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Book Review

THE FOUNDING AND THE FOUNDERING OF THE AMERICAN CONSTITUTION

**MICHAEL J. KLARMAN, *THE FRAMERS' COUP:
THE MAKING OF THE UNITED STATES
CONSTITUTION,*
OXFORD 2016, 865 PP.**

**GANESH SITARAMAN, *THE CRISIS OF THE
MIDDLE-CLASS CONSTITUTION:
WHY ECONOMIC INEQUALITY THREATENS
OUR REPUBLIC,*
KNOPF 2017, 423 PP.**

Robert F. Blomquist*

I. INTRODUCTION

When the Constitutional Convention closed on September 17, 1787, Benjamin Franklin offered two observations. First, “[W]hen you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views.” Second, despite this inevitability, Franklin was astonished “to find this system [the Constitution] approaching so near to perfection as it does.”¹

Aristotle (and the American Framers millennia later), believed that a constitution built on a strong, large middle class carried the greatest potential for stability and human flourishing. A society using only rich and poor classifications would evolve into “a city, not of freemen, but of masters and slaves, the one despising, the other envying; and nothing can

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¹ MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 1 (2016) (quoting Benjamin Franklin at Philadelphia Convention, Sept. 1787 (Madison's Notes), in *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., rev'd ed., 1966), 2:642).

be more fatal to friendship and good fellowship in states than this.”² Further, “[a] large middle class made it less likely that there would be ‘factions and dissensions’³ that could destabilize the community, because the middle class would have a shared economic status and, as a result, a shared ethical and cultural worldview.”⁴ Unified political communities are stronger than those divided.⁵

In the *Framers’ Coup: The Making of the United States Constitution* (“*Framers’ Coup*”),⁶ Michael J. Klarman crafts a jolting, deeply historic, and comprehensive narrative of the Founding – from the recognition of flaws in the Articles of Confederation⁷ to the economic turmoil of the states,⁸ from the Constitutional Convention itself⁹ to the matter of slavery and the Constitution,¹⁰ and from the anti-federalist opponents of the Constitution¹¹ to the ratification drama¹² and to the capstone of fashioning the Bill of Rights.¹³ Klarman recounts “three principal contributions”¹⁴ of his work that he claims add “to the rich and voluminous existing scholarship on the origins of the U.S. Constitution.”¹⁵ Klarman then elaborates on each contribution:

First and foremost, nobody has previously attempted to write a comprehensive account of the Founding. Many books—some of them quite wonderful—have been written on the various pieces of the Founding story: the flaws in the Articles of Confederation that seemed to cry out for redress, the conflicts over fiscal and monetary policy in the states in the mid-1780s that contributed mightily to the making of the Constitution, the Philadelphia convention that produced the Constitution, the contrasting ideas and interests of the Federalists and Antifederalists . . . , the campaign for ratification of the

² GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 52 (2017) (quoting ARISTOTLE, POLITICS 4.11.1295b21–23).

³ *Id.* (quoting ARISTOTLE, POLITICS 4.11.1296a7).

⁴ *Id.* (quoting ARISTOTLE, POLITICS 4.11.1295b.24–26) (other citations omitted).

⁵ *See id.* (citations omitted).

⁶ KLARMAN, *supra* note 1.

⁷ *Id.* at 11–72.

⁸ *Id.* at 73–125.

⁹ *Id.* at 126–256.

¹⁰ *Id.* at 257–304.

¹¹ *Id.* at 305–96.

¹² *Id.* at 397–545.

¹³ *Id.* at 546–95.

¹⁴ *Id.* at ix.

¹⁵ *Id.*

Constitution, and, finally, the enactment of the Bill of Rights.¹⁶

According to the author, a second contribution of the *Framers' Coup* is the presentation of the story:

to the greatest extent possible, in the words of the participants. Doing so helps us to understand them as political actors engaged in a controversial enterprise rather than as the mythical Founding Fathers we have long been taught to revere. If nothing else, allowing the principal figures in these events to speak for themselves ought to better enable readers to make up their own minds as to how to interpret the making of the Constitution.¹⁷

Finally, Klarman asserts that his book:

advances a view of the Founding that differs somewhat from those previously offered. Plainly, no single motive or explanatory variable can account for the making of the Constitution. However, experts will recognize that *I have been especially drawn to the view, long advanced by others, that the Constitution was a conservative counterrevolution against what leading American statesmen regarded as the irresponsible economic measures enacted by a majority of state legislatures in the mid-1780s, which they diagnosed as a symptom of excessive democracy.*¹⁸

¹⁶ *Id.* at x.

¹⁷ *Id.*

¹⁸ *Id.* (emphasis added). The author continues:

Along that dimension, I hope to provide more complete answers than have previously been given to two questions raised by this interpretation of the Founding. First, why were the delegates to the Philadelphia convention inclined and able to write a constitution that was very different from the one most Americans expected and wanted them to write? Second, how were the Federalists able to convince the nation, in the course of a reasonably democratic . . . ratifying process, to approve a document that was severely constraining of popular influence on government, especially when contrasted with the state constitutions of the period?

Id.

In *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (“*Crisis of the Middle-Class Constitution*”),¹⁹ Ganesh Sitaraman elaborates on his theory of the middle-class American Constitution by: (1) examining the radicalism of the American Constitution;²⁰ (2) probing the history of the middle-class Constitution;²¹ and (3) describing the crisis of the middle-class Constitution.²²

In light of these two new, promising books on the American Constitution, Part II of this Essay examines the major inconsistencies between the two books.²³ Next, Part III of this Essay focuses on a possible synthesis between the major pertinent arguments in each book.²⁴

II. DEMOCRACY AND ITS LIMITATIONS

The *Crisis of the Middle-Class Constitution* spends considerable space discussing the intellectual origin of America’s middle-class Constitution.²⁵ Framed broadly, in the first place, Sitaraman’s account goes back to history’s great republics’ class warfare constitutions—designed with economic inequality and conflict in mind.²⁶ Second, Sitaraman claims that America was built—in contradistinction to the ancient and medieval European republics of Rome, Venice, and England²⁷—with a democratic *middle-class constitution* in mind:

The American Constitution is different. Our Constitution isn’t based on the assumption that class conflict is inevitable. Our Constitution is a *middle-class constitution*. Unlike the class warfare constitutions of earlier times, our Constitution assumes relative economic [and democratic] equality in society; it assumes that the middle class is and will remain dominant. The framers of the Constitution were well aware of the history of statesmen and theorists grappling with class warfare. But they did not adopt a design premised on the inevitability of class conflict. *In fact, our Constitution does not have a single provision – not*

¹⁹ SITARAMAN, *supra* note 2.

²⁰ *Id.* at 19–104.

²¹ *Id.* at 105–220.

²² *Id.* at 221–302.

²³ *See infra* Part II.

²⁴ *See infra* Part III.

²⁵ *See, e.g.*, SITARAMAN, *supra* note 2, at 3–5.

²⁶ *Id.*

²⁷ *Id.* at 3.

*one – that explicitly entrenches economic class into the structure of government.*²⁸

For Klarman, in *The Framers' Coup*, he writes about “[h]ow the Constitution [d]id and [d]id [n]ot [a]dapt to [d]emocracy.”²⁹ Many of his points, in this regard, run against the grain of Sitaraman’s middle-class Constitution. First, Klarman asserts that Article V created “enormous barriers . . . against constitutional amendments by . . . threaten[ing] to disable current majorities from escaping constitutional constraints imposed by their predecessors.”³⁰ Klarman presses home this point with some empirical evidence: “Rarely in American history has it been possible to mobilize the extraordinary popular support necessary for formal constitutional amendments. Since the Bill of Rights was ratified in 1791, the Constitution has been amended . . . seventeen times in well over two hundred years.”³¹ Indeed, Klarman attributes “the open texture of the constitutional provisions” arranged throughout the document, coupled with broad interpretation of congressional power,³² for why the people have been able to enjoy the fruits of a democracy.

Second, an example of an undemocratic provision that resisted liberal interpretation was “the Three-Fifths Clause, which pegged representation in the House partly to the amount of property that a state’s inhabitants held in human beings.”³³ Klarman continues:

Although northerners occasionally called for an amendment to eliminate this provision, nobody seemed to believe that it could be circumvented through construction (though some northerners did briefly argue that the Three-Fifths Clause did not apply to states added to the union after the Founding). Only the formal abolition of slavery by the Thirteenth Amendment, enacted after the Civil War, terminated this most undemocratic of practices, which the Framers had foisted upon their descendants.³⁴

²⁸ *Id.* at 4 (emphasis added).

²⁹ KLARMAN, *supra* note 1, at 622.

³⁰ *Id.* at 624.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 625.

³⁴ *Id.* (endnote omitted).

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Third, another example of an undemocratic provision that was too specific to allow any other interpretation specified that state legislatures choose U.S. senators.³⁵ Klarman elaborates on this point:

Deeply in tension with Jacksonian trends toward greater popular participation in governance, this provision proved highly resistant to amendment. Not until the late nineteenth century was there a serious effort made to change it, and even then senators were able to block for decades an amendment providing for their popular election, even though most Americans clearly supported it, as evidenced by its repeated passage in the popularly elected House. Senators apparently either feared alienating the state legislatures that had appointed them to office or else doubted that the skill set enabling them to thrive in back-room negotiations (such as characterized state legislative selection of U.S. senators) would translate well into success on the hustings. Not until 1913 was the Constitution finally amended to end this undemocratic practice.³⁶

Fourth, according to Klarman:

Another very precise, yet undemocratic, constitutional provision is . . . the electoral college system. . . . [A] potentially undemocratic feature of this system—the authorizing of state legislatures to provide for the selection of presidential electors in some manner other than direct popular election—was elided in an era more democratic than the Founding by legislatures’ stipulating direct popular election as the mode of selection. However, another feature of this system—the apportionment of electors among states in a manner not proportional to their population (because each state’s number of electors consists of its representatives plus its senators, and every state, regardless of size, has two senators)—cannot be so easily circumvented. [Five] times in American history, the candidate winning the most popular votes did not ascend to the presidency because he [or she] failed to win in the electoral college. That

³⁵ *Id.*

³⁶ *Id.* (endnote omitted).

result is difficult to reconcile with [middle-class] democratic principles: The votes of citizens in different states do not count equally in presidential elections. Yet an amendment to alter this aspect of the system would be virtually impossible to enact—both because the even more drastically malapportioned U.S. Senate would very likely never pass it and because the smaller states, which benefit from the malapportionment, would never ratify it.³⁷

Fifth:

Tenure during good behavior (which is, effectively, lifetime tenure) for unelected federal judges is another feature of the Constitution that is both difficult to reconcile with [middle-class] democracy and impossible to circumvent without an amendment. At the time of the Founding, several state constitutions authorized legislatures to remove judges—many of whom enjoyed tenures much briefer than “good behavior”—on grounds falling short of the criteria specified for impeachment, which under the Constitution is the only way to remove federal judges from office. By the middle of the nineteenth century, the accountability gap between state and federal judges had grown even greater, as all newly created states and many existing ones were providing for the popular election of state judges to finite terms in office. The federal system probably would have moved in that same direction at roughly the same time had federal constitutional amendments not been so difficult to secure.³⁸

Sixth, in Klarman’s analysis:

Since the Founding, there has been a dramatic shift in the way that judges have exercised the power of judicial review. At most, the Framers would have anticipated courts’ striking down laws that were clearly unconstitutional or that especially affected the judiciary, such as restrictions on the right to a jury trial. By contrast,

³⁷ *Id.* at 625–26 (textual notes and endnotes omitted).

³⁸ *Id.* at 627 (endnote omitted).

today's unelected, life-tenured federal judges resolve many of society's most contested social and political issues – abortion, affirmative action, gay marriage, school prayer, gun control, campaign finance reform, and the death penalty, to name only a few. Moreover, today's Supreme Court generally resolves such issues by five-to-four votes that divide the justices along largely consistent and predictable political lines, which strongly suggests that ideology plays a substantial role in the justices' constitutional interpretations. Empowering unelected and remotely accountable government officials with this much political discretion seems very difficult to reconcile with [middle-class] democracy.³⁹

Seventh, and finally:

The Constitution contains one other undemocratic feature that is too specific to be circumvented through creative construction and is unlikely ever to be amended: the Article V provision specifying that constitutional amendments require the approval of two-thirds of both houses of Congress (or a proposal by a constitutional convention called by Congress at the behest of two-thirds of the state legislatures) and ratification by three-quarters of the state legislatures (or by three-quarters of special state ratifying conventions, if so specified by Congress). This provision blocks constitutional changes that are supported even by large majorities of the American people. Thirty-four senators from the seventeen smallest states – together representing as little as 7 percent of the nation's population – can defeat a constitutional amendment. So can the legislatures of the thirteen smallest states, which together constitute less than 4 percent of the nation's population. Were it not for the extraordinary difficulty of enacting constitutional amendments, popular majorities probably would long ago have adopted measures guaranteeing equality without regard to sex, allowing voluntary nondenominational prayer in public schools, and

³⁹ *Id.* (endnote omitted).

permitting governments to criminalize the burning of the American flag as an act of symbolic speech.⁴⁰

As we have seen, Sitaraman builds his entire argument around the conscious fashioning of a middle-class constitution.⁴¹ While he acknowledges the theory of Charles Beard that “the personal economic interests of the [F]ounders shaped their support for the Constitution,”⁴² he claims that this theory “was debunked decades ago.”⁴³ But Sitaraman’s case depends on circumstantial evidence, such as the following: “We should interpret [the Constitution] as a radical culmination to the Revolutionary era. It was radical because it rejected two thousand years of thinking on class warfare constitutions. Instead, the Constitution was built on the bedrock of America’s middle class.”⁴⁴ Moreover, Sitaraman cites further circumstantial evidence of the intent of the Founders: “There are differences in wealth during every era, and the founding era was no exception. But the reality . . . is that early America was astonishingly equal for its time.”⁴⁵ But how relevant is such evidence to what the Founders intended in the Constitution?

Sitaraman turns to what he calls “the intellectual origins of America’s middle-class Constitution.”⁴⁶ Claiming that James Harrington was the “intellectual muse” of America’s middle-class constitution,⁴⁷ Sitaraman points to James Harrington (an Englishman born in 1611) as “the first theorist to make explicit—even more so than Aristotle—that the forms of government were based on property ownership.”⁴⁸ Harrington wrote:

If one man be sole landlord of a territory . . . his empire is absolute monarchy[,] [i]f the few or a nobility, or a nobility with the clergy, be landlords . . . the empire is mixed monarchy. . . . And if the whole people be landlords, or hold the lands so divided among them, that no man, or number of men [] overbalance them, the empire [] is a commonwealth.”⁴⁹

⁴⁰ *Id.* at 627–28 (endnote omitted).

⁴¹ *See supra* notes 20–22 and accompanying text.

⁴² SITARAMAN, *supra* note 2, at 59.

⁴³ *Id.*

⁴⁴ *Id.* at 61.

⁴⁵ *Id.*

⁴⁶ *Id.* at 67 (emphasis omitted).

⁴⁷ *Id.*

⁴⁸ *Id.* at 54 (endnotes omitted).

⁴⁹ *Id.* (endnotes omitted).

Sitaraman argues that Harrington's "key insight"⁵⁰ was as follows:

If inequality between rich and poor created strife, relative economic equality should eliminate internal conflicts, create a stable government, and guarantee freedom. "[E]quality of estates causeth equality of power," Harrington said, "and equality of power is the liberty not only of the commonwealth, but of every man."⁵¹

According to Harrington, changing the balance of property would change the political system as well.⁵²

A number of prominent political and economic theorists who postdated Harrington came to endorse his ideas. According to Sitaraman: "In the century between [Harrington's writings] and the American founding, Harrington's ideas spread to some of the leading constitutional theorists of the age."⁵³ Indeed, Thomas Gordon and John Trenchard, writing under the pseudonym Cato in the 1720s, used Harrington's themes in a series of prominent American founding-era pamphlets.⁵⁴

Moreover, Scottish Enlightenment philosopher, David Hume, acknowledged Harrington's views as influential:

[Hume] recognized that "most of our political writers" accepted that property is "the foundation of all government," though Hume himself thought that other factors mattered more. Hume also embraced a Harringtonian understanding of the dynamic relationship between power and property. He argued that if there is an imbalance between power and property, the "order of men who possess a large share of property" will find a way to "stretch their authority, and bring the balance of power to coincide with that of property." Affirming Aristotle and Harrington, Hume even wrote an essay in lavish praise of the "middle station." The middle station was best suited to "the calm voice of reason," because "[t]he great are too much immersed in pleasure, and the poor too much occupied in providing for the necessities of life." Only those in the middle station could exercise the virtues of "patience, resignation, industry,

⁵⁰ *Id.*

⁵¹ *Id.* (endnotes omitted).

⁵² *Id.* at 55.

⁵³ *Id.* at 56.

⁵⁴ *Id.*

and integrity” in addition to those of “generosity, humanity, affability, and charity.” They had more wisdom and ability than the rich or the poor, and they would also be better suited to friendship because they had no jealousy of others (like the poor) or suspicion of others (like the rich).⁵⁵

Sitaraman makes a final historical intellectual point by bringing up the writings of Montesquieu, the French philosopher who articulated the separation of powers theory, set forth in his book, *Spirit of Laws*.⁵⁶ According to Sitaraman’s take on Montesquieu:

Montesquieu noted that some constitutions divided lands equally, but he warned that if the founders of government do “not give laws to maintain” the balance of property, the constitution will be “transitory.” “[I]nequality will enter at the point not protected by the laws and the republic will be lost.”⁵⁷

Sitaraman admits that Harrington is rarely recognized as a central figure in the American constitutional story.⁵⁸ Sitaraman does his best to elevate his status. He writes:

And yet, more than any theorist since Aristotle, Harrington took seriously the relationship between the distribution of wealth in society and the structure of the constitution. He argued that the two were intertwined, and he went beyond Aristotle in exploring how economic change could force constitutional change. For American colonists an ocean away, his insights would prove invaluable.⁵⁹

Sitaraman quotes with approval Gordon Wood: “the founding generation ‘believed that equality of opportunity would necessarily result in a rough equality of station, that as long as the social channels of ascent and descent were kept open, it would be impossible for any artificial aristocrats or overgrown rich men to maintain themselves for long.’”⁶⁰

⁵⁵ *Id.* at 56–57 (endnotes omitted).

⁵⁶ *Id.* at 57.

⁵⁷ *Id.* (citations omitted).

⁵⁸ *Id.* at 58.

⁵⁹ *Id.*

⁶⁰ *Id.* at 64 (quoting GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 72 (1969)).

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A representative to the New York ratifying convention, Melancton Smith, supports Sitaraman's conception of a middle-class constitution – at least as seen through the eyes of one delegate to one state's ratifying convention. Smith:

contended that the middle class would be better at governing than even the natural aristocracy or a body with class representatives. "Those in middling circumstances," he said, "have less temptation." "[T]hey are inclined by habit and the company with whom they associate, to set bounds to their passions and appetites." The middle class "are more temperate, of better morals and less ambition than the great"; they had "frugal habits" and "would be careful" in allocating public burdens on the people. Just as Aristotle had argued that the middle class could maintain the balance of power between the rich and the poor, because it could align itself with both groups – but not completely – so, too, did Smith. Because "the interest of both the rich and the poor are involved in that of the middling class," a government of the middle would be less likely to fracture. "A representative body, composed principally of respectable yeomanry," he concluded, "is the best possible security to liberty."⁶¹

After the ratification of the Constitution, the further evolution of that document developed. According to Sitaraman: "In the early nineteenth century, many perceptive commentators, like [Daniel] Webster, held fast to the idea that America was still the most equal commonwealth the world had ever known and that its equality was key to its constitutional system."⁶² So too, Supreme Court Justice Joseph Story echoed these thoughts. He recorded:

in his 1833 *Commentaries on the Constitution* that there was an "intimate connexion" between the "general equality of the apportionment of property among the mass of a nation, and the popular form of government." The general equality in property meant that a government would have "the substance of a republic," and "[o]ur

⁶¹ *Id.* at 88–89 (emphasis omitted) (endnotes omitted).

⁶² *Id.* at 112.

revolutionary statesmen were not insensible to this silent but potent influence.”⁶³

Published during the Jacksonian era in America, Frenchman Alexis de Tocqueville argued, in *Democracy in America*, “that the most important fact about America is its remarkable ‘equality of conditions.’ Not equality of opportunity, which commentators and political figures celebrate today, but ‘equality of conditions,’ an ‘almost perfect equality in fortunes.’”⁶⁴

III. A POSSIBLE SYNTHESIS BETWEEN KLARMAN’S AND SITARAMAN’S VIEWS OF THE CONSTITUTIONAL FOUNDING

While Klarman does a masterful job of developing and discussing the primary materials in the making of the Constitution, Sitaraman does a fair job of examining the major materials. For Klarman, he viewed the Constitution as a counterrevolution—tinged with conservatism—that constituted a reaction to irresponsible economic measures taken by the states.⁶⁵ For Sitaraman, the Founding was due to a commitment to a middle-class polity premised on roughly equal property ownership, a view that property is the foundation of all government and that the middle class is more temperate and able to govern.⁶⁶

While there are different points of emphasis between Klarman and Sitaraman, these gentlemen appear to assert key arguments on the same plane. First, both scholars are upset about the states’ irresponsible turn in handling fiscal affairs during the late 1700s. Second, there is no clear evidence that a conservative counterrevolution was anathema to the eventual governance by middle-class leaders. Finally, there appears to be no evidence in the historical record that would contravene the notion that middle-class governors are most temperate in their supervision of the governed.

⁶³ *Id.* (endnote omitted).

⁶⁴ *Id.* at 113 (endnotes omitted).

⁶⁵ *Supra* note 18 and accompanying text.

⁶⁶ *Supra* notes 41–52 and accompanying text.

