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Vanderbilt Law School Professor Ganesh Sitaraman, a close friend and former advisor of Senator Elizabeth Warren, does not pull his punches. By his title, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic*, Sitaraman proclaims two themes that dominate his book. He writes, "the number one threat to American constitutional government today is the collapse of the middle class . . . Not the polarization of the two political parties." Why? "Because economic inequality le[ads] inevitably to political inequality and, as a result, instability, class warfare, and constitutional revolution."

To say the least, these are alarmist claims. But, sadly, their constant repetition is not a substitute for rational argument. Indeed, Sitaraman's thesis is wrong in every key respect. He misunderstands the source of today's modern discontent by overstating the importance of economic inequality (which is currently overwhelmed by the frenzied public concerns with gender equality as represented by the #metoo movement,[1] which now registers close to a hundred million google hits), while downplaying political polarization and ignoring the decline in overall economic growth attributable to weak property rights and extensive government regulation. Further, he wholly misreads the American constitutional tradition by insisting, wrongly, that rough economic equality is necessary for a sound and stable constitutional order.

Inequality, polarization, and growth. Political polarization, not economic inequality, is the source of the huge divisiveness in the United States today. Fifty years ago, people showed little concern if their children married someone from the opposing political party. Race and religion mattered much more. Today the exact opposite is true.[2] The Democratic Party has steadily moved to the left, as the progressive wing now led by Senators Warren and Sanders has driven out the centrist Clinton-era coalition. Simultaneously, the Republican Party has become more ideological, both socially and economically. There is virtually no overlap between the two parties,[3] making it harder to broker deals attractive to

1 Search Results of "#metoo," GOOGLE, www.google.com.

2 Joanna Rothkopf, *Study: We Don't Want Our Kids Marrying Across the Aisle*, JEZEBEL (Dec. 7, 2015, 4:15 PM), https://theslot.jezebel.com/study-we-dont-want-our-kids-marrying-across-the-aisle-1746698282 [https://perma.cc/HB86-8M7L].

3 *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CTR., (Oct. 5, 2017), http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/ [https://pera.cc/Q7R3-JHK9].

the median voter. Think of the wholly partisan votes, both ways, on both the Affordable Care Act in 2010 and the Tax Cuts and Jobs Act of 2017.

We can see that ideology matters more than religion or race because the visible political cleavages leave rich and poor on both sides of the divide. On the Democratic side is a coalition of well-heeled intellectual and professional elites, led by such financial heavyweights as Bill Gates, George Soros, and Tom Steyer, who count their billions, and minority group members whose income and wealth generally fall well below the median. The issues that animate this economically diverse group are claims of police brutality, gun control, racial injustice, identity politics, environmental degradation, global warming, corporate greed, and yes, income inequality—at least as it applies to their favored groups. On the conservative side, the Koch brothers neatly counterbalance Gates, Soros, and Steyer atop the income scale. Many business and management types have incomes comparable to those of the liberal professionals, and large numbers of the working class, who share conservative politics, have far smaller incomes, which are not offset by major transfer payments. The conservative movement is increasingly distinguished by a sense of cultural and intellectual isolation. Disdain for progressive cultural elites propelled Donald Trump to the presidency in the key heartland states of Michigan, Ohio, Pennsylvania, and Wisconsin. These and other voters hated being called "deplorable," and they could not (and cannot) abide the smug and ill-concealed contempt of the progressive elites that control so much of the media, universities, and popular culture in which diversity, inclusion, and social justice are the minimum conditions for intellectual respectability.

Both sides on this great divide are, of course, uneasy with economic inequality. Large numbers of both groups feel they have been slighted or passed over during the slow growth of the last decade, from the end of George W. Bush presidency to the Obama era. When voters face economic stagnation, they tend to polarize. But now that the positive improvements across all sectors of the labor market have taken hold,[4] there is some hope that we could ease the polarization crisis by adopting the very pro-growth market policies that Sitaraman rejects in his misguided pleas for the restoration of the middle-class.

Rather than face the analytical question, Sitaraman fixates on a crisis of his own making without bothering to define exactly what the middle class is or why it is in crisis. Sitaraman does not even try. The Pew Research Center defines middle-class income as between sixty-seven and two hundred percent of average family income, roughly $60,000 per year, encompassing around fifty million families whose income is between $40,000 and $100,000.[5] But even this class

[4] Binyamin Appelbaum & Jim Tankersley, *The Trump Effect: Business, Anticipating Less Regulation, Loosens Purse Strings*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/us/politics/trump-businesses-regulation-economic-growth.html.

[5] Kimberly Amadeo, *What Is Considered Middle Class?*, THE BALANCE (Oct. 28, 2017), https://www.thebalance.com/definition-of-middle-class-income-4126870 [https://perma.cc/4M4K-SE4M].

is quite heterodox as the two ends of this group lead very different lives. However, it seems odd to call the twenty-five percent of families earning $100,000 "upper class" when they are closer to the median earner than to the one percent, which in turn has little in common with the vastly wealthier top one-tenth of one percent. It is therefore very hard to find clean breaks in the continuum. But for our purposes, these definitional issues may not matter. Certainly, under the heavy labor market regulation of the Obama years, it was the more vulnerable workers who suffered the most.

Unfortunately, Sitaraman confuses wage stagnation with full-blown social crisis. Ironically, his devotion to progressive politics blinds him to the true factors behind working-class wage stagnation of the Obama years. The road to hell is often paved with good intentions, so it is best to lay much of the blame on the regressive labor regulation that took hold first in the 1970s in the effort to protect vulnerable workers by encouraging unionization, adding teeth to minimum wage and overtime regulations, stepping up enforcement of antidiscrimination and family-leave laws, and much more. The resulting disconnect is palpable. The only way to increase the fortunes of the middle class is to remove the shackles of this so-called protective regulation. Yet at no point does Sitaraman show the slightest appreciation of the ability of competitive markets to improve the lot of all participants. The Obama style of heavy-handed labor regulation has at least two dire consequences. The first is that it slows down the overall rate of economic growth—growth during the Obama years never exceeded two percent on an annualized basis. The second is that by making labor more costly, the Obama era regulations induced firms to invest in equipment instead of labor, especially low cost labor where it is far harder to absorb the regulatory burden. No liberal pieties about the need for income equality can undo the enormous damage wrought by the structural policies Sitaraman embraces. On this score, whatever objections one has to the Trump administration on immigration and free trade—mine are intense[6]—the domestic deregulatory initiatives of his administration have led to an increased annual growth rate in the three percent range,[7] dramatic increases in all major stock market indexes,[8] and high levels of consumer confidence,[9] which reflect positive economic expectations that ripple through the economy. I would expect that pattern to continue after the implementation of the tax reform legislation, which

[6] Richard A. Epstein, *Trump's Mixed Report Card*, HOOVER INSTITUTION (Dec. 18, 2017), https://www.hoover.org/research/trumps-mixed-report-card [https://perma.cc/9RZ8-YJZW].

[7] Madeline Conway, *Trump Gets Boost as GDP Growth Is Revised Upward*, POLITICO (Aug. 30, 2017, 11:21 AM EDT), https://www.politico.com/story/2017/08/30/trump-gdp-second-quarter-2017-242171 [https://perma.cc/LG2H-TEBC].

[8] Corrie Driebusch, *Everything Went Right for Markets in 2017—Can That Continue?*, WALL ST. J. (Dec. 29, 2017, 7:14 PM), https://www.wsj.com/articles/everything-went-right-for-markets-in-2017can-that-continue-1514543400?mg=prod/accounts-wsj.

[9] Patrick Gillespie, *U.S. Consumer Confidence Remains Near 17-Year High*, CNN MONEY (Dec. 27, 2017, 11:28 AM), http://money.cnn.com/2017/12/27/news/economy/us-consumer-confidence/index.html [https://perma.cc/A3GJ-RRMN].

for all its flaws in dealing with individual taxpayers, at long last reduces corporate taxes to levels that make the United States competitive with other nations.[10] In economic terms, we are leagues ahead of where we would have been if Hillary Clinton had been elected President of the United States.

The weakness of egalitarian thought. Sitaraman is not only wrong on the salience of economic inequality, he also overstates its importance. One reason to like economic equality is that, other things being equal, it is a desirable state of affairs if we assume, as we should, the declining marginal utility of wealth. But other things are never equal, and so, from a dynamic perspective, efforts to use giant wealth transfers to secure economic equality stifles the growth that, in turn, would allow for the overall improvement of human welfare through greater product innovation and higher wages.

In order to expose the Achilles heel of the strong egalitarian position, do this simple thought experiment. Assume there are two individuals (or groups), one of which has an income of a hundred and the other an income of a thousand. Which of these policies is better: narrow the gap between the two groups by raising the bottom to a hundred and ten and lowering the top to five hundred; or widen the gap by raising the bottom to a hundred and fifty and the top to twelve hundred? The former occurs with strong restrictions on contractual freedom and extensive wealth transfers. The latter occurs through voluntary exchange. Note that the latter is a strict Pareto improvement whereby everyone is better off than before. The former example is not even Kaldor-Hicks efficient because of a shrinkage in the overall size of the pie: The winners do not have nearly enough to offer hypothetical compensation to the losers.

The real challenge is to find ways to minimize damage to growth while trying to ensure the bottom is not left defenseless in the face of adverse circumstances. So every society takes steps, privately or collectively, to protect against various forms of catastrophe, usually with only middling success. No one has quite mastered the technique for keeping transfer payments down, so they go where they are needed the most. But in the midst of that uncertainty it should never be forgotten that there are fewer people who face acute danger in a society that produces high levels of wealth. Even the least fortunate have more options as the demand for labor increases. And the greater wealth of the rich means that voluntary means can cover a larger portion of hard cases that arise in troubled times. It is, in general, a dangerous view to shrink the overall pie in some, usually futile effort, to improve the distribution of social wealth and income.

The constitutional dimension. All of these issues were not lost on the Framers, and Sitaraman is flatly wrong when he thinks that their primary vision was to ensure wealth disparities did not grow to unhappy lengths. Quite the opposite, they believed in a republican (as opposed to a pure democratic) form of government because they feared the tyranny of the masses, which they tried to

[10] Matthew Frankel, *Your Complete Guide to the 2018 Tax Changes*, YAHOO! FIN. (Dec. 30, 2017), https://finance.yahoo.com/news/complete-guide-2018-tax-changes-115200441.html [https://perma.cc/LD4T-EMCZ].

guard against in two ways. First, structural protections such as separation of powers and federalism. Second, the protection of individual rights, including rights to private property and contract, both of which encourage voluntary transactions for mutual benefit and block schemes that create cross-subsidies through regulation and taxation. When Madison addressed the perils of faction in *Federalist 10*, he stated that "the most common and durable source of factions has been the various and unequal distribution of property."[11] He did not pull his punches when he lamented "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."[12] Those words make it all too apparent that Madison did not think the correct way to control factions was to compel transfers from the propertied to the nonpropertied, or from creditors to debtors. His view was the opposite. The federal government was meant to restrain faction, which is why in the original constitutional design, the federal government had no welfare function to perform.

Those days may well be past, but Madison's concerns remain powerful. A system of weak property rights and extensive government regulation that lies at the heart of the New Deal constitution is all too often ill-equipped to control powerful factional forces. It is those elements, not economic inequality, that represent a real peril to national well-being—a peril everyone should remain diligently against, lest political intrigue wipe out economic prosperity and political stability. Economic inequality does not lead to political insecurity and class warfare. Weak property rights and massive transfer systems lead to greater poverty and ultimate strife. Sitaraman gets everything backwards.

[11] THE FEDERALIST NO. 10 (James Madison).

[12] *Id.*