
RECONSTRUCTING DEMOCRACY IN AN ERA OF INEQUALITY

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Ganesh Sitaraman has written a timely and important book, fluidly written and provocative. It should be required reading for scholars, policymakers, and Americans grappling with our current moment of economic and political upheaval. Sitaraman's book, *The Crisis of the Middle-Class Constitution*, is the latest in a larger set of scholarly re-engagements with the theme of "law and political economy" ("LPE").¹ First, scholars in this vein have taken a number of overlapping approaches: recovering historical traditions of normative, legal, and constitutional thought around economic inclusion, opportunity, and democracy.² Second, scholars have revisited questions of power and institutional design, noting as Sitaraman does that economic inequalities are particularly pernicious in exacerbating disparities of political power and influence, leading to systemic skewing of democratic institutions despite our existing constitutional checks and balances.³ Third, scholars have also taken a broader view: unpacking how law systematically creates economic exclusion, inequality, and disparities of power through the background rules shaping social, economic, and political life.⁴

Sitaraman contributes to all three of these areas of inquiry. He recovers an important historical—and specifically *constitutional*—tradition in American legal and political thought, highlighting the interrelationship between broad-

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¹ For a definition and discussion of this new approach, see for example David Singh Grewal, Amy Kapczynski, & Jedediah Purdy, *Law and Political Economy: Toward a Manifesto*, L. & POL. ECON., <https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto> [<https://perma.cc/X8UG-FE9P>].

² See generally Joseph Fishkin & William Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, in WEALTH (Jack Knight & Melissa Schwartzberg eds., 2017); Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014)..

³ See generally Daryl Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 33 (2016); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015).

⁴ See generally David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014); L. & POL. ECON., <https://lpeblog.org/> [<https://perma.cc/N7VW-BBAB>] (functioning as blog hub for these inquiries) (last visited Apr. 25, 2018).

based economic opportunity and inclusion on the one hand, and the stability of democratic institutions on the other. As Sitaraman writes, “when economic and constitutional structures become misaligned, reform or revolution must ultimately get them back into sync.”⁵ Democracy, in this telling, is unsustainable in the face of deep, systemic inequality which tends toward oligarchy, corruption, and illiberalism. The major constitutional transformations in the United States—from the formal constitutional amendments of the early Republic and the Reconstruction Era, to the equally transformative changes of the Progressive, New Deal, and Civil Rights Eras—represent periods of such radical *realignment* of a “middle-class” economy of inclusive opportunity with democratic aspirations. The inequality crisis facing American democracy today, thus, points to the need for a similarly radical transformation of our current economic structure. Through expanded antitrust laws, labor organizing, and other reform efforts, Americans today must restore an inclusive economy, so as to secure the survival of democracy into the twenty-first century.

I share much of Sitaraman’s interest in this historical account and its contemporary relevance for post-financial crisis American politics.⁶ And part of what makes this book so vital is that it opens up a number of important areas for further scholarly interrogation and political advocacy. In that spirit, I would like to highlight three key themes that build on Sitaraman’s arguments.

I. INEQUALITY AS A PRODUCT OF BACKGROUND ECONOMIC AND SOCIAL STRUCTURES

A key segment of Sitaraman’s historical account considers what we might think of as the “long Progressive Era,” the stretch of time from the late nineteenth century through the early New Deal Era. This period, encompassing the Populist movement, the Progressive movement, the rise of organized labor, and the antitrust movement, and their eventual culmination in the New Deal represented a crucial era of urgent institutional innovation and transformation. Faced with the social and economic upheavals of industrialization, Americans saw the threat of inequality in specifically constitutional terms; the stakes for reform were not just economic, but also political, making American democracy viable for the industrial era.

As a number of legal scholars and historians have suggested, this Progressive “search for solutions,”⁷ as Sitaraman puts it, represents a crucial precursor to our current debates about inequality and democracy. But crucially, these Progressive critiques of economic inequality were, in the end, *not* about income inequality per se. Rather, their concern was something deeper: the problem of *domination*, the classic republican concern that concentrated, unchecked power represented a threat to freedom and the idea of democracy itself. For Progressives, the threat of domination was not just from the State, but also from private economic actors

⁵ GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 18 (2017).

⁶ *See generally* K. SABEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016).

⁷ SITARAMAN, *supra* note 5, at 161.

like corporations, monopolies, and more diffuse systemic forms of market coercion and exclusion. As a result, one of the key sites for reform was the transformation of the background *economic structures*: thus, Progressives developed legal regimes to restrain private power (e.g., antitrust laws), regulate economic actors (e.g., corporate governance and the modern administrative state itself), and new forms of social insurance to balance disparities of economic power and inequality.

The implication for reformers today is clear: Our inequality crisis is more properly understood as a crisis of domination and power, where the solutions will require not merely changes to wages and taxes, but changes to the background rules of the twenty-first century economy itself. In today's inequality crisis, we can name a range of background economic structures and rules of the game responsible for creating systemic economic inequality. Therefore much of the critique of inequality has centered not just on income but background rules that facilitate problems like increased market concentration and financialization; the erosion of the safety net and the increasing precarity of work; and even the geographic segregation of economic opportunity and inclusion.

II. STRUCTURAL ECONOMIC INEQUALITY AND THE RADICALISM OF DEMOCRACY

This focus on background economic structures raises a second key issue. In the book, Sitaraman argues that the need to reform economic structures is presented as a necessary prerequisite for democracy to thrive. In this, Sitaraman echoes the classical constitutional traditions of Greek and Roman thought with which he starts the book. For democracy to survive, societies themselves must be relatively egalitarian in social ordering. Thus, for Sitaraman, “the problem today is that the basic foundation upon which our middle-class constitution was built—the prerequisite of relative economic equality—is crumbling.”⁸

But while this is no doubt an important point, this link also runs in the other direction as well. It is not just that economic equality of opportunity ought to be pursued out of a civic commitment to democratic institutions. Rather, it is *democratic institutions* that need to be *built* as a *tool* through which we contest those very background structures of economic inequality and domination. Indeed, for the Progressives that Sitaraman cites, democratic institutions were crucial vehicles for empowering the community to fight back against concentrations of wealth, power, and the hoarding of opportunity.

This inversion of the classical view of reforming economics to make democracy possible is crucial, for the classical republican ethos evoked by Sitaraman risks understating the radicalism of democracy—and the nature of its populist appeal. In this more radical view, the starting point is not just the aspiration of civic equality to which economic reform is instrumental. Rather the starting point is a hostility to domination and concentrated power, whether in the

⁸ SITARAMAN, *supra* note 5, at 5.

form of the unaccountable state or the unaccountable market. Democracy is not merely an aspiration but a vital and urgent tool through which we make possible the radical restructuring of social and economic inequalities.

Indeed, the innovations of previous eras were both political and economic. It should be no surprise that the structural economic changes of the turn-of-the-century—from labor regulations to antitrust law to the rise of consumer protection—all involved the creation of new forms of democratic action: mass-member civil society organizing, the creation of administrative agencies and public utilities at the state, local, and federal level, and more. This shift in emphasis suggests that responding to today's inequality crisis requires, in part, the creation of more effective and empowered forms of democratic collective action in order to overcome and dismantle entrenched political and economic power.

III. EQUALITY, INCLUSION AND PROGRESSIVE POPULISM

Finally, if it is true that inequality is a product of background social and economic structures, and that contesting these structures is one of the key catalysts for the creation of new forms of democratic collective action and new institutions of governance, then these modifications to Sitaraman's argument suggest a different approach to a twenty-first century "progressive populism." At the end of his book, Sitaraman outlines some specific areas for economic reform, from increased antitrust enforcement, to a revisiting of public utility regulation of private control over infrastructure, to revived labor organizing and more. To achieve this, Sitaraman suggests a convergence between the "new populists" mobilizing grassroots activism for these structural equality-enhancing shifts, and "progressive conservatives" who can operationalize these aspirations into concrete legislation and public policy.

That sounds right as a matter of public policy, but it is important to note that to the extent this "progressive populism" is already emerging, it is doing so through a different kind of fusion: between critiques of economic inequality on the one hand, and long-running battles for racial and gender inclusion on the other. American constitutional and political history has of course been shaped by both these fights for economic opportunity and for social inclusion, but Sitaraman suggests that we can bracket the latter movement for inclusion as a separate project. The fights for economic equality are "what happens when efforts at inclusion succeed."⁹ Thus abolition and Reconstruction or the Civil Rights movement were each followed by sustained efforts to thicken economic opportunity, including for those communities now included as full members of the polity.

But this bracketing approach, if taken too literally, risks overlooking the real sources of grassroots energy and policy innovation among practitioners seeking to tackle twenty-first century inequality. Indeed, some of the most compelling and effective contemporary movements for economic equality have arisen

⁹ *Id.* at 13-14.

precisely out of the intersectional fusion of critiques of economic inequality *and* structural racial and gender exclusion. The Fight for Fifteen and the attempts to reinvigorate worker organizing, for example, are being led by self-consciously multi-racial and cross-constituency social movement organizations. The policy battles to expand economic opportunity by recreating the modern safety net and restoring public control over basic goods—from the water crisis in Flint to the battles over affordable healthcare—are similarly being driven by activists and policymakers sensitive to these interactions between race, gender, and class. This fusion should not be surprising, for in many ways the inequality-increasing policy changes of recent decades—from economic deregulation to the erosion of the safety net—have been driven by a public politics animated by a converse fusion of traditional libertarian critiques of big government on the one hand and more subtle forms of grassroots opposition to the legacy of racial and gender inclusion.

Sitaraman's book is incredibly timely and important, speaking to the scholarly and political interest in developing a more progressive political economy. Taken together, these three themes suggest an even greater potential for the kinds of equality-enhancing policies and movements that Sitaraman calls for. By diagnosing a wider range of background economic structures at the root of today's inequality crisis, and by harnessing the energy of racial, gender, and economic justice movements to develop new policies and democratic institutions, we can transform our foundational economic and political institutions to make possible economic inclusion, opportunity, and democracy. Sitaraman's book provides a rich foundation for these normative, policy, and public debates.