THE SAFEGUARDS OF OUR CONSTITUTIONAL REPUBLIC: AN INTRODUCTION

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We find ourselves today at a political, legal, and cultural crossroad. The first two years of the Trump presidency have been marked by scandals, standoffs, travesties, and tragedies. Customs have been flouted, compacts broken, laws transgressed, responsibilities ignored, and individuals and communities threatened and debased.

Given the disorienting and, for many, distressing turn of events, the *UCLA Law Review* organized a symposium, titled *The Safeguards of Our Constitutional Republic*, and invited leading scholars and lawyers from around the country to assess this critical, perhaps unprecedented, moment. Drawing on their professional experiences and on their studies of legal history, jurisprudence, ethics, organizational behavior, legal theory, political development, and comparative constitutionalism, participants explored whether we are in a time of simple flux or full-blown crisis; whether any such crisis rises to the level of a constitutional—as opposed to just a political or cultural—dislocation; and how we can steer the ship of State back on course. Eleven of those scholars and lawyers have come together to produce ten Articles that examine these pressing questions.[1]

Two of the Articles concern themselves with norms. In their co-authored contribution, Josh Chafetz and David Pozen use the Trump presidency as an opportunity to explore "How Constitutional Norms Break Down."[2] Chafetz and

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1. We are appreciative of the comments and contributions of all of our symposium participants: E. Tendayi Achiume, Kate Andrias, Josh Chafetz, Mariano-Florentino Cuéllar, Seth Davis, Kristen Eichensehr, Blake Emerson, David Fontana, Aziz Z. Huq, Heidi Kitrosser, Jennifer Nou, David E. Pozen, K. Sabeel Rahman, Steven L. Schooner, Matthew R. Segal, Miriam Seifter, David Alan Sklansky, David A. Super, and Christopher J. Walker, Adam Zimmerman. To view the full Symposium, please visit *The Safeguards of Our Constitutional Republic*, UCLA L. REV. (Feb. 2, 2018), https://www.uclalawreview.org/symposium-2018/ [https://perma.cc/V9LK-CWAU], *also available at https://uclalaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=3d86acb9-08f2-4ab9-a9f9-a86b0132dcc9*.

2. Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018).

Pozen explain that norms are often in flux—endangered not only by those who flagrantly seek to destroy them but also by those who hasten their decomposition by subtly altering or reducing their regulative force and reach. Perhaps counterintuitively, the authors suggest that "spectacular efforts to destroy [a] norm may be less troubling than subtler efforts to decompose it. . . . [B]ehaviors seen as flouting a constitutional norm will almost invariably have greater salience . . . than incremental revisions or refinements."[3] As such, the norm flouter will likely encounter far greater and more forceful pushback. Tying their general theories to the events of today, Chafetz and Pozen remind us that Trump, a norm-flouter *par excellence*, has indeed faced "impassioned resistance"[4] at nearly every turn.

David Super likewise keys in on norms—specifically those governing rational, good-faith decisionmaking.[5] According to Super, these norms give shape and meaning to modern deference doctrines. But when those norms break down, as may well be the case today, the entire governing structure of administrative law (dependent as it is on multiple dimensions of deference) is endangered. Taking the long view, Super cautions against permanently abandoning deference—and instead suggests that courts and civil servants should, for the time being, suspend deference, treating the instant period as a "hiatus in consensus for good-faith decisionmaking."[6] Using a specific provision of the Social Security Act, Super shows how strong these rational, good-faith norms had proven to be; explains how the Trump administration has undermined these norms, and maps ways in which the courts and civil servants may adjust their approaches "during periods of systematic disregard for the administrative state's norms"[7]—and then quickly find their way back upon a return to normalcy.[8]

Another two Articles in the Symposium focus on political movements. In his contribution, David Fontana seeks to rehabilitate the term populism.[9] Of late, Fontana notes, populism has been treated as a bundled concept. Antiestablishment populism is lumped together with authoritarian and xenophobic populism. As a result, "[t]he intellectual and popular energy that is dedicated to criticizing a narrow and isolated Establishment is undermined

3. *Id.* at 1448.
4. *Id.* at 1452.
5. David A. Super, *A Hiatus in Soft-Power Administrative Law: The Case of Medicaid Eligibility Waivers*, 65 UCLA L. REV. 1590 (2018).
6. *Id.*
7. *Id.* at 1603.
8. *Id.* at 1594.
9. David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482 (2018).

because the only word we have to describe [that energy] is the same word we use to describe figures like [Donald] Trump and [Marine] Le Pen."[10] According to Fontana, nonauthoritarian, nonxenophobic, and thus "[r]espectable populists" are "tainted because they share the p-word with abhorrent populists"[11]; at the same time, abhorrent populists like Trump and Le Pen garner legitimacy by being grouped with respectable populists. Fontana stresses that this lumping of the two types of populism is really a form of cooptation. "The year of the populist [2017] was the year of grand populist theft. Trump and Le Pen and [Viktor] Orbán stole populism."[12] Given how politically resonant the term is, Fontana urges us to "unbundle" populism and, more generally, be thoughtful and precise when choosing to apply or withhold the populist moniker.

Also zeroing in on political movements is K. Sabeel Rahman. In *(Re)Constructing Democracy in Crisis*,[13] Rahman recognizes the present-day challenges and dangers most closely associated with the Trump presidency but cautions against "overstating the exceptionalism of the current moment."[14] Doing so, he explains, runs the "risk [of] obscuring the ways in which [American] democracy has been a distant, unrealized ideal for too many communities, for too long."[15] Rahman is especially concerned that we exercise care when thinking back to the good old (pre-Trump) days, thus "implicitly valorizing the status quo ante," which again, from his perspective, was invariably far from ideal.[16] Having put questions of democratic backsliding under President Trump into a broader historical perspective, Rahman then goes on to outline what a more broadly inclusive democracy would look like—and how we may go about the forward-looking project of "democracy building."[17]

Four of the Articles examine institutions and organizations and their respective roles in promoting and safeguarding our constitutional republic. Christopher Walker fixes his gaze on the courts.[18] Walker advises against putting too much faith in the courts, particularly when it comes to exercises of modern administrative power. Indeed, "federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at

10. *Id.* at 1485.
11. *Id.*
12. *Id.* at 1505.
13. K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552 (2018).
14. *Id.* at. 1555.
15. *Id.*
16. *Id.*
17. *Id.*
18. Christopher J. Walker, *Administrative Law Without Courts*, UCLA L. REV. 1620 (2018).

least substantially insulated from such review."[19] In documenting several important categories of agency action largely beyond the reach of judicial review, Walker invites us to "turn to other mechanisms to protect liberty and the rule of law"—for example, Congress, the president, the civil service, and civil society—and calls upon scholars and policymakers to assess whether these alternative safeguards can and do provide adequate support and protections.[20]

California Supreme Court Justice Mariano-Florentino Cuéllar, for his part, considers the relationship between constitutional safeguards and other key institutions and organizations.[21] Like Walker, Cuéllar stresses a "more expansive, less court-centric view of constitutional safeguards."[22] The decisions of the courts, Cuéllar advises, may surely protect certain rights and interests. But they may be just as relevant and impactful insofar as they inform and facilitate public debate and engagement by nonjudicial actors—within and outside of government. These nonjudicial actors may then take it upon themselves to use their respective institutional authority, political capital, and organizational clout to check abuses of official power and to otherwise protect and promote the constitutional order when that order is threatened by, among other things, "fraying norms," "economic uncertainty," and "interference from geopolitical rivals."[23]

Matthew Segal addresses the critical role played by civil society as guardians of civil rights and civil liberties and bulwarks of the rule of law.[24] Segal observes that his own organization, the American Civil Liberties Union, "saw its membership almost quadruple in just the first four months of Trump's presidency."[25] He notes that groups such as Planned Parenthood, MoveOn.org, and GLBTQ Legal Advocates & Defenders experienced similar surges in membership and donations. As appreciative as Segal is that these civil society groups have stepped up to challenge the Trump administration's abusive policies, he also recognizes there are risks associated with the nation's newfound infatuation with—and seeming dependence on—select civil society groups. Specifically, the present, often overwhelming, challenges posed by the Trump administration may lead civil society groups to ignore longstanding injustices unrelated to this particular presidency, to adopt an overly litigious posture vis-à-

19. *Id.* at 1624.
20. *Id.* at 1639.
21. Mariano-Florentino Cuéllar, *From Doctrine to Safeguards in American Constitutional Democracy*, 65 UCLA L. REV. 1398 (2018).
22. *Id.* at 1402.
23. *Id.*
24. Matthew R. Segal, *America's Conscience: The Rise of Civil Society Groups under President Trump*, 65 UCLA L. REV. 1574 (2018).
25. *Id.* at 1582.

vis the government, and, possibly, to paint with too broad a brush and thereby portray government as inherently mean-spirited.[26]

Last in the studies of institutions and organizations is Heidi Kitrosser's. In *Accountability in the Deep State*,[27] Kitrosser recounts the story behind the much-publicized resignation of Joel Clement, formerly head of the U.S. Department of Interior's Office of Policy Analysis. Clement claimed that he was retaliated against for his work on climate change. He further alleged that Interior Secretary Ryan Zinke and President Trump were waging an "all-out assault on the civil service by muzzling scientists and policy experts like myself."[28] Kitrosser uses the Clement account "to explore more fundamental questions" about the federal civil service, what we mean by government accountability and responsiveness, the importance of at least some bureaucratic independence from partisan politics, and the ways in which that independence can be secured.[29]

The final two Articles in the Symposium offer some comparative analyses. Aziz Huq focuses on what he calls "apex criminality"—criminal actions by those elected or appointed to high positions in national government—and queries how constitutional designers (working from general principles) should, or should not, go about addressing, defining, and then punishing apex criminality.[30] Huq concedes that, given the massive costs and attendant uncertainty, it is at least an open question whether a rational constitutional designer would target apex criminality in the first place.[31] And, even if the designer does indeed target apex criminality, questions abound whether the instruments of enforcement and punishment ought to be legal, political, or some combination of the two. Given the many pitfalls associated with addressing apex criminality, Huq concludes by suggesting that a constitutional designer ought to decide on a particular course of action "by asking what kind of political culture, or 'project,' she wishes to seed through her constitution design" of apex criminality.[32] Though Huq's intervention has little direct applicability to the question "'what is to be done' about President Trump,"[33] it nevertheless serves as a powerful guide for future constitutional and legislative drafters (here and elsewhere) and as a beacon for

26. *Id.* at 1588–89.
27. Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532 (2018).
28. *Id.* at 1535.
29. *Id.*
30. Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506, 1508 (2018).
31. *Id.* at 1510.
32. *Id.*
33. *Id.*

those knee-deep in the current American morass to gauge where we are—and, perhaps, how far we've drifted.

Seth Davis, for his part, uses the Trump administration's controversial statements about federal Indian policy—and the apparent ease with which the Administration has intimated it can unilaterally restructure U.S. commitments vis-à-vis Indian Nations and peoples—as an occasion to explore how Indian constitutional law is constructed.[34] Davis underscores how treaties, agreements, and the longstanding civil and political values of the Indian Nations (as often expressed through treaty and agreement negotiations) "constitute political institutions" that, combined, shape and entrench Indian constitutional law. Yet at various times (including, quite possibly, today), U.S. officials do not respect the Indian treaties and agreements as constitutionally grounded.[35] To the extent these officials seek instead to question and bargain over Indian Nations' and peoples' rights, they threaten what Davis calls the sovereignty of "Our Tribal Republic."[36]

All told, the ten pieces in this Symposium add rigor, clarity, complexity, and perspective. They enrich our understanding of the present moment, guide us as we confront today's challenges, and ready us for the work that lies ahead. We are grateful for their generative and insightful contributions and are pleased to present them in the pages that follow.

34. Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLA L. REV. 1460, 1463–65 (2018).
35. *Id.* at 1463 (noting that vulnerability and uncertainty is something that many Indian Nations and peoples have long experienced (certainly well before January 2017)),
36. *Id.* at 1480.