges who sit on it, have given themselves powers greater than those conferred on them by law. He analyzes in particular the series of decisions rendered by the Supreme Court since the *Lochner* decision (p.266-267).

¹⁰⁴ It should be recalled that Oliver Wendell Holmes was appointed in 1902 to the Supreme Court by President Theodor Roosevelt, and was not yet a judge in the *Allgeyer vs Louisiana* case cited above in 1897 where the Court unanimously recognized that freedom of contract is protected by the due process clause of the XIVth amendment to the U.S. Constitution.

¹⁰⁵ "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics", and, "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire", *Lochner v. New York*, 198 U.S. 45 (1905), Dissenting Opinion by *Oliver Wendell Holmes, Jr.*

health, for example) could be admitted, even if very sparingly on the part of the Court. For example, the limitation of women's work is accepted on public health grounds¹⁰⁶, and a Statute that limits the work of workers in underground mines is upheld¹⁰⁷. The reality of the adherence to Social Darwinism by members of the US Supreme Court may have been debated or qualified¹⁰⁸, but the Court's interpretation of the Constitution over nearly four decades has been both consistent and almost always an obstacle to improving the status of workers through legal rules¹⁰⁹. The *Lochner* decision was a tacit support for economic liberalism, or non-interventionism by the state.

Although a supporter of the thesis of the Living Constitution, which calls for a detachment from the theoretical, even ideological constitution, Judge Holmes was not, however, sensitive to the idea of an economic interpretation of the constitution proposed by Charles Beard, which thus operated a kind of return to the origins of the drafting of the constitution. Holmes considered the work as a non-event and even rather unwelcome¹¹⁰. In the context of the radical-liberal turn taken by the Supreme Court a few years before the publication of Beard's work, the ideological reception of Beard's work could, however, through the proposal of an external analysis of the constitutional text, have nourished the judge's reflections on the meaning to be given to it¹¹¹.

But in order for Beard's work to have an impact on the judicial interpretation of the constitution, several conditions had to be met: firstly, it had to be considered that the judge was not required to oppose individuals and governments to a strict and purely "internal" reading of the constitutional text, but, for the case he was judging, to offer the most shared reading of the text¹¹². Second, that Beard's thesis be "well received", in any event, by personalities likely to influence in and on judicial work; and third, that adherence to Beard's thesis does indeed provide judges with an alternative way of interpreting constitutional provisions.

¹⁰⁶ *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁰⁷ *Holden v. Hardy*, 169 U.S. 366 (1898).

¹⁰⁸ For example P. H. Doran, *Evolution and the Constitution: Reassessing the Influence of Social Darwinism on the Turn-of-the-Century United States Supreme Court (1873-1937)*, Senior Honors Theses, 2005, 140.

¹⁰⁹ Although Boudin published his "Government by judiciary" in 1911, it is generally considered that the Frenchman Edouard Lambert was responsible for the expression "gouvernement des juges" which gives its title to the book he published in 1921 about the United States (*Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, LGDJ, 1921), Americans more readily speak of "judicial activism". Thus, according to Tarek Darwish referring to Yves-Henry Nouailhat (*The United States: The advent of a world power: 1898-1933*, Richelieu, 1973, pp. 97-98), "The reformers in social matters did not only come up against employers and representatives of economic interests who could consider themselves threatened, but also against very strong opposition from the judiciary and the bar"; see. T. Darwish, *Lochner v. New York (1905 US Supreme Court Judgment)*, dissertation under the supervision of professor E. Zoller, Master's degree in comparative public law, University of Paris II, 2014, pp. 81-82.

¹¹⁰ In a letter sent to Harold Laski, Holmes made it clear that "notwithstanding [Beard's] disavowal of personal innuendo, 'An Economic Interpretation' encouraged . . . the notion that personal interests on the part of the prominent members of the Convention accounted for the attitude they took, thus making the book 'a stinke'" : see for this detailed analysis of Justice Holmes' reactions and comments on Beard's work, which he reportedly read in 1916, Edward G. White, "Charles Beard & Progressive Legal Historiography", *Constitutional Commentary*, Vol. 29, No. 3 (2014), p. 359-362.

¹¹¹ A. Vermeule, "Beard and Holmes on Constitutional Adjudication", *Constitutional Commentary*, Vol. 29, No3. (2014), p.457.

¹¹² Unless, in the words of Justice Holmes, a minority judge in the *Lochner* case, another reading were to put forward the resulting contradiction to fundamental principles accepted by popular tradition as being right, a reading that Holmes considers to be that of a "rational and fair man" or even "reasonable man"; see his Dissent cited above in *Lochner*. The reference to the "reasonable man" refers to the drafting of *Lochner* decision by Justice Peckham which said that there is "no reasonable foundation for holding this [curtailed hours of labor]to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker"

The first condition did not seem to be met, since an “open” and lively interpretation of the Constitution was that of the minority Supreme Court judges, including Justice Holmes. The second condition was also not met since, in legal and political circles it turns out that, as Beard himself points out in his preface to the 1935 edition (p. XI), his thesis was not well received at all, either by the majority judges or by minority judges like Holmes.

Even taken to the letter, it seems difficult to draw from Beard's analysis any support for a living interpretation of the Constitution, except by reaction. Charles A. Beard's economic reading of the constitution had indeed the double fault, on the one hand, of shocking the guardians of the temple by questioning the quasi-sanctity of the founding fathers of the American regime, and, on the other hand, at a time when it was perhaps undesirable to insist on the economic aspects of the constitutional rules, to appear to justify the strict interpretation of the Supreme Court judges. Indeed, if it is indeed economic interests that the American constituents intended to preserve, the American Supreme Court would almost be justified in making their protection sustainable over time¹¹³.

This was undoubtedly never Beard's intention, on the contrary, he was a partisan of the living interpretation of the Constitution¹¹⁴, the precursor of “progressive constitutionalism” or “constitutional realism”, of which Turner and Wilson would become the main promoters¹¹⁵. His scientific posture of declaring himself to be outside the controversies of the time may paradoxically have made his work unsuitable for political or legal militant use¹¹⁶.

If Beard, as a progressive social-liberal, no doubt wanted to denounce the economic - i.e. liberal - reading of the Constitution, his own “economicism”, which he claims as the defender of a “theory of economic determinism”, will not have facilitated its reception in the constitutionalist doctrine that was initially and exclusively formed around the liberal idea of the protection of the rights of the people: without this idea, there would simply be no constitutionalism, and therefore no constitutional doctrine.

¹¹³ This is also the thesis put forward by Jean-Yves Chérot (“Une relecture économique de la Constitution des Etats-Unis, Charles A. Beard, *Compte-rendu*”, *Journal des Économistes et des Études Humaines*, Vol. 1, Issue 2 (1990), p. 189–194), and no doubt the explanation of what, as will be explained later, Charles A. Beard is sometimes considered to be a precursor of the liberal current “*Constitutional economics*” (see the American *Wikipedia* page about this current already quoted *supra* note 25).

¹¹⁴ Although the study he publishes on this subject is very late, 1936, one before the end of the *Lochner* era, Ch. A. Beard, “The Living Constitution”, *The Annals of the American Academy of Political and Social Science*, Vol.185, *The Constitution in the 20th Century* (1936), p. 29-34.

¹¹⁵ Frederick Jackson Turner (1938) thus called for a study “behind the institutions, behind the Constitutions”, of the “vital forces” that shape institutions and change the conditions of their application (quoted by A. J. Mehrotra, 2014, *op.cit.*, p. 499, note 75).

¹¹⁶ Charles Beard, however, will be more explicit in the book he publishes the following year, *Contemporary American History, 1877-1913* (New York, Mac Millan, 1914) : A sub-chapter is devoted to “Writing *Laissez Faire* into the Constitution” and the theme of *Laissez Faire* philosophy in American institutions is recurrent in the book: quoting Holmes' dissenting opinion on Spencer's doctrine thus activated by the *Lochner* decision, Beard is nevertheless more nuanced by saying - we are in 1914, that, in any case, the Supreme Court did not invalidate many social legislations. In fact, he is much more critical of the courts of the federated states, which he believes to be committed to the *Laissez faire* philosophy, than he is of the Supreme Court (p. 87).

3. The reception of Charles Austin Beard's thesis in American and European academic circles

Criticized from the outset by the prevailing conservatism for having trampled underfoot the national narrative of the founding fathers' guardian figure, Beard's work reveals an economic vision of constitutional rules, where historians, politicians, and even more so lawyers, have long since constructed a political and formalist model separate from the economy. He shakes up this field by proposing an extra-legal - economic - reading of the constitutional fact. Although he is part of a tradition of constitutional interpretation, Charles Beard does not seem to have influenced constitutionalist doctrine and jurists in general in the United States¹¹⁷.

The difficult reception of the Beardian thesis in American constitutional literature

James H. Hutson asserts that Beard, the historian, had the instincts of a “publicist”, that is to say, one whose privileged object was public law¹¹⁸. But it is understandable that the reception of *An Economic Interpretation...* in the American constitutionalist doctrine could only be limited because it breaks with its very foundation, namely the autonomy of politics from economics. The reception of Judge Holmes himself had been measured, even though he had not been appreciably hostile to it¹¹⁹. Charles Beard is not a lawyer and does not actually seem to write for lawyers. When he published his study on the living constitution in 1936, a thesis at the time in favour of a reversal of jurisprudence in favour of the *New Deal*, he was still publishing in a political science journal and not in law¹²⁰.

The thesis, however, is not unfamiliar to American constitutionalists, especially those with a strong background, but each time its scope is reduced to a historical peculiarity. Bruce Ackerman's famous *We the People*¹²¹, which aims to present the spirit and meaning given to the constitution from the time of its writing until the end of the 20th century, contains in its very beginning a reference to Charles Beard. Ackerman includes it in this progressive movement that will be realized with the *New Deal* and which proposes another way of interpreting the American constitution¹²². He reminds us that this current will be put at a distance in the 1960-70s with the rehabilitation of the founding fathers and the American constitution. A little later in the book, Bruce Ackerman nevertheless attributes to it the posterity of the Madison doctrine

¹¹⁷ The search on the “Jstor” portal leaves little doubt in this regard: more than 4 out of 10 references are attributable to work published in journals in the historical discipline, more than 3 are from “American studies”, and nearly 3 are from political science work. In total, only about 6% of the occurrences are in law journals and 7% in journals in the “Economics” category. The 330 or so references specific to *An Economic Interpretation...* are still 73% due to works in history and American studies, although the “weight” of legal and economic works is this time greater, amounting to 21% and 14% respectively.

¹¹⁸ J. H. Hutson, “The Creation of the Constitution: Scholarship at a Standstill”, *Reviews in American History*, Vol. 12, No. 4. (Dec., 1984), p. 467.

¹¹⁹ See above. The Columbia Law Review seems to be one of the only law journals to have published a review of the work as early as 1913. The review, which was fairly favourable, was written by the jurist Thomas Reed Powell, who, because he believes that, since it was written, the Constitution has been interpreted independently of the original intentions of its authors, consequently states that “The significance of this volume is for the historian and the political theorist rather than for the constitutional lawyer”, *Columbia Law Review*, Vol. 13, No. 7 (Nov., 1913), pp. 659-66 (p. 660). About Thomas Reed Powell, Erwin N. Griswold states in the *Harvard Law Review*, for which he published a tribute after the professor's death, that “his mind was not sufficiently orthodox and rigid to meet the standards of the teachers of its time. His was always a questing mind, not content with rules, but always going behind them, seeking premises, and exposing fallacies”, Vol. 69, No. 5 (Mar., 1956), pp. 793-796 (p. 796).

¹²⁰ See below.

¹²¹ B. Ackerman, *We The People, Vol. I. Foundations*, Harvard University Press, 1991.

¹²² B. Ackerman, *We the People, op. cit.*, p.228 et “Oliver Wendell Holmes...”, *op.cit.* p. 1796.

in the history of constitutional thought, in particular from the famous “No. 10” exhumed by Beard, which he formulates in these terms in a study devoted to Judge Holmes: “*It’s hard to believe today, but Federalist 10 was not then considered one of Madison’s major accomplishments - after all, it is only a newspaper article written in haste during New York’s ratification campaign*”¹²³. Another contemporary American constitutionalist, Cass Sunstein, published in 1987 an article entitled “The Beard Thesis and Franklin Roosevelt”, giving Beard a certain visibility in constitutionalist literature. He historically admits that “*the progressive historians were correct in pointing to the central importance of controversial understandings of private property to the original constitutional regime, and the ways in which those understandings have been repudiated in modern political and constitutional thought*”. But, he concludes, in line with the post-war American doctrine, that “*Beard and his followers were far too crude in this regard, and they undervalued the breadth and the power of central features of the Framers’ vision*”¹²⁴. In other words, and despite these two contemporary references to Charles A. Beard, there seems to be no question of constitutionalist doctrine rethinking or reassessing the basis of constitutional thinking on the basis of the historical facts revealed by Beard in *An Economic Interpretation*...¹²⁵. In fact, the Constitution and constitutional law are today thought and taught as if Charles Beard’s thesis did not exist or, at best, would have only anecdotal value¹²⁶.

However, in an enlightening study of the constitution-making process, Jon Elster found that: “*While few today would defend the Beard thesis that the framers at the Federal Convention were motivated mainly by their own economic interests, statistical analysis of the vote patterns suggests that these interests have some explanatory power*”¹²⁷.

The impossible reception of the Beardian thesis in European constitutional literature

Little known to European historians, *An Economic Interpretation*... is logically almost unknown to European constitutionalist literature. A few years after the publication of the book, the Frenchman Edouard Lambert presents in France his thesis on the government of judges without making any reference to Charles Beard¹²⁸. Strictly speaking, there is no analysis of the motivations of the constituents in Europe that would specifically seek or make it possible to find an economic explanation for the Constitution¹²⁹, but only political and social analyses

¹²³ B. Ackerman, « Oliver Wendell Holmes lectures. The Living Constitution », *Harvard Law Review*, vol.120 (2007), p. 1796; and *We The People*..., *op. cit.* pp. 221 et s.

¹²⁴ C. R. Sunstein, “The Beard Thesis and Franklin Roosevelt”, *George Washington Law Review*, Vol.56 (1987), p.123.

¹²⁵ And in its largest study of “Constitutionalism after the New Deal” (published at the *Harvard Law Review*, Vol.101, No. 2 (Dec., 1987), pp. 421-510), Cass R. Sunstein doesn’t quote Beard once. See for the same observation the study of the legal theorist L. B. Solum, “Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate”, *Northwestern University Law Review*, Vol. 113, No. 6 (2019), pp.1243-1296.

¹²⁶ American constitutional law textbooks, many of which are organized around the theme of constitutional interpretation, make no reference to it.

¹²⁷ J. Elster, « Forces and Mechanisms in the Constitution-Making Process », *Duke Law Journal*, Vol. 45, No. 2 (Nov., 1995), p. 364-396 (p. 377).

¹²⁸ E. Lambert, *Le gouvernement des juges* ..., *op. cit.*

¹²⁹ But see Jon Elster, cited above, who, without carrying out a systematic and wide-ranging study, does not neglect the question concerning the constitutions of Central and Eastern Europe. See in another perspective, S. Milacic, for his masterly study on “La constitution soviétique du 7 octobre 1977 comme discours de politique internationale: de la constitution comme soutien idéologique de la stratégie internationale de l’URSS”, in *L’Union Soviétique dans les Relations internationales*, Economica, 1982, p. 129 et s.

along these lines, such as that of Ferdinand Lassalle in 1848, which Beard quotes. Beard's work has, however, been translated: an astonishing fact compared to what happened in the United States with the post-war break in consideration for Beard, the first translations date from the 1950s. It seems that we owe the first one to the South American continent since a Spanish version was published in Buenos Aires in 1954¹³⁰, before a version in Italian in 1959¹³¹, in German in 1974¹³², and in French in 1988¹³³. A noteworthy fact about the French translation is that the only known review is due to a jurist¹³⁴, which could illustrate and augur an interest in and discussion of this thesis, but although it was republished in a constitutional law journal after its first edition in an economic journal little known to jurists¹³⁵, the discussion did not in fact take place. The author of the review himself minimizes the scope of the work by considering it only as a historical insight¹³⁶. The possible contribution of Charles A. Beard's work would thus be reducible to a historical interest, an interest that is itself definitively stuck in the time that concerns him. In 1990, the political scientist Marie-France Toinet also presented a contribution to the 1st Congress of the French *Association of Constitutional Law* entitled “A propos de *Une relecture économique de la constitution des Etats-Unis* de Charles Beard”¹³⁷, which does not open the debate in general, although she said she was counting on future studies on the subject, which would consist of comparing the American and French experiences. Some research shows that Beard's thesis is in fact almost never referred to by European jurists and constitutionalists¹³⁸, because, in any case, in Europe as in the United States, this thesis is in itself inadmissible.

Its incompatibility with the liberal basis of constitutionalism

Indeed, it is political liberalism that is at the very basis of the constitutionalist doctrine. With his analysis, Beard violates the tables of the law of constitutionalism by imprinting on it an original economic mark, the effect of which is to relegate to the background, or even to that of an alibi, the will to achieve a government based on the sovereignty of the people and, above all, capable of allowing equality and freedom to be achieved in the social space and the enjoyment by individuals of their rights to be founded. While the discourses of the constituents do not run counter to this idea, Beard hopes to show, particularly through the thought of James Madison, that they are very closely linked to the question of the foundation of a system of government that would allow the preservation of the well-understood interests of a category of men to which

¹³⁰ This can easily be explained by the strong presence in the region of Marxist thought, which influences the themes addressed by the intellectuals, and thus the theme of capitalism and constitutionalism: Ch. A. Beard, *Una interpretación económica de la Constitución de los Estados Unidos*, Arayú, Buenos Aires, 1953.

¹³¹ Ch. A. Beard, *Intepretazione economica della costituzione degli Statit Uniti*, Flettrinelli ed., Milan, 1959.

¹³² Ch. A. Beard, *Eine ökonomische Interpretation der amerikanischen Verfassung*, Frankfurt Suhrkamp, 1974 (Johann Baptist Muller's preface).

¹³³ Ch. A. Beard, *Une relecture économique de la Constitution des Etats-Unis*, trad. P. Hoffman, Economica, 1988.

¹³⁴ Who is also the author of the concluding remarks of this book.

¹³⁵ J.-Y. Chérot, “Une relecture économique de la Constitution des Etats-Unis, Charles A. Beard, Compte-rendu”, *Journal des Économistes et des Études Humaines*, Vol. 1, Issue 2 (1990), p.189–194, and then *Revue Française de Droit Constitutionnel*, vol. 5 (1991), pp. 147-152.

¹³⁶ *Ibid.* p. 190

¹³⁷ *Op. cit.*

¹³⁸ Particularly little in Germany or Spain, for example, but significantly more in Italy, where constitutional law is still very much linked to political science. In the French case, there are occasional references to Beard's thesis, almost always when presenting or discussing American thought or law (see for example. M. Tourbe, “La conception du pouvoir judiciaire chez Woodrow Wilson. Le réalisme juridique à l'épreuve du gouvernement des juges”, *Jus Politicum*, n° 4 (online) or Ph. Raynaud, *Trois révolutions de la liberté. Angleterre, Amérique*, PUF, coll. Léviathan, Paris, 2009, p. 154).

the founding fathers would have been attached. This is the full meaning of the title of his book: “An” *Economic Interpretation*... not “The” *Economic Interpretation*. Charles Beard refrains from asserting that the American constitution can be explained “only” by the economic motivations of its authors. But constitutions are precisely called “political” in order to appear to escape other contingencies, including economic ones: making them appear as a reality is not only a potential heresy or a coquetry of a certain political ideology (Marxism for example), it is simply an irrelevant part of dogmatic constitutionalism. That is probably why there is so much ambivalence in constitutionalist studies about the European Union: although it presents institutions organized in a political form (an executive, a legislative power and a judge), its initial vocation, which is mainly and explicitly economic, is still very often emphasized¹³⁹. Meanwhile, the analyses of the European Union by constitutionalists who are very attached to the institutional political model (i.e. still the most numerous), avoid talking about economy, either classically interested in the political transformation of the state, or in a more contemporary way in the question of the relations between legal orders¹⁴⁰, as if the capitalist structure and the constitutional structure had no relationship that could be enlightened.

Yet no one doubts the precedence of the principles that govern the drafting of constitutions. The traditional literature mainly emphasizes the principle of the need to limit the arbitrary nature of the power that would ensure the enjoyment of rights, which cannot be altered by the exercise of the power that is now regulated. This is the principle of constitutionalism that emerged from the revolutions of the eighteenth century, which laid the foundations for a reflection on the constitution and the principle of government that is still being carried out today¹⁴¹. Starting from this principle of limitation and taking it for granted, most of the thinking has since focused on the various constitutional arrangements in terms of their ability to effectively limit arbitrariness and enable the enjoyment of rights, making the writing - and also the interpretation - of constitutions a veritable engineering exercise¹⁴². Consequently, any constitution which does not have as its real object the effective limitation of power is disqualified, either by being described as *facade constitution* or by being denied the very qualification of constitution¹⁴³. There is thus an academic paradox: on the one hand, any constitution and any writing of a political document called a “constitution” (which aims to organize power on the basis of this claimed belonging to constitutionalism) are likely to enter

¹³⁹ See recently Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism*, Harvard University Press, 2018.

¹⁴⁰ That is to say, the links, whether competitive, exclusive or complementary, between the standards resulting from the different systems of standards production: the national States on the one hand and the European Union on the other. See, for example, the last call for papers for the next congress of the French Association of Constitutional Law for the Workshop “Ordres constitutionnel, international et européen” (Constitutional, International and European Orders), <https://cfdc2020.univ-tln.fr/atelier-4-ordres-constitutionnel-international-et-europeen/>

¹⁴¹ See for example Ph. Raynaud, “Constitutionnalisme”, in S. Rials et D. Alland (eds.), *Dictionnaire de culture juridique*, PUF, 2003, p. 266. See also M. Barberis, “Idéologies de la constitution – Histoire du constitutionnalisme”, in D. Chagnollaud, M. Troper (eds.), *Traité international de droit constitutionnel*, Vol. 1, 2012, p. 114.

¹⁴² Engineering which, today, tends to be based on an economic analysis of rules -mainly centred on their effectiveness- (James Buchanan) and/or on economic-behaviourist analyses (Thaler and Sunstein), despite the silence on this point by a majority of constitutionalists in Europe. On these questions, see point 4 of this contribution below. And, for a good example of how this engineering can be explained, see R. D. Cooter, *Strategic Constitution*, Princeton University Press, 2002.

¹⁴³ See for example G. Sartori, “Constitutionalism: A Preliminary Discussion”, *American Political Science Review*, 1962, p. 867. The term “sham constitutions” is also used: see for example D. Law et M. Vertseeg, “Sham Constitutions”, *California Law Review*, Vol. 101, No.4 (2013), p. 863, or also that of “constitutions sans constitutionnalismes” (*constitution without constitutionalism*), T. Groppi, “Costituzioni senza costituzionalismo ? La codificazione dei diritti in Asia agli inizi del XXI secolo”, *Politica del diritto*, 2006, p. 187.

the bosom of constitutionalist literature; on the other hand, because of their inability to limit arbitrariness and the lack of real will in this sense on the part of their authors, these phenomena are simultaneously disqualified and would not fall within the scope of constitutionalism.

It is possible that this paradox results largely from the fact that little attention has been paid to the substance of the link - since it is taken for granted in the literature of constitutionalism - between the principle of the will to limit arbitrariness, the enjoyment of rights and the writing of constitutions. Perhaps the reason why there are so many “facade constitutions” is that the constitution itself is only a way of organizing power and not the limitation of power per se. If it is a question of limiting power, the constitution is in fact seen as a means, a consequence of what has been thought or decided before, and not as a means to limit power by itself.

4. A possible economic re-reading of constitutionalism based on the “Beardian thesis”?

The contribution of Beard's analysis to the understanding of the constitutional phenomenon can be questioned in this way: while it is little debatable that once written, the constitution, like any text, detaches itself from its author and leads its own life, one cannot *a priori* exclude the existence of a lasting imprint of the way in which its writing was thought of from its origin. In that it reveals the intentions of the founding fathers of the American constitution, Charles A. Beard would indicate that the constitution does not need to be interpreted or thought out economically¹⁴⁴ since it somehow ensures in itself the primacy of the economic question, from which the political organization only derives¹⁴⁵. In this sense Charles A. Beard may be “foucauldian” before his time, or Foucault may be “beardian” without naming him: in his lectures on biopolitics, he indicates that the 18th century is the place where the passage between the principle of “jurisdiction” and the market replaced it as the place of “truth”, from which the principle of all government, so called “frugal”, then derives. Michel Foucault's thesis, in some respects implicit, is that the writing of constitutions as a new basis for the institution of government marks this fundamental shift from government as a place for the production of law to the market as a regime of truth. It then required mechanisms to guarantee this new arrangement, such as the protection of property as a principle of government action that is still at work.

Constitution as a consequence and as a means to an end

Beard argues that the purpose of constitutional law, like all law, is indeed to regulate property and class relations: “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

¹⁴⁴ As proposed in particular by the famous American judge Richard Posner, who takes an active, not to say activist, economic interpretation of the constitutional text. See, for example, his seminal article, “The Constitution as an Economic Document”, *George Washington Law Review*, 56 (1987), p. 4.

¹⁴⁵ M. Foucault, *Naissance de la biopolitique. Cours au collège de France, 1978-1979*, Gallimard-Seuil, p. 31 et s.

government” (p. 13). Hannah Arendt puts away Charles A. Beard among those who have strived to account for the hypocrisy of the constituents, whether in France or in the United States¹⁴⁶. But, she says, “In politics, more than anywhere else, we have no possibility of distinguishing between being and appearance”¹⁴⁷. The analysis of the interests, objectives or purposes at the origin of a constitution can indeed prove to be delicate¹⁴⁸. In any case, it is not because things are not given to us *a priori* that they can be either suspected of non-existence or deemed unknowable as Hannah Arendt suggests. Research does not always presuppose that things are found; it feeds on hypotheses whose existence is sometimes sufficient to advance a little further in the understanding of things. Not always being able to find out what is at the real starting point of constitutions does not exclude the formulation of hypotheses, as Charles Beard did despite his observation of the incompleteness of his sources. These hypotheses can be bridges between different researches and between different moments in history. It is therefore possible to present elements of contextualization of discourses and practices that can nourish reflection and hypotheses about the existence of intentions on the part of the drafters of a constitution¹⁴⁹. However, although the sources are increasingly numerous, coming from a plurality of disciplines, they do not seem to have given rise to any reflection of this kind and in any case have had no impact on classical constitutional theory.

So if we were to take the Charles A. Beard hypothesis seriously, if only for a moment, it would make constitutional policy the consequence of a choice that is at least partly economic. Widening the thesis beyond specifically economic interests, it could even be said that constitutional policy can always be regarded as a consequence and not as a starting point. In fact, we have never seen a constitution overturn the order from which it derives: the process of overturn must already be substantially initiated for a constitution to reflect it or even complete it. It is not the constitution that produces the overthrow, but it can, or even must, take the measure of it. Constitutional writing is put at the service of choices, orientations, beliefs, or purposes that are both prior to it and almost totally separable.

Through the constitution, it is first of all a question of ensuring the integrity of one or more determined principles, through an adequate design and arrangement of political institutions and organizational principles¹⁵⁰. The life of a constitution then remains intimately linked to what it was made for, within the framework of a given social organization. Even when interpreted by actors who no longer have any organic links with the constituents, especially when a constitution has a long duration, a constitution has effects that do not completely or not fundamentally (if one considers that it is alive) break away from the order it has established. Interpretation produces discourses that do not fundamentally change what is primary. Beard concludes: “the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities” (p. 161). It is thus unlikely that he will finally be able

¹⁴⁶ H. Arendt, *On revolution*, Penguin books, 1963, p. 99.

¹⁴⁷ *Ibid.* p. 98.

¹⁴⁸ In general, there has been little historical analysis of constituent interests and strategies. See, however, S. Milacic, *supra* note 129.

¹⁴⁹ Reference is made in particular to the texts of L. Fontaine, “Le texte constitutionnel est toujours un contexte”, in Fondation Joseph Karolyi (ed.), *Une Constitution, pourquoi faire ?* 2014, and “The original strategisation of constitutional writing (and re-writing)”, in E. Nicolas et J. Guittard, *Les narrations de la norme*, Mare et Martin, 2020 (to be published in french), online (<https://www.ledroitdelafontaine.fr/le-texte-constitutionnel-est-toujours-un-contexte/>), and (<https://www.ledroitdelafontaine.fr/the-original-strategisation-of-constitutional-writing-and-re-writing/>).

¹⁵⁰ As early as the 18th century, there were several constitutional projects among the physiocrats, who thus put forward the links to be structured between politics, law and economics. See for example P. Lemerrier de la Rivière, *Canevas d'un code constitutionnel – Œuvres politiques 1787-1789*, Slatkine Erudition, Genève, 2011.

to dissolve it through a bold and persistent interpretation of its future actors. A “successful” constitution is one that has been put at the service of interests whose primacy is guaranteed by it and by the existing or future social order. And the more symbols the constitution displays, the more likely it appears to be able to fulfil the objectives it was originally assigned. Symbols do not necessarily need to be in apparent connection with the purposes of a constitution, it is sufficient that they provoke adherence to the constitution¹⁵¹. Thus, for example, the Basic Law adopted in Hungary in 2011 expresses the Christian origins of the Hungarian people and highlights the nation and its emblems in such a way that, partly intended to assert the sovereignty of the Hungarian government vis-à-vis the outside world (the European Union and its member countries), it makes it effective by provoking the accession of the members of the nation¹⁵².

Beard's thesis thus makes it possible to focus on what is really sought by writing a constitution. The classic question “what a constitution is for?” does not have a single answer, and in any case not the one that arises from what became, after the writing of the first constitutions, the ideology of constitutionalism. And although Beard's thesis is “historically” accepted, it does not invalidate the still dominant thesis that it is sufficient that the constitution has become, through its successive and lasting interpretations, a text in favour of the greatest number of people¹⁵³. In part, the difficulty of knowing the reality of the objectives and purposes pursued by the drafters of a constitution has made it suspect to claim that a constitution was not made for the greatest number of people¹⁵⁴; it would be a matter of ideology and not science... strange reversal.

However, these beliefs still only concern the “political” constitution, i.e. the one which, most often on the basis of a written document, organizes the exercise of power, also called political, in the sense that it excludes the economic question. Even today, the thesis most often conveyed - and the most seductive - is that a constitution was originally thought of as something exclusively political. What Beard is telling us is that the economic is not separated from the political constitution, just as it can be said after him that not everything that the founding fathers want to do with a constitution is therefore completely separated from it. As Karim Beyekhlef explains, reporting on the thesis of Ran Hirshl, an American constitutionalist, “the process of constitutionalization can be explained as the product of a strategic game between three pre-eminent social groups: the political elite, which seeks to preserve its domination by subtracting certain political processes from the vicissitudes of democratic debate; the economic elite, which

¹⁵¹ See the interesting - yet different - idea of Eivind Smith's *The Constitution as a Screen for Personal Choice* in “The Symbolic Functions of Constitutions” in D. Chagnollaud and M. Troper, *Traité international...*, op. cit., Vol.1, p. 785.

¹⁵² See for example L. Fontaine, *Les évolutions du genre constitutionnel: premiers éléments d'une « radiographie engagée*, Part 5, *L'insularisation constituante à l'époque contemporaine* » (<https://www.ledroitdelafontaine.fr/le-genre-constitutionnel/>).

¹⁵³ And look at the position of U.S. Supreme Court Justice Clarence Thomas, a black American: “Thomas takes seriously the document that Americans’ representatives ratified in 1789 and insists that only Americans’ representatives change it today — not nine unrepresentative lawyers, ephors sitting in a marble palace in Washington”, *City Magazine*, 2007 (<https://www.city-journal.org/html/reading-constitution-right-13012.html>).

¹⁵⁴ It is even rather often admitted by political philosophy - which unfortunately does not often intersect with the political and legal literature on constitutions - that the writing of the latter is the consequence of the recognition of the absence of virtue of men, thus obliged to organize themselves to limit the effects of passions and selfishness... (see for example D. Mueller, *Constitutional Democracy*, Oxford, Oxford University Press, 1997, p. 51). For James Madison himself, men are not angels and are animated by their personal interests and ambitions and this serves as a basis for the functioning of a constitution which must therefore be thought out on the basis of these data (*The Federalist Papers* n° 47, 48 and 51), quoted by M. Barberis, op. cit. Continued in its logic, this observation can also lead us to admit that men are not more virtuous in the very writing of constitutions.

appreciates the constitutionalization of certain freedoms of an economic nature (property rights, mobility, etc.); and the judicial elite, which seeks to increase its political influence and international prestige”¹⁵⁵. The idea of a constitution open to all the winds is fundamentally embarrassing, but it has the advantage of making it possible to take an interest in what men do or want to do, with or without a constitution.

The economic constitution without the constitution

To say that the writing of constitutions seeks to fulfill certain objectives obviously presupposes a belief not only in the relevance of this medium for fulfilling them, but perhaps above all, in the fact that it is the best. This point is fundamental: relying on the constitution as the best means of fulfilling certain objectives presupposes that, if, on the contrary, one does not believe in it or no longer believes in it, the objectives will not disappear, but that other media will be considered more apt to fulfill them, or that it will be transformed according to the measure of its effectiveness. This may also suppose that, with a view to fulfilling certain objectives, the constitution will be considered as a necessary, but not sufficient, condition. This last observation seems to have gained ground, as evidenced by the growing scepticism regarding the capacity of the political constitution to respond to society issues as to social and economic issues: for example, the inability of (political) constitutional texts to promote equality between the members of society or to foster solidarity is pointed out¹⁵⁶.

In terms of economic capacities and “virtualities”, there is a plurality of positions: there are those who, faithful to the precepts of economic liberalism, believe that the constitutions do not include enough rules favourable to the capitalist logic or too many rules that constrain private actors (particularly with regard to the protection of private property, the free movement of goods and capital, etc.); there are those who, in a logic of ordo-liberal inspiration, demand, in addition to the previous rules, a constitutionalization of the macroeconomic policy, aiming at limiting the budgetary margins of manoeuvre and the debt capacities of the States¹⁵⁷; on the other hand, there are those who, on the contrary, and following a logic of regulation or limitation of the scope of capitalism, believe that constitutions are too poor in social, community and/or environmental rights likely to protect individuals or communities from the harmful effects of the capitalist logic¹⁵⁸; and finally, there are those who consider that the role of the constitution

¹⁵⁵ I translate. K. Benyekhlef, *Une possible histoire de la norme. Les normativités émergentes de la mondialisation*, éd. Thémis, 2008, p. 697, about Ran Hirshl, “The Political Origins of the New Constitutionalism”, *Ind. J. Global Legal Stud.*, vol.71 (2004), from p. 78.

¹⁵⁶ For such an observation, see the report on the website of the International Journal of Constitutional Law of a major conference organised in August 2017, “Grand Challenge on Inequality”, Matthew Coe and Zoe Graus, who note the predominance of the theme of scepticism on the question of whether constitutions are indeed the right vectors of change today, particularly in the field of inequalities, <http://www.iconnectblog.com/2017/12/conference-report-constitutions-human-rights-economic-inequality/>

¹⁵⁷ The “golden rule” or budget balance amounts to a mechanism aimed at “automating budgetary choices” by subordinating them to an accounting logic rather than a political logic. See M. Bouvier, “La règle d’or: un concept à construire?” in *Revue française des finances publiques*, Vol. 113 (Feb. 2011), p. V. It is in line with the original neo-liberal project aimed at containing (by means of a national or supranational rule) state interventionism and, upstream, the expression of democracy and popular sovereignty likely to put forward demands in favour of social and labour issues and/or to the detriment of the interests of capital (defended by a private supranational legal system that surpasses national legislation). See B. Amable, “Aux sources néolibérales de l’UE”, *Libération*, 1^{er} avril 2019. The European Budgetary or Fiscal Compact Treaty signed in 2012 provides for the adoption of a Community golden rule which obliges the signatory States (after integration into national law or constitution) to vote for balanced budgets limiting the deficit to 0.5% of their GDP.

¹⁵⁸ Several of the recently revised South American constitutions (Ecuador, Colombia, Uruguay, Brazil, etc.), are distinguished by the recognition of the rights of indigenous communities (language, culture, etc.) to nature, to the

should not take account of the economy or incorporate rules relating to its functioning, within a somewhat more libertarian logic¹⁵⁹. Many jurists today, more or less explicitly, seem to be committed to the economic cause and believe that the constitution must be “more” economic, i.e. either at the service of the economy, or conceived in economic terms and through economic-type analyses¹⁶⁰. From this point of view, the American doctrine and that of northern Europe is already very advanced, where some combine legal and economic analysis, following the example of Cass R. Sunstein: a constitutionalist, he is the bearer, with Richard Thaler, an economist, of a behaviouralist theory¹⁶¹ – the famous “nudges”, incentive rules based on material interest - which has been very successful in the United States and is making progress in Europe¹⁶².

This way of thinking about constitutional rules tends to dispense with the traditional notion of political constitution and to envisage the pre-eminence of another notion, that of “economic constitution”, whose success since the second half of the twentieth century is certain¹⁶³. The two notions are distinct: with that of “economic constitution” it is essentially a question of referring to norms - formal or informal, heterogeneous - which, taken together, can be considered as the fundamental basis of a given economic system (the one that can be analyzed from European law, for example). These norms do not need to be explicitly presented as constitutional in the sense of political constitution; they do not need to be the emanation of public actors, and can derive from the self-regulation of private actors, just as they can emancipate from a strictly national framework to the benefit of a supranational framework; they are conceived as constitutional because they exist as norms structuring a given economic model or vision. By way of example, and in a jumble, we could find a set of rules guiding the interventionism of a central bank, that of market regulators, or the behaviour of financial players, legal guarantees allowing investors to turn to a private supranational jurisdiction in the event of a dispute with a State¹⁶⁴, a series of rules dictating or guiding employment relations (promotions and careers, social dialogue procedures, etc.), or regulations organizing the delegation of public services and public procurement procedures, etc.

Good Life including food, water, health, education, (Ecuador). The stakes and then climate emergencies are reopening the debate in Europe as well. See, for a comparison between national constitutions on this point, and highlighting France's lagging behind in environmental law, <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/l-environnement-dans-les-constitutions-etrangees>.

¹⁵⁹ For example, in 2016, a famous astro-physicist in the United States, Neil deGrasse Tyson, posted on his twitter account a constitution with only one line: “All policy shall be based on the weight of evidence”, which he calls “Rationalia” (@neiltyson).

¹⁶⁰ See the debate published in the *Revue Commentaire* between 2013 and 2015 illustrating these oppositions, a debate between Jean Peyrelevade (“La Constitution contre l’économie”, Vol.144 (2013-2014), p. 841) and Pierre Delvolvé (“Sur la Constitution et l’économie. Dialogue avec Jean Peyrelevade”, Vol. 146 (2014), p. 343) continued by Guillaume Drago (“La liberté d’entreprendre”, Vol.150 (2015), p.395).

¹⁶¹ See R. Thaler, *Misbehaving. The Making of Behavioral Economics*, W. W. Norton & Company, 2015, et C. R. Sunstein, *Simpler: The Future Of Government*, Simon & Schuster, 2013. The “Nudge Theory” or “Behaviorial Economics” is also defended by the two authors as a “Libertarian Paternalism”, *American Economic Review*, Vol.93, No. 2 (May 2003), p. 175, and from the same authors also, “Libertarian Paternalism Is Not an Oxymoron”, *The University of Chicago Law Review*, Vol.70 (2003), p. 1159.

¹⁶² C. R. Sunstein, R. Thaler, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Yale University Press, 2008.

¹⁶³ See J.-Y. Chérot, “Constitution et économie”, in D. Chagnollaud, M. Troper (eds.), *Traité de droit constitutionnel*, Vol. 3, 2012.

¹⁶⁴ One thinks in particular of the project to introduce “private arbitration tribunals” into free trade agreements, which will be one of the stumbling blocks in the negotiation of the agreement between the EU and the United States (TTIP).

The rules making up the “economic constitution” may more or less - and rather less than more - coincide with the political constitution, as exemplified by the legal corpus of the European Union. In his article entitled *La Constitution économique parmi les Constitutions européennes*, Karlo Tuori says the following about the constitutionalization of the European Union: “It may seem natural that the constitutional discourse and thus the constitutionalization started in the economic sphere”¹⁶⁵. In the author's mind, this is “natural” because the European Union was first an economic organization¹⁶⁶, thus making it consider that the economy is in itself the bearer of a constitutional discourse, independently of any political formalization in this sense (but with the essential support of the law).

With the “constitution as an economic document”, on the other hand, it is a matter of affirming, as Charles Beard does, that what forms the basis of the economy, namely the right of ownership, is also a principle that predates the institution of constitutional government that derives from it (p. 160). There is thus a difference in register between “economic constitution” and “constitution as an economic document”, which prompts us to revisit the birth and evolution of political constitutionalism. The writing of political constitutions has in fact put practice at a distance from the norm by regulating it *a priori* and assuming their difference. The constitution then became what was in the norm, and the non-compliant practice, at least in theory, a violation of the norm. The recent notion of “economic constitution” rehabilitates the fact - the practice - by making it a norm, and, in any case, seeks norms elsewhere than in the written political constitution¹⁶⁷. The use of constitutional vocabulary to designate what is not strictly speaking in the written constitution is not so much the effect of a transformation of the constitutional phenomenon as a reflection of what it fundamentally is: a means to an end. It may be recalled that the economist James Buchanan, the leader of the *Constitutional Economics* studies, which consists in thinking rules and institutions - whatever their nature, moreover - on the basis of the satisfaction of the economic interests they ensure, made history when he proclaimed: “*we are all constitutionalists !*”¹⁶⁸. The “constitutional” name of this current is of course misleading and is wrong to create confusion. Charles A. Beard 's work of qualification and deciphering can thus be cited as a precursor of the “constitutional economy” by Buchanan¹⁶⁹, whereas the latter school is fundamentally normative since it is a question of saying what to do. In contrast to Beard, who set out to explain how this was done, constitutional economics aims to highlight the most efficient normative arrangements in economic terms, an analysis that can lead to advocating the elimination of political institutions when they do not offer the hoped-for leverage or neutrality with regard to these aspirations¹⁷⁰.

¹⁶⁵ K. Tuori, “La Constitution économique parmi les Constitutions européennes », *Revue Internationale de Droit Economique*, vol. XXI, No.4 (2011), p. 559-599.

¹⁶⁶ Moreover, he considers that “Lochner was in Luxembourg from the outset: as the guardian of the economic Constitution, the Court of Justice has always been more like the Court in the *Lochner* case than the Court that ruled on the *Warren* case after the Second World War” (I translate), *ibid.* p. 575-576. See also Q. Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism*, Harvard University Press, 2018.

¹⁶⁷ And therefore, unlike a written constitution which would have its origin in the economic interests of its drafters, the interpretation of the “economic constitution” is necessarily in conformity with it. See D.J. Gerber, “Constitutionalizing The Economy: German Neo-liberalism, Competition Law and the ‘New Europ’”, *American Journal of Comparative Law*, Vol.25 (1994), pp. 44-45.

¹⁶⁸ J. Buchanan, “Why Do Constitutions Matter?”, in N. Berggren, N. Karlson, J. Nergelius (eds.), *Why Constitution Matter ?* 2002, p. 12.

¹⁶⁹ See *infra*.

¹⁷⁰ James Buchanan argues for an axiological relativity of institutions. See for example J. Buchanan, “The Constitution of Economic Policy”, in J. Buchanan, *Economics: Between Moral Philosophy and Predictive Science*, College Station, Texas A&M University Press, 1987, p. 303 (his speech when he was awarded the Nobel Prize in Economics by the Suez Bank in 1986); J. Buchanan and G. Tullock, *The Calculus of Consent*, University of

In this same perspective, we can see today that the advocates of writing a constitution that would give the economy its fundamental framework are more often found in the camp of those who want to limit the disastrous effects of the economy¹⁷¹ rather than in the camp of those who want to see it unfold without external limits. Frequently, economic interests see formal written constitutions as potential resources, as illustrated by the debate on the golden rule in budgetary matters, but also as obstacles if they are poorly thought out¹⁷², or may even see them as useless¹⁷³. There are thus several readings of the constitution as a resource, as a brake or as a secondary instrument depending on the interests and groups concerned. The bearers of a “political” vision of the constitution, whether or not it integrates the economic question, are also still very numerous¹⁷⁴.

In any event, the acceptance of the thesis of an economic basis for constitutionalism provides the opportunity to think much more clearly about the actual and contemporary movement of migration of constitutional law from the political state to non-political, non-state, but frequently economic structures. In particular, this is the strong societal constitutionalism thesis of Gunther Teubner, a German professor and legal theorist, which is both an observation and in some respects even a plea for a horizontal distribution of constitutionalism in which the power of self-regulation would be the basis for action¹⁷⁵. This process of regulatory migration and recomposition can also be seen in the work of the new Contemporary International Political Economy¹⁷⁶. It reflects a composite framework for regulating economic globalization, based on a set of heterogeneous standards that are increasingly being developed at the initiative of private actors¹⁷⁷. Because of their origin, but also because of their scale (supranational rather than national), these systems of regulation tend to bypass popular sovereignty in a problematic way.

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Charles A. Beard was accused of economic reductionism, the idea being understood as a defeat of thought. Taking it at its word, on the contrary, by presenting economic interests as “an” element in explaining the writing of the American constitution (“*An*” *Economic Interpretation...*) and without reducing it to a bygone historical possibility, opens up new

Michigan Press, Ann Arbor, 1962, or also, *The Limits of Liberty. Between Anarchy and Leviathan*, Chicago, University of Chicago Press, 1975.

¹⁷¹ See for example P. Jorion et V. Burnand-Galpin, “Inventer une Constitution pour l’économie ?”, in L. Fontaine (ed.), *Lire les constitutions*, L’Harmattan, 2019. See also the constitutional phenomenon thought to be a means of limiting corporate power, A. Lyon-Caen, J.-P. Robé, S. Vernac (eds.), *Multinationals and the Constitutionalization of the World Power System*, Routledge, 2016.

¹⁷² This is in fact the origin of ordo-liberalism.

¹⁷³ See Richard Posner in a text published by the *Slate* website on June 24, 2016: “I see absolutely no value to a judge of spending decades, years, months, weeks, day, hours, minutes, or seconds studying the Constitution”.

¹⁷⁴ See for example the constitutional debates and the writing of constitutions in Central and South America over the last thirty years or so (cf. note 158 and, for example V. Robin-Azevedo, “La Constitution à l’épreuve du multiculturalisme en Amérique latine. Réflexions d’une anthropologue à partir des cas péruvien et bolivien” <https://www.ledroitdelafontaine.fr/actes-de-la-journee-detude-sur-les-perceptions-extra-juridiques-de-la-constitution-partie-1/>).

¹⁷⁵ G. Teubner, *Constitutional fragments. Societal Constitutionalism and Globalization*, Oxford University Press, 2012.

¹⁷⁶ See in particular Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press, 1996.

¹⁷⁷ For example, private regulatory authorities or private international legal systems (arbitration tribunals), which are above national laws, are likely to provide foreign investors with rights superior to those of national citizens.

possibilities for thinking about the nature, extent and functioning of the constitutional phenomenon, both in past history and in the contemporary world. The question of the autonomy of constitutional law arises in particular, and particularly in relation to capitalism¹⁷⁸ whose developments are clearly causing the constitutional phenomenon and the ends it pursues to evolve in concert.

¹⁷⁸ One of the few studies: R. Goldwin (ed.), *How capitalistic is the Constitution?*, American Enterprise Institute, Washington, 1982.