
THE MIDDLE-CLASS CONSTITUTION: A RESPONSE

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I am very grateful to the *Boston University Law Review* for bringing together such a terrific group of scholars to engage with my book, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic*. It is a testament to the work and excellence of the *Boston University Law Review* that they pulled together such an intellectually engaging group of commentators. My deepest thanks also to Professors Markovits, Rahman, Lyons, Epstein, and Somin for taking the time to read the book and comment on it.

Professor Daniel Markovits, with characteristic insight, observes that my argument is distinct from both the unconventional view that money is power and the conventional view that money buys power. Rather, I recognize the truth in both and argue that the “economic perversions” of American democracy today are “distinctive and contingent.” He also astutely observes that middle-class constitutions are fundamentally liberal, in their “insistence on formal equality of political participation,” among other things, and that class warfare constitutions are fundamental illiberal because they “violat[e] formal political equality” in acknowledging and accounting for the differential power of economic classes. These few observations capture much of the spirit and thrust of the book. Without understanding the relationship between money and power (and going beyond the narrow view that money corrupts only through campaign channels), we cannot actually grapple seriously with the problem. Once we understand the scope of the problem, it also illuminates constitutional design choices that have long been ignored—namely, the divide between class warfare and middle-class constitutions.

At the same time, however, Professor Markovits points out that my “cure mistakes the depth of [my] own diagnosis” because the constitutional structure itself is distorted by the problems of inequality. In other words, if the system is so rigged by the power of money (in both forms) and if it is based on a middle class constitutional choice that is premised on formal equality, then how could it ever be possible to reform the system? This is a good question. In the book, I tried to anticipate and respond to this challenge, though perhaps unpersuasively. First, throughout history there have been moments when reform was possible, even in the midst of a relatively captured government. Acute crises, for example, frequently lead to major changes—the Great Depression and reforms of the New Deal are perhaps the paradigmatic example. Second, popular mobilization coupled with reform-minded leaders has also led to change. The reforms of the Progressive Era fit this pattern. So despite the seriousness of our problems, I remain optimistic that reform is still possible.

Professor Sabeel Rahman also offers much that I agree with. He notes that the Progressive Era search for solutions to the problems of the Gilded Age were about domination broadly construed, not economic inequality narrowly understood. I completely agree. Because Progressives recognized that domination came from the exercise of economic power, not just from money buying power, for example, they invented antitrust laws to break up concentrations of power. Rahman also argues that we should care about economic equality not only to preserve democratic institutions (the core of my argument) but also because democracy allows us to “contest those very background structures of economic inequality and domination.” I agree with this too. Democracy is radical because it gives we the people the freedom to organize ourselves. This is a core insight of American political and legal thought, but one that is too often forgotten today. We decide the rules of the system—and we do it through democracy.

Professor Rahman suggests that I think we can make economic reforms *after* efforts at racial and gender inclusion succeed, and he disagrees. He argues that reforms need to happen and are happening today in an integrated fashion. I think Rahman misreads my argument here, because I largely agree with Rahman on this count as well. In the book, I argued that efforts at economic reform often came after efforts at inclusion and that the former failed. Reconstruction, for example, brought (formal) political and civil rights, but not economic justice. My point was not prescriptive, that attempting to bifurcate these goals and sequence them is the right path forward. Rather, it was descriptive, that people throughout our history recognized that economic equality and inclusion were connected, fought to achieve both aims, and often failed when it came to their economic agenda. Rahman’s position is to try to make integrated change—to build alliances across race and gender in order to achieve political and economic reform together. Of course, throughout history many efforts along these lines often failed as well (the Populists in the 1890s are an example), but like Rahman, I also think this seems like the more promising path forward today.

Professor David Lyons had similar concerns. He notes that I recognize a variety of qualifications to the middle-class tradition in American republican thought, and he presents them starkly and systematically: the problems of inclusion, the inefficacy of the safety valve of western lands, the ideology of white supremacy, the reality of class conflict, and the wealthy being divided between North and South for much of history.

I agree that these are important qualifications, and at various points in the book, as Lyons recognizes, I mention them (though I did not comment explicitly on the fact that the wealthy were divided between the North and South, which is an important point). The implicit critique embedded in Lyons’s response is that the collection of these qualifications undermines the thrust of the book’s argument. But I don’t think it does for three reasons. First, my task in the book was to describe what the people themselves thought their project was, what they were doing, and what their ideology was. This is a far cry from evaluating them with hindsight or moral principles in mind. For example, they might have

thought Western lands were a safety valve for inequality and relied on that fact in policymaking, even if the expansion West wasn't effective at serving the safety valve function. Second, understanding the middle-class tradition is important today, even with its qualifications and limitations, because it establishes a set of aspirations and traditions that can both inspire action and provide foundation and guidance for action. Third, as in my response to Professor Rahman, these limitations and qualifications can also suggest alternative paths forward for reform.

From the other side of the political spectrum, Professor Richard Epstein argues that I overstate the importance of economic inequality, ignore the decline in economic growth, and downplay polarization. Perhaps unsurprisingly, I disagree. Some of his arguments rely on anecdote rather than evidence, as when he cites the presence of rich people on the right (Koch brothers) and left (Soros), rather than the extensive political science research that shows that wealthy people and corporate interests not only have different views from everyone else but also that public policy is far more responsive to them than to ordinary people's preferences. His oft-repeated arguments about how regulations are the source of our economic problems are rhetorically common these days but I don't think they hold up very well. As one example, George Mason economist Alex Tabarrok has recently published a paper showing that federal regulations are not causing the decline in dynamism in our economy.¹

More broadly, his view that government regulation is the problem when it comes to economic growth and the distribution of wealth seems, to me, to be at odds with both history and common sense. The dominant ideology of the last forty years has been a neoliberal one focused on deregulation, privatization, liberalization of trade, and fiscal austerity and tax cuts for the rich. The result of these policies—pushed and celebrated by both Republican and Democratic congresses and presidential administrations—has been increases in economic inequality, the wreckage of the financial crash of 2008, the extraordinary corporate consolidation in virtually every sector of the economy, the precipitous decline in union membership and power, and the pervasive corruption and capture of government. Absent regulation, individual freedom is increasingly at risk from the private sector as well: Corporations include non-compete and no-poach clauses that prevent competition in labor markets, they prevent workers from speaking freely on the internet, they require the use of private arbitration rather than the judicial system, and they spend boatloads of money to rig government policies and keep the unregulated game going. “The road to hell,”

¹ Alex Tabarrok, *Federal Regulation Is Not the Cause of Declining Dynamism*, MARGINAL REVOLUTION (Feb. 5, 2018, 7:23 AM), <http://marginalrevolution.com/marginalrevolution/2018/02/federal-regulation-not-cause-declining-dynamism.html> [<https://perma.cc/Q48C-4JLP>].

Epstein says, “is often paved with good intentions.”² Indeed. And in this case, it seems that the road to serfdom was paved by *The Road to Serfdom*.³

Professor Epstein also disagrees with my arguments about the American constitutional tradition. His comments suggest that he thinks that there is a singular tradition of the “founding” and that the “founders” had a singular vision of what they were trying to do. This isn’t the right way to think about the history of this period (or any period). The founding generation were a diverse group of thinkers and political actors, whose views were varied, who disagreed fiercely, and who compromised frequently. This is precisely why I argue that the middle-class constitutional tradition is *a* tradition, rather than the *only* tradition and why I acknowledge that there were other important intellectual traditions at work during the Founding Era.

More specifically, Professor Epstein’s objection relies on one quotation from James Madison’s *Federalist 10*, though I’m sure he could have cited other evidence (see my point earlier about multiple traditions).⁴ But he does not engage with the considerable amount of evidence I have assembled to show that concerns about economic inequality were widespread during the Founding Era in every region of the country, among people of different political valences, and across time; with the broader argument that the relative economic equality of the era was an assumption and precondition for our republican constitution; or with my multi-page interpretation of James Madison’s views and of *Federalist 10* specifically.⁵

The biggest problem, however, is that Professor Epstein doesn’t engage with the argument that economic power is a threat to freedom—either that private power threatens freedom directly or that it can capture government and rig the system to serve its own ends. Throughout history, some of the greatest minds and statesmen were deeply concerned with this problem. Epstein should be too.

Another of my critics, Professor Ilya Somin, offers a similar set of objections from a somewhat similar perspective, but he grapples carefully with many of the complexities of these issues and much of the empirical evidence. Professor Somin argues first that the “growing size and complexity of government” is a bigger threat to our political system than is economic inequality because it is “increasingly difficult for ordinary people to exercise effective control over government—or even to understand what it is doing.”⁶ Second, he argues that I ignore the Founders’ concern for property rights and limiting government power.

² Richard Epstein, *Sitaraman’s Mistaken Case for the Middle-Class Constitution*, 98 B.U. L. REV. ONLINE 15, 17 (2018).

³ See generally F.A. HAYEK, *THE ROAD TO SERFDOM: TEXT AND DOCUMENTS* (Bruce Caldwell ed., 2007).

⁴ Epstein, *supra* note 2, at 19.

⁵ GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 100-04 (2018).

⁶ Ilya Somin, *Why Growing Government is a Greater Political Menace than Growing Inequality*, 98 B.U. L. REV. ONLINE 21, 21 (2018).

To take the second point first, I agree with Professor Somin that an important tradition in the Founding Era was concerned with property rights, individual liberty, and limited government. This tradition is commonly thought of as “Lockean,” and it is well understood. My hope in the book was to emphasize the middle-class tradition in republicanism, to which I think insufficient attention is paid. At the same time, I would caution Somin from taking the Lockean tradition too far, both historically and normatively. Historically, the Lockean tradition was only one of many that were alive and flourishing at the time of the Founding, and the Republican tradition was arguably far stronger in the overall ethos of the period. Normatively, while the Lockean tradition is extremely important and contributes a great deal of moral and political value, it also underrates the threat of having an ineffectual government. Indeed, one of the most important reasons for writing a new Constitution in 1787 was that the Articles of Confederation government was too weak and decentralized, and, as a result, ineffective.

Professor Somin’s point on ignorance of government and government complexity is well-taken. While we might disagree on the relative importance of that problem versus the problem of inequality, I agree with Somin that complexity and ignorance can be problems. Civic republicans throughout American history (including during the Founding Era) were very concerned about the need for an active and engaged citizenry to sustain republican government. I also agree with Somin that complexity is a serious problem. It is a problem because, as Somin notes, it makes capture and corruption more likely. This is true when it comes to regulation. But complexity is also a problem because complicated government programs are harder for people to use and they can be less effective. Complexity might even degrade trust in government and lead to feelings that government itself is ineffective. My own view is that we should try to make government programs and regulations clearer and simpler—and that we should be willing to be honest about the inevitable trade-offs that come with embracing that approach. Where I think Somin falls into a trap is in framing the question of complexity as tied to the *size* of government. Governments can grow in size without complexity being of the type that undermines civic engagement. For example, government will need to get larger in size when a new state enters the Union. But there are many benefits to having 50 states from sea to shining sea instead of just the original 13. At the same time, we shouldn’t be overly rosy about small governments. They can be corrupt, captured, and ineffective too. To my mind, the real question we should be asking isn’t whether government is bigger or smaller in some material sense, it is whether government actions are simple and clear, whether it is effective at what it does, and whether it is public-spirited rather than captured.