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## From Doctrine to Safeguards in American Constitutional Democracy

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### ABSTRACT

Although scholars, judges, and policymakers have sometimes observed that American constitutional democracy depends on far more than the constraints imposed by formal, judicially-interpreted legal arrangements, many questions remain concerning the scope, theoretical basis, and practical implications of this insight. Drawing on judicial doctrine as well as insights from political science and the history of American institutions since the end of World War II, this Article explores what it means to take seriously a more expansive, less court-centric view of the safeguards associated with American constitutional democracy. I consider how historical experiences such as the postwar expansion of the consumer economy, the brutality of the Jim Crow South, and Cold War legal disputes illustrate why safeguards are best understood as encompassing society's capacity to improve institutions over time, rather than protecting an ideal set of political, economic, or legal arrangements. I offer a relatively explicit account of the mechanisms that underlie norms supporting constitutional democracy, which may either promote or weaken the alignment between such norms and formal institutions. I also explore reasons why difficulties may grow in the future—particularly in light of changing social conditions, technology, and geopolitics. While acknowledging the importance of constitutional doctrine—often most clearly articulated in the United States by courts—this Article explains why the concept of constitutional safeguards makes little sense descriptively or prescriptively without understanding a larger context focused on specific norms and institutional capacity. Attending to that larger context better reveals the mechanisms through which doctrine articulated in court decisions informs public action, and particularly how legal interpretations facilitate coordination around ideals that limit abuses of official power and strengthen the constitutional system's capacity to address institutional shortcomings and societal tensions.

While these nuances of constitutional safeguards bring into focus some of the sources of resilience for institutions, they also highlight a variety of questions and trade-offs that I begin to address here. These include the extent to which courts elaborating constitutional doctrine can reasonably be expected to take account of concerns about norms and institutional capacity, the role of private sector organizations whose capacity to shape public attitudes and communications is substantial enough to affect mass public deliberation, the importance of social insurance in addressing economic uncertainty that can undermine social cohesion and the public's stake in constitutional systems, and the alternatives available to societies coping with ruptures in those norms necessary to support democracy and constitutional governance. Perhaps most important, candor in the discussion



of constitutional safeguards will tend to encourage reflection about how laws are implemented in practice and what it takes for safeguards to function as tools for enhancing constitutional democracy in a changing world that may become increasingly skeptical of this form of government.

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## INTRODUCTION

In *Youngstown Sheet & Tube Co. v. Sawyer* (the *Steel Seizure* case),<sup>1</sup> the U.S. Supreme Court struggled to resolve whether the president of the United States had the power to seize control of privately-owned steel mills in the midst of a national security emergency. Arguing on behalf of the Truman administration was Solicitor General Philip Perlman, whose forcefully-presented case relied on briefs emphasizing the president's distinctive role in protecting the country's security. That the solicitor general would face headwinds could be readily appreciated by almost any lawyer—even one sympathetic to an expansive view of executive power under the U.S. Constitution. Not only did the president lack any apparent statutory authority for the seizure, but arguably, he was also acting in contravention of a statute. Eventually the Supreme Court rebuffed President Harry Truman. A majority of justices agreed the president lacked statutory authority to resolve labor disputes by seizing property, and was also bereft of explicit or inherent constitutional authority to undertake such an action without statutory authorization.<sup>2</sup> That the *Steel Seizure* case attained canonical status in the ensuing decades is hardly surprising: It showcases the prominent role of courts in setting constitutional constraints on official power even when the country is subject to intense geopolitical pressures,<sup>3</sup> the consequences of argumentative overreach by Justice Department litigators,<sup>4</sup> and the strategies of American lawyers and

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1. 343 U.S. 579 (1952).

2. *Id.* at 585, 587. The government's expansive legal position was a hard sell even to the dissenting justices, as the dissent sought to tether its arguments to statutes or statutory precedents, to the extent possible, and attempted to reconcile the presidential actions in question with the statutory framework governing labor relations. See *id.* at 670 (Vinson, C.J., dissenting) (discussing the Mutual Security Act of 1951); *id.* at 671 (discussing the Defense Production Act); *id.* at 704–08 (analyzing the Taft-Hartley Act).

3. *Id.* at 668 (“Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.”). The reference to a “more terrifying global conflict” almost certainly is an allusion to the risk of geopolitical conflict involving nuclear weapons.

4. See generally Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES* 233, 247–51 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (describing how the government committed a misstep by devoting a significant portion of its briefing to the question of the president's constitutional authority to order the mills' seizure, when, as the nonmoving party, it should have emphasized the equities surrounding the grant of preliminary relief rather than the seizure's legality).

policymakers given the absence of any across-the-board constitutional emergency provision available for use in domestic or international security crises.<sup>5</sup>

Yet two other mid-twentieth century historical episodes—experienced as crises by many Americans—cut sharply against facile rule-of-law optimism in the wake of the *Steel Seizure* case. In the Jim Crow South, millions of Americans lived in societies in which officially-sanctioned brutality was commonplace.<sup>6</sup> And on Capitol Hill, just across the Potomac River from the state once hosting the Confederacy's capital, the House Un-American Activities Committee and Senator Joseph McCarthy spurred congressional investigations into communist infiltration of American government and society—investigations that soon disrupted the federal government and the professional lives of thousands.<sup>7</sup> Freighted with both historical and constitutional importance, these episodes contribute to a more nuanced understanding of the norms and institutional realities that buttress or detract from robust constitutional safeguards. They showcase how questions about constitutional safeguards play out well beyond tribunals adjudicating cases about presidential power. As examples from Argentina, Venezuela, and Turkey also reveal, the nature and efficacy of constitutional safeguards depend on what happens in agencies, police departments, legislatures, and, ultimately, the public's minds. Canonical judicial disputes such as the *Steel Seizure* case may appear prominently in any portrait of constitutional safeguards in the United States. But that portrait is replete with intricacies that can be gleaned only in part from the pages of judicial opinions: implementation problems associated

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5. See John Ferejohn & Pasquale Pasquino, *Emergency Powers*, in THE OXFORD HANDBOOK OF POLITICAL THEORY 333, 333–48 (John S. Dryzek et al. eds., 2008) (describing the main conceptual questions entailed in the emergency power doctrine); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2495–03 (2006) (comparing the lack of explicit executive emergency powers in the U.S. Constitution to the constitutions of Germany, France, the United Kingdom, Mexico, and South Korea); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1539, 1541 (2007) (contemplating the role of the Suspension Clause, which allows for suspension of the writ of habeas corpus, as an emergency power, and drawing on historical evidence to find that “suspension affects neither the legality of detention nor the availability of post-detention remedies for unlawful detention”). But see Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 664–87, 681 (2009) (articulating a broad view of the Suspension Clause, where “even though our constitutional tradition is built on the cornerstone of individual liberty, . . . in certain extraordinary circumstances Congress may vest the executive with discretionary authority over individual liberty as a necessary means of preserving the constitutional order itself”).

6. See *infra* Part I.

7. See *infra* Part I.

with law enforcement and investigative authority, ongoing challenges arising from the capacity of government institutions to protect people from both private and official actions undermining constitutional governance, and shared norms contributing not only to the country's resilience but also its potential to adapt.

This Article explains what it means to take seriously this more expansive, less court-centric view of constitutional safeguards. While acknowledging the importance of constitutional doctrine—often most clearly articulated in the United States by courts—I explain why the idea of constitutional safeguards makes little sense descriptively or prescriptively without attention to a larger context involving specific norms and institutional capacity.<sup>8</sup> Attending to that larger context better reveals the mechanisms through which doctrine articulated in court decisions informs and facilitates public action, including collective action to reduce risks associated with abuses of official power and to strengthen governmental capacity for addressing internal tensions.

Specifically, this account highlights how institutions, organized interests, and the public shoulder responsibility for constitutional safeguards.<sup>9</sup> It emphasizes the risks associated with an unrealistic worldview in which courts are assumed capable of shouldering the primary responsibility for protecting the constitutional order despite fraying norms, weak institutions, economic uncertainty, and interference from geopolitical rivals. It may be tempting to treat fidelity to institutional commitments as a somewhat self-contained enterprise depending on insulated judicial decisionmaking. Instead, my argument builds on scholarship emphasizing the importance of norms, institutions, and civic understanding. Indeed, certain aspects of my account mesh closely with scholarship in law and society, legal history and “popular constitutionalism,” and the study of public institutions and organizations.<sup>10</sup> In

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8. See *infra* Parts I–II.

9. See *infra* Part III.

10. See generally FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* (2014) (acknowledging that shared norms of conduct have consequences for the use of official authority in different political systems); NEIL GUNNINGHAM, ROBERT A. KAGAN & DOROTHY THORNTON, *SHADES OF GREEN: BUSINESS, REGULATION, AND ENVIRONMENT* (2003) (assessing how variations in regulatory compliance across countries is largely explained not only by regulatory rules' content, but by factors such as the “social license” to operate in a particular fashion); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (surveying American history, social theory, and institutional development to illustrate how the American constitutional tradition heavily depends on the public's engagement in constitutional interpretation);

the course of advancing this account, I add further texture to our understanding of the interaction between informal norms and more formal institutional rules. I offer a relatively explicit and nuanced account of the mechanisms that underlie norms supporting constitutional democracy which may either preserve or weaken the alignment between such norms and formal institutions. I then explore reasons why difficulties may grow in the future—particularly in light of changing social conditions, technology, and geopolitics.

The resulting questions necessarily concern institutions and society as much as lawyerly arguments and black robes. Among the most important issues raised by such questions are the extent to which courts producing constitutional doctrine can reasonably take account of concerns about norms and institutional capacity, the role of private sector organizations whose role in communications is substantial enough to affect public deliberation, the importance of policies such as social insurance in addressing economic uncertainty that can undermine social cohesion and the public's stake in constitutional systems, and how societies cope with ruptures in those norms necessary to support democracy and constitutional governance. Perhaps most important, candor in the discussion of constitutional safeguards tends to encourage reflection about how laws are implemented in practice, and about what it takes for constitutional safeguards to function, not primarily as bulwarks protecting an idealized status quo, but as tools for elevating constitutional democracy in a changing world.

## I. CONSTITUTIONAL SAFEGUARDS ARE UNDERTHEORIZED

When judicial opinions address matters such as the right to trial by jury or protections against arbitrary detention, they sometimes endeavor to make the idea of a constitutional safeguard seem intuitive and self-evident. But nearly everything about constitutional safeguards—not only what they mean doctrinally, but how they endure, and what kind of society they enable—is rife with conceptual and historical complexities. A trip back to the 1950s readily underscores why.

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MARGARET LEVI, *OF RULE AND REVENUE* (1988) (describing how norms facilitating coordination constrain rules and why achieving quasi-voluntary compliance in raising revenue is so valuable to states); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989) (exploring how bureaucracies depend on norms for their internal operations, how pressures emerging from bureaucracies' interaction with other institutions and the public shape them, and how bureaucratic norms and values can constrain political leaders).

Picture the United States a half-decade after World War II. Americans were living through a period of substantial domestic and U.S.-fueled global economic growth.<sup>11</sup> In terms of material wellbeing, a mass consumption, tract-home version of the “American Dream” was becoming available to millions who had never experienced it.<sup>12</sup> The American military was girding for a long Cold War and had seen the conflict turn hot on the Korean Peninsula.<sup>13</sup> Policymakers and the military could generally rely on broad public support for governmental institutions and on a considerable measure of domestic order. Some Americans no doubt still associate this period with unusual prosperity, optimism, and global influence for the country. But a constitutional lens reveals a darker and more complicated picture of those halcyon days.

Take the aforementioned *Steel Seizure* case.<sup>14</sup> The Supreme Court held that the president did not have the power—in the midst of what he considered a national security emergency, but without any apparent statutory authority—to seize private property. Not surprisingly, *Steel Seizure* is a staple of modern discussions about constitutional safeguards. Little wonder: It is a lively case to teach, Justice Jackson writes a fine concurrence replete with memorable phrases, and judges and scholars analyzing more recent cases often find echoes of some of the case’s prominent themes. That said, the practical impact of the majority opinion and even Justice Jackson’s celebrated concurrence sometimes strikes me as considerably less far-reaching than the dissent’s aggressive approach to constitutional avoidance through statutory interpretation—

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11. In the United States, the gross domestic product per person, in constant U.S. (2011) dollars, grew from just over \$11,300 in 1940 to \$29,600 in 1980. *Maddison Project Database 2018*, GRONINGEN GROWTH AND DEVELOPMENT CENTRE, <http://www.rug.nl/ggdc/historicaldevelopment/maddison/releases/maddison-project-database-2018> [https://perma.cc/UK3H-4M6Y] (last modified Jan. 25, 2018, 4:40 PM). See also Moses Abramovitz & Paul A. David, *American Macroeconomic Growth in the Era of Knowledge-Based Progress: The Long-Run Perspective*, in *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES, VOLUME III: THE TWENTIETH CENTURY* 1, 36–37 (Stanley L. Engerman & Robert E. Gallman eds., 2000) (describing U.S. economic growth in the twentieth century); Barry Eichengreen, *U.S. Foreign Financial Relations in the Twentieth Century*, in *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES, VOLUME III, supra*, 463, 463–64 (describing U.S. financial institutions’ influence on global economic growth).

12. See, e.g., Abramovitz & David, *supra* note 11, at 31 (describing how “[m]ajor twentieth-century developments in transportation, communications, information, and entertainment and, most important of all, in the provision of health care and length of life itself transformed the character and quality of life for people”); KEVIN STARR, *GOLDEN DREAMS: CALIFORNIA IN AN AGE OF ABUNDANCE, 1950–1963*, at x–xi, 28–29 (2009) (describing the growing access to consumer goods and higher material standards of living during this period in California).

13. See ODD ARNE WESTAD, *THE COLD WAR: A WORLD HISTORY* 181–82 (2017).

14. 343 U.S. 579 (1952).

prominently applied a few decades later in the *Dames & Moore* majority opinion, among others.

Now consider the larger context. At roughly the same historical moment, several other stories were also playing out across the United States, and they too contribute to a more nuanced and comprehensive understanding of constitutional safeguards. Between 1947 and 1956, the government conducted over five million loyalty screenings assessing the trustworthiness of federal workers. These screenings, which ranged from relatively routine informal adjudications to more extensive investigations, resulted in an estimated 2,700 dismissals and 12,000 resignations.<sup>15</sup> Many of those the government investigated were noncommunist New Deal supporters who favored policies designed to reduce inequality. The investigations almost certainly slowed changes in labor, civil rights, and public housing policy, among other issues. We now understand far more clearly how, notwithstanding the reality of geopolitical competition and spying at the time, the political context of the early 1950s contributed to a heightened fear of communism that had these lasting consequences. Going even beyond the scope of investigations undertaken by the House Un-American Activities Committee, Senator Joseph McCarthy made reckless claims about alleged communist infiltration in the State Department, the Army, and elsewhere. Aided by his Chief Counsel Roy Cohn, McCarthy fueled anxiety about alleged communist plots to undermine the American government and showed little compunction about the impact of his tactics on accused individuals. The Supreme Court upheld the loyalty programs' constitutionality that same month. Dwight Eisenhower later also relaxed standards for dismissal<sup>16</sup> by expanding Truman's Public Law 733, which allowed any executive employee's termination on "security grounds."<sup>17</sup>

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15. Landon R. Y. Storrs, *McCarthyism and the Second Red Scare*, in OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY 9 (July 2015), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-6?print=pdf> [<https://perma.cc/BC39-SN9J>]. There is no denying Soviet interest in obtaining intelligence from the United States government at the time. See, e.g., RICHARD RHODES, *DARK SUN: THE MAKING OF THE HYDROGEN BOMB* 182–87 (1995) (discussing Soviet espionage efforts to harvest information about the American atomic weapons program). But the McCarthy-era hysteria was a poor fit for legitimate counterintelligence needs and adversely affected a vast number of individuals who posed no threat to the United States government.

16. Felix Rackow, *The Federal Loyalty Program: Politics and Civil Liberty*, 12 W. RESERVE L. REV. 701, 715–17 (1961).

17. Act of Aug. 26, Pub. L. No. 81-733, 64 Stat. 476 (1950).



McCarthy eventually lost influence.<sup>18</sup> He made increasingly outrageous charges and Army Counsel Joseph Welch confronted him at the so-called Army-McCarthy hearings. The televised hearings featured an emphatic Welch asking why McCarthy persisted in seeking to undermine the reputation of a young lawyer who had belonged to the National Lawyers Guild: “Have you no sense of decency, sir, at long last?” Welch asked. “Have you left no sense of decency?”<sup>19</sup> In the ensuing years, between 1953 and 1957, four new justices joined the Supreme Court, and by the late 1950s, the Warren Court imposed such meaningful limitations on the means through which alleged communists were identified and punished that two decisions on this issue released on the same day prompted J. Edgar Hoover to christen it “Red Monday.”<sup>20</sup>

Some version of Welch’s question would also occur to many reasonable observers of the Jim Crow South, where millions of Americans lived in the shadow of officially sanctioned brutality and segregation.<sup>21</sup> In 1950, about nine million black people lived in the states of the former Confederacy, constituting about 26 percent of their population.<sup>22</sup> Although segregation was by no means limited to the American South, the pervasive nature of race regulation in the Southern states merits special reflection. Alabama, for example, had several ordinances mandating separate sections for blacks and whites in theaters, trains, hospitals, bars, and ballparks. Georgia banned black barbers from giving whites haircuts and segregated burial plots in cemeteries. Often, prosecutors subjected public establishment proprietors to misdemeanor convictions for allowing racial integration within their businesses. Signs proclaiming “Whites Only” were a common sight within the Jim Crow South. But the signs themselves were sometimes unnecessary: Not only official action, but also community violence, enforced these laws and customs.<sup>23</sup>

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18. See generally ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* 263–69 (1970) (describing the Army-McCarthy hearings’ impact among McCarthy’s supporters, particularly among moderates “who had long tried to avoid or ignore the McCarthy problem altogether”).

19. *Special Senate Investigation on Charges and Countercharges: Hearing Before the Spec. Subcomm. on Investigations of the Comm. on Gov’t Operations*, 83d Cong. 2429 (1954) (involving Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel, Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr).

20. Storrs, *supra* note 15, at 13–14, 14 n.24 (citing *Watkins v. United States*, 354 U.S. 178 (1957) and *Yates v. United States*, 354 U.S. 298 (1957)).

21. See, e.g., EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (2d ed. 2015).

22. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 100 tbl. A-9 (U.S. Census Bureau, Pop. Div., Paper No. 56, 2002).

23. See EQUAL JUSTICE INITIATIVE, *supra* note 21.

These historical episodes are not the only ones that raise awkward questions about constitutional governance or safeguards. But given their timing and substance, they underscore the importance of three insights that contribute to a more robust understanding of American constitutional democracy across more than two centuries. First, geopolitical considerations do more than simply give public officials some basis for questioning constitutionally rooted constraints they may perceive as interfering with some national security or foreign policy objective. They also serve as rationales for resolving domestic tensions that create constitutional problems and damage the country's influence overseas as well as its capacity to serve as a compelling example for other countries.

Second, an evolving public conversation tends to shape how society articulates and ultimately seeks to resolve the major problems bedeviling constitutional democracy. That conversation plays out not just in courtrooms, but in legislative chambers, executive agencies, and ultimately, in the evolving norms and values of people with meaningful influence over the use of public power. McCarthyism was not just a product of insufficiently clear or unreasonable court decisions. It emerged from a toxic brew of political opportunism, fear, and breakdowns in norms of comity and decency that facilitated public accusations, subpoenas, and firings. Little of this could have happened without the engagement of numerous public officials who decided to abet or at least tolerate these actions, irrespective of their own mixed agendas and perhaps even personal misgivings.

Third, careful reflection about this pivotal mid-twentieth-century period in the United States shows why constitutional safeguards, properly understood, are ironically not only about continuity, but about change. The messy realities of the 1950s showcase how little sense it makes to think about constitutional safeguards primarily in terms of preserving a prosperous, idealized status quo from shocks to the system that might undermine otherwise near-ideal conditions. Whatever the merits of particular court decisions, or the economic conditions that let many families gain a tenuous foothold in the middle class at the time, or the progress in harmonizing a consumer economy with the Cold War military buildup, this period was also painful and replete with unrequited justice for many Americans—particularly African Americans in the South. Informal networks from the time, whether operating from within police departments or from storefront offices of innocuous-sounding organizations such as “citizens councils,” often acted with some degree of

semiofficial cover to facilitate collective action in support of maintaining racist policies and social norms.<sup>24</sup>

It is difficult to reconcile the officially-sponsored brutality of the Jim Crow South in the 1950s, or the graphic images of the police using truncheons and tear gas on protesters at the Edmund Pettus bridge in Selma in 1965, with any anodyne story of constitutional safeguards as protections against the erosion of already-realized rule-of-law gains. Even more than a half century later, American institutions inevitably encounter challenges aligning routine practices with the demanding norms against official brutality and arbitrary treatment associated with many constitutional guarantees. An artist drawing a candid portrait of American law and society would no doubt find some way to depict constitutional safeguards. But an honest portrayal would cast such safeguards in a specific light: as means to address unresolved gaps between societal commitments and everyday realities—gaps that, left unresolved, threaten to undermine the minimal sense of shared purpose and legitimacy on which the system almost certainly depends. Replace sanitized narratives with the messiness of actual history, and it becomes obvious why a metaphor of guardrails is such a poor fit for constitutional safeguards that must deliver the means of perfecting the Union in order to preserve it.

A more nuanced depiction of the Union's historical context also tends to reveal how much civic life in a constitutional republic depends—for better or worse—on geopolitics, along with the norms and arrangements necessary for institutions to function. Geopolitics can exacerbate the pressures that make safeguards important. Attempts to preserve domestic order in a manner consistent with a constitutional republic's rhetoric can impact a country's reputation and so-called soft power.<sup>25</sup> The tone and substance of those attempts, in turn, depend on the decisions of public officials working within

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24. Sometimes these informal networks even brought together two groups—activists sympathetic to Senator McCarthy's anticommunist appeals and Southerners resistant to desegregation—whose activities were shaping norms of civic life in American constitutional democracy at the time. For a discussion of the informal collaborations between anticommunist activists in the North, public officials, and citizen activists resisting desegregation in the South, see generally YASUHIRO KATAGIRI, *BLACK FREEDOM, WHITE RESISTANCE, AND RED MENACE: CIVIL RIGHTS AND ANTICOMMUNISM IN THE JIM CROW SOUTH* (2014).

25. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (geopolitical concerns played a role in shifting federal policy on civil rights enforcement); Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2001, rev. ed. 2011) (federal executive branch officials were concerned about the reputational consequences of civil unrest and Jim Crow laws in the South for the United States).

institutions: from freshly recruited police officers, to grizzled regulatory inspectors whose jobs still mean more than a paycheck, to unscrupulous lawmakers like Joseph McCarthy or legislative staffers such as Roy Cohn. Their actions have the potential to foment not only breakdowns in society's capacity to honor its own constitutional commitments, but also growth in its capacity to resolve problems of practical ethics and technical complexity: how to prolong economic growth and bolster a civilian economy in the midst of the Cold War, for example, or how to diminish the influence of illicit networks that undermine regional economies.

So while safeguards can be easily described as protections from a breakdown in a long-lasting, legitimate rule-of-law regime meant to constrain government from undermining already-achieved guarantees to the public, this depiction is misleading: It does not convey how particular episodes in history like Jim Crow vary greatly from our now-common constitutional aspirations, or how much governance arrangements depend on institutional capacity to resolve society's shared problems. Nor does the conventional account fully convey the centrality of public attitudes and elite decisions as both an explanatory variable when society fails to honor constitutional norms and a key target of institutions' work to interpret laws and shape value commitments. Just how institutions—judicial and nonjudicial—and the norms that support them interact to sustain constitutional safeguards in this more nuanced depiction of the world is what we take up next.

## II. JUDICIAL INSTITUTIONS MATTER TO CONSTITUTIONAL SAFEGUARDS

Legal guarantees interpreted by judicial institutions indeed deserve an important place in any conversation about American constitutional democracy. Because of their structure and partial insulation from day-to-day political pressures, federal and many state courts can in fact stand up for principles that matter even in the face of political winds undermining those principles, as some pivotal federal judges did in the Civil Rights Era.<sup>26</sup> This argument should not be

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26. This is a complex subject, but for some helpful overviews, see, for example, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (discussing classic countermajoritarianism in general and considering its implications for American courts' legitimacy); MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 305–06, 332–33 (1999) (discussing putatively countermajoritarian judges' role in marshaling public opinion—through their decisions—against the Jim Crow South regime); Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008) (surveying political science and legal scholarship challenging the countermajoritarian perception of courts).

overstated, since backlash from other institutions and the public can constrain courts. But judicial insulation has real world consequences. At a minimum, it allows courts to catalyze responses from others and ensure some aspects of constitutional safeguards are not forgotten. Moreover, courts ease the burden on other institutions by providing a setting for resolving social and cultural conflict in which decisionmakers are capable of deliberating and explaining their decisions somewhat coherently, as did the Warren Court in its loyalty oath-related decisions. Finally, courts help explore and explain what it means to implement guarantees that may inspire near consensus in the abstract but conflict in practice, as is routinely the case with constitutional criminal procedure questions.

Consider some examples. Frequently joining the *Steel Seizure* case in canonical conversations about constitutional safeguards in America are a panoply of other familiar cases grappling with basic questions of government structure and individual rights. Expand the conversation slightly to encompass the legitimate uses of coercive authority and certain criminal cases and doctrines also make an appearance. That these cases and doctrines are familiar to law professors, lawyers, and judges—and remain subject to debate around the edges—should not diminish appreciation of their likely importance.

Many judicial decisions, for example, set sufficiently explicit limits that can play a role in reining in the government's capacity for unjustified coercion and arbitrariness. In *Railway Express Agency, Inc. v. New York*,<sup>27</sup> Justice Jackson waxed eloquent about equal protection: “[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”<sup>28</sup> The nonarbitrariness trope also features prominently not only in the statutory structure governing the regulatory state, but also in procedural due process judicial discussions, as in *Wolff v. McDonnell*.<sup>29</sup> And together with free speech,<sup>30</sup> stingy limits on emergency powers confined to suspension of habeas

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27. 336 U.S. 106 (1949).

28. *Id.* at 112.

29. 418 U.S. 539, 558 (1974) (noting that “[t]he touchstone of due process is protection of the individual against arbitrary action of government”).

30. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1948) (“The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute.”).

corpus,<sup>31</sup> and perhaps separation of powers decisions,<sup>32</sup> court-articulated limits on the investigation and adjudication of criminal offenses convey to elites and the public how the government's capacity for legitimate coercion is itself policed. Assuming such guarantees are generally honored, these limits make it both more feasible and more meaningful for members of the public and opposition public officials to criticize the country's leadership as a matter of routine civic life.

These features of the doctrinal landscape convey something of American society's aspirations—and sometimes, its priorities. We can readily acknowledge gaps between principle and practice and still appreciate a core idea that merits attention even amidst all the nuance: Other things being equal, nonarbitrariness principles and limits on official coercion in the United States tend to facilitate deliberation about what society needs, and what, if anything, the government does about it. And they help preserve the public's power to engage in minimally-regulated collective action in response. These principles and limits amount to far more than what many individuals can remotely expect in other countries.<sup>33</sup> Even now, Americans reflect on this fact far too little.<sup>34</sup> Scholars, jurists, and concerned citizens may point out how these constitutional commitments are sometimes in tension with each other, why they sometimes do not mean what we think, or how California's constitution protects more

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31. See, e.g., *Steel Seizure*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (“Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, [the Constitution’s drafters] made no express provision for exercise of extraordinary authority because of a crisis.”); *Ex parte Merryman*, 17 F. Cas. 144, 151 (C.C.D. Md. 1861) (No. 9487) (noting that even with respect to the suspension of habeas corpus, “the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient” (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 136)).
  32. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (finding the U.S. Sentencing Commission constitutional under separation of powers principles, and setting forth functional yet meaningful constraints on the legality of governmental structures mixing the powers of multiple branches of government).
  33. See, e.g., Gary King, Jennifer Pan, and Margaret E. Roberts, *Reverse-Engineering Censorship in China: Randomized Experimentation and Participant Observation*, SCIENCE, Aug. 22, 2014, at 1251722-1 (2014) (describing evidence of systematic Chinese censorship of social media).
  34. Cf. *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POLICY CTR. OF THE U. OF PA. (Sept. 12, 2017), <http://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions> [<https://perma.cc/9HT2-7DJY>] (discussing survey results where more than half of those surveyed incorrectly thought that undocumented immigrants have no rights under the U.S. Constitution, 37 percent failed to name any rights guaranteed under the First Amendment, and only 26 percent could name all three branches of government).

rights than the federal one. Rightly so (especially that last part). But none of that is a good basis for minimizing the fact that these national guarantees exist at all or that we tend to share an aspiration that they will be implemented with integrity. Unconstrained official power is indeed dangerous, not only because it can squelch the public's ability to render leaders vulnerable to criticism, but also because it can wreck the finely calibrated feedback relationship that lets public officials learn, however imperfectly, how society responds to their actions.

Yet if it matters to grasp the role of formal legal arrangements as a part of the safeguards story, it matters just as much not to over-rely on this logic. Important safeguard-related questions sometimes arise only partially or not at all in a court setting for a variety of reasons, such as how fast a dispute progresses, how justiciable it is, or how likely it is that parties affected will learn about it. Indeed, even when the formal legal system's power and influence is at its height, it proves all but impossible to deny that the vast majority of questions raised by our constitutional scheme are being resolved outside that system and only partially even in its shadow—in agency conference rooms, gubernatorial offices, the White House Situation Room, and the lay public's decisions about what they can accept. The extent of presidential control of the Justice Department is just one example: The existence of some measure of court-endorsed presidential power over an executive agency does not imply that norms protective of constitutional democracy are best served by routine presidential control of federal attorneys' litigation-decisions or FBI agents' investigative priorities. Moreover, as we will see, courts depend on a variety of other factors—particularly civic norms governing public officials' behavior, government institutions with capacity to advance domestic and geopolitical goals, and reservoirs of sufficiently broad public support—for their decisions to have meaning.

### III. BUT SAFEGUARDS DEPEND EVEN MORE ON NONADJUDICATORY FACTORS

Even for savvy-legal-realist types, the fact that judicial decisions tend to have some effect in the United States can create a temptation to treat constitutional law as a self-contained universe in which lawyers argue, judges decide, litigants and public officials adjust in fairly predictable ways, and law professors critique. This picture is, of course, wrong. By understanding the mechanisms through which judicial decisions sometimes matter, we can better discern not only their limitations, but the extrajudicial norms, social

conditions, and institutional factors central to safeguarding constitutional democracy.

Though courts have an important role to play in the story of American constitutional democracy, no one can realistically expect them to solve all or even most governance problems. Courts take time to rule. They do not adjudicate certain disputes, either because of prudence or stark institutional capacity limitations. And institutions and societies may respond in a variety of ways that cut against the effective implementation of these legal commitments. Such limitations go a long way to explaining, for example, why the Argentine Supreme Court cast aside Argentina's tradition of constitutional democracy in the 1930s by promptly ratifying a coup instead of resisting it.<sup>35</sup> As we can further glean from both our own history and the experiences of other erstwhile constitutional democracies such as Argentina, Venezuela, and Turkey, constitutional commitments may depend on factors that remain at least partly extraconstitutional: norms, institutional capacity, and society's response to economic conditions and physical circumstances that can disrupt life for much of the public.

Some reflection on the nature of legal interpretation and why it matters to society begins to show why. As Barry Weingast explained in a paper exploring the political roots of concepts like "the rule of law,"<sup>36</sup> societies both benefit and face risks from leaders with the capacity to engage in official coercion. Legal rules and standards help society not only resolve private disputes, but also coordinate to constrain abuses, and systems in which concepts like the rule of law and democracy seem to have purchase are those that solve this coordination problem. With some elaboration, Weingast's argument resonates. Even when people and groups throughout the country have a stake in restraining abuse of

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35. During the twentieth century, "Argentina's most important political problems [were] problems of political organization, problems deriving from the failure of institutions . . . to reflect and implement the agreement on goals that exists at the base of the society." JEANE KIRKPATRICK, *LEADER AND VANGUARD IN MASS SOCIETY: A STUDY OF PERONIST ARGENTINA* 231 (1971). After José Félix Uriburu seized power in Argentina in September 1930, the Argentina Supreme Court issued a statement legitimizing the new regime as a "de facto government" just several days after the coup d'état. ALBERTO CIRIA, *PARTIES AND POWER IN MODERN ARGENTINA (1930–1946)*, at 9–10 (Carlos A. Astiz & Mary F. McCarthy trans., S.U.N.Y. Press 1974) (1964). The Court's members reportedly faced threats of removal both from their own tenured positions and from the entire judicial branch. *Id.* at 287, 304 n.20. This precedent was then used to recognize governments after later coups. *Id.* at 9–10, 81–82, 287. Ultimately, by Juan Perón's rise, legislators had repeatedly removed judges to replace them with the regime's supporters, thus almost completely subordinating the judiciary to the political branch. *Id.* at 287–89.

36. Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).



official power or supporting official action to address some divisive problem, economic and political cleavages make it difficult to achieve coordination among powerful stakeholders such as business executives, union leaders (at least in California), leaders of civil society movements and faith communities, and opinion leaders influential with the general public.

Free speech and criminal procedure guarantees, for example, work in part by rendering political leaders vulnerable to criticism—it would be difficult to criticize such leaders if they can lock up critics.<sup>37</sup> When the government ignores these guarantees to heighten insulation or frustrate criticism, elites and even members of the general public must choose how to respond. If they are to respond effectively to an undesired outcome, elites and the public will likely need to seek a measure of coordination, among themselves and with each other. Institutions make cooperation easier, as when the Supreme Court ruled on President Richard Nixon's lack of authority to withhold the Oval Office tapes,<sup>38</sup> and public officials and the public largely converged in supporting this decision.<sup>39</sup> Carefully reasoned legal judgments offered by trusted institutions can make it easier for people to overcome cleavages and allow for a response cutting across divisions to have lasting consequences.

It's true that some of these dynamics can be explained in terms of rational goal-seeking by actors in a limited-information coordination and principal-agent game. It would be analytically reckless, however, to cast aside entirely a more subtle and eclectic understanding of what motivates these actors, and how those motivations seem to affect civic action in the real world in ways that go beyond what such a simple game would endogenously derive. After all, legal decisions do not merely facilitate coordination but depend for their relevance on shared values that make people take those decisions seriously—and perhaps for some, seriously enough to make them feel queasy if not nauseous about disregarding them, even when noncompliance's expected utility initially seemed higher. If it is true that legal judgments are important because of what they can signal to community activists and corporate titans alike who rationally share an interest in avoiding, for example, intrusive searches undertaken with no reasonable suspicion, it is also almost certainly true that societal actors

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37. Cf. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1948) (describing how free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger”).

38. See *United States v. Nixon*, 418 U.S. 683 (1974).

39. See generally Richard W. Boyd & David J. Hadley, *Presidential and Congressional Response to Political Crisis: Nixon, Congress, and Watergate*, 10 CONG. & PRESIDENCY 195 (1983) (describing the decline in congressional support for Nixon's legislative program in Watergate's wake).

ranging from accountants to soldiers to public defenders often perform and expect lawful behavior for reasons that go beyond narrow conceptions of hyperrational personal interest. The most plausible story explaining why elites and the public sometimes cooperate to further civic goals despite their divisions would acknowledge how for some individuals, the desire to align behavior with perceptions that they live in a just world,<sup>40</sup> combined with overlapping commitments to larger groups, shared ideals, and the country itself, can overcome narrower interests or risk aversion that sometimes cut against cooperation.

“Can overcome” is the key phrase. Whether those broader commitments materialize is contingent, depending in no small measure on the presence of a vibrant ecosystem of norms and state capacity sustaining them. Although it is not sufficient to sustain constitutional democracy, the existence of some measure of shared public sentiment supporting constitutional democracy—assigning value to its larger project despite the costs of accepting leaders one may disdain or even loathe—seems valuable in no small measure because constitutional democracy’s underlying logic is precarious without such sentiment; its absence or decline has undermined constitutional democracy in Turkey, Venezuela, and elsewhere. I take such sentiment to be grounded in an understanding, however tenuous or fleeting, that constitutional democracy is consistent with two (likely) benefits: It facilitates responsive governance, and—when consistent with at least some minimal degree of constitutional constraint—it offers promise to somewhat limit the kind of cruelty and arbitrary violence Judith Shklar references in her classic essay on the “Liberalism of Fear.”<sup>41</sup> Without ignoring the kind of pain that can be readily imposed by private coercion, Shklar explains why she somewhat reluctantly embraces constitutional democracy’s liberal foundations. Eschewing zealous ideological devotion, she seems to favor instead the evaluation of different approaches to government through a weary process of elimination driven by an abiding concern over abuse of power:

Given the inevitability of that inequality of military, police, and persuasive power which is called government, there is evidently always much to be afraid of. And one may, thus, be less inclined to

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40. See John D. Murray, Jo Ann Spadafore & William D. McIntosh, *Belief in a Just World and Social Perception: Evidence for Automatic Activation* 1 J. SOC. PSYCHOL. 35, 35–36 (2010) (surveying social psychological literature supporting the idea that many people have a need to believe that their environment is just, where people who transgress norms are subject to punishment).
41. Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21 (Nancy L. Rosenblum ed., 1989).

celebrate the blessings of liberty than to consider the dangers of tyranny and war that threaten it. For this liberalism the basic units of political life are not discursive and reflecting persons, nor friends and enemies, nor patriotic soldier-citizens, nor energetic litigants, but the weak and the powerful. And the freedom [this sort of liberalism] wishes to secure is freedom from the abuse of power and intimidation of the defenseless that this difference invites.<sup>42</sup>

By treating the “weak” and the “powerful” as “basic units of political life,” Shklar underscores why a system aspiring to limit arbitrary official violence must afford such an important role to norms. When certain attitudes and expectations about the conduct of civic life are widely shared, they make it easier for the public to appreciate the risks of those norms being transgressed by the likes of Senator Joseph McCarthy or police acting under color of law in the Jim Crow South. It becomes more feasible for members of the public to fashion an organized response. Without widespread norms, it is difficult to give any reasonable account of how American constitutional safeguards help achieve such reductions in risk of cruelty while still allowing for sufficient capacity to solve the types of domestic and geostrategic problems relevant to both the “weak and the powerful.” Indeed, theories such as Weingast’s tend to have norms working in the background. A theory of why individuals respond to institutional decisions without coercion helps explain how court decisions are relevant, and highlights that certain norms that emerge from a shared understanding of what is minimally necessary for coordination and competition in governance are important to the viability of formal institutions.

The right norms bolster the prospects that citizens will see a nation-state not as abstract and impersonal, but as a tangible means for advancing shared interests. Such prospects depend, for example, on whether policymakers believe that politically relevant elites and citizens operate under the trade-offs between pressing for maximal policymaking advantage and exercising restraint, and these prospects recognize the risks of normalizing cruelty by legitimizing, for example, violence at political rallies or mocking people with disabilities.

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42. *Id.* at 27. Underlying Shklar’s approach is a concern with government’s unique coercive, persuasive, and administrative power. Yet government not only regulates, but is itself affected by private actors with competing agendas and their own capacity for behavior that undermines civic life. The problems that also exist with private cruelty, coercion, and corruption not only create dilemmas in calibrating government power in constitutional democracy, but also underscore the risks that arise when control of public power converges with purely self-serving or pecuniary agendas. *Cf.* *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting) (“We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.”).

Because they can buttress the reasons for people and organizations to observe the law, such norms lower enforcement costs and make coercion less necessary. Institutions such as the jury or voting impose some costs on the public. Yet they can also prove important to a constitutional system that tends to depend on norms. Though strategic action can certainly undermine norms, it is generally implausible to presume that the eclectic mix of individual decisions giving rise to mass civic behavior (as opposed to, say, financial market transactions undertaken by sophisticated parties) is driven entirely by narrow self-interest. And in specific settings—political campaign activity, jury service, protests—the individual rewards of participation, at least when measured in narrow self-interest terms, rarely deliver complete explanations for behaviors or outcomes. Nor are most bargains or political understandings, such as the U.S. Senate's filibuster, enforced externally. The burden of justification therefore seems to be on anyone who contends that norms rooted in more than narrow self-interest can be cast aside in understanding what makes it possible to deliver some semblance of American constitutional democracy from one generation to the next.

The relationship between norms and institutions runs both ways. Societies choose and find it desirable to continue supporting institutions, of course, in part because they fit with conventions and norms.<sup>43</sup> Those institutions, in turn, can give people more of a reason to sustain norms that would make little sense otherwise; an individual's commitment to jury service is meaningful, for instance, when juries matter and her employer generally supports jury service. Joseph Welch's rebuke of Senator McCarthy was more likely at the margin because it seemed at least possible that Welch's attack would undermine the alchemy of fear, ambition, and apathy that enhanced the Wisconsin lawmaker's *de facto* power. Relatively reliable mass taxation can be achieved with reasonable enforcement costs and without authoritarian coercion, but it almost certainly depends on having the public experience sufficient economic security to bolster the state's legitimacy. One can argue plenty about cause and effect. What matters for present purposes is that certain conditions—such as mechanisms to reduce economic uncertainty for the larger public—can make norms of democratic sentiment and the opposition's legitimacy easier or more difficult to sustain. And once institutions and the norms supporting them arise together under favorable conditions, the two help sustain each other.

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43. See Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in *POLITICAL SCIENCE: THE SCIENCE OF POLITICS* 51 (Herbert F. Weisberg ed., 1986).

The right norms can exert a powerful influence on society even if deliberation about their scope and limits ordinarily happens more among elites than members of the public. Subnorms of special importance likely include the principle that the political opposition is legitimate (and that any assumption to the contrary is at our peril); that the sphere of public debate allows for some self-serving exaggeration but is not epitomized by rank falsehood; that political capital is scarce and political advantage should not be pressed to its limits on every occasion; that much of society should be able to take part in the public sphere without regard to distinctions such as wealth and class, race, sex, and so on; and that adaptation to changing circumstances must at least be weighed as potentially valuable relative to the status quo's benefits. Not only do these norms contribute to making judicial decisions and statutes relevant, but they also help constitute the background presumptions around which people in the public sphere—from political activists to judges—structure their arguments.

These norms seem especially important in facilitating cooperation, creating shared space for deliberation, and allowing society to glean more from meaningful criticism of public officials. Yet they do not fully describe those factors contributing to constitutional democracy's viability beyond the guarantees articulated in judicial opinions. In another project, my coauthors and I explore how economic dislocation and conflict over work and labor undermined institutions and constitutional governance in the decades before the New Deal. Today, it is difficult to imagine the United States's 25 percent unemployment rate in 1933, strikes of 600,000 akin to the 1922 mine workers strike, or explosions in company headquarters in the midst of labor conflicts. That the United States was largely able to channel such conflict into courts and agencies by World War II's end is not only a milestone in the country's legal and economic history, but also an example of how unresolved economic dislocation and conflict can undermine legal arrangements' legitimacy. Elite bargains between business, labor, and government played a role in this resolution.<sup>44</sup> So did social insurance, new labor laws, and concern during wartime and after with protecting emerging mass consumer economy's delicate jugular vein.

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44. See generally Mariano-Florentino Cuéllar, *Adaptation Nation: Three Pivotal Transitions in American Law & Society Since 1886*, 70 OKLA. L. REV. 321, 323–36 (2018) (discussing how compromise between labor leaders, politicians, and business coincided with reduced labor strife in the early twentieth century United States); Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014) (explaining the significance of the Roosevelt administration's reluctance to pursue a confrontational strategy direct governmental control of industry, instead of economic coordination and large-scale federal contracting in consultation with leaders from business and labor).

History never precisely recurs. But it often rhymes. If asked to “give us a verse” and “drop some knowledge” about how economic distress might affect constitutional norms’ legitimacy, *Hamilton* creator Lin-Manuel Miranda would probably write his lyrics in the shadow of some interesting facts: The typical American worker’s hourly inflation-adjusted wages have barely moved since the 1970s, growing on average 0.2 percent a year in the United States.<sup>45</sup> Spending a little time in exurban central Oklahoma, rural West Virginia, or parts of California’s Central Valley make it far clearer why someone might vote to blow up existing norms and undermine institutions.<sup>46</sup> Which is why it is difficult to reflect on norms bolstering safeguards without weighing conditions supporting those norms and how those conditions create different lives in different regions of a continent-sized country.<sup>47</sup>

Those divergent life experiences and economic risks can drive a wedge between groups that benefit from constitutional safeguards. The extent of such

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45. Jay Shambaugh & Ryan Nunn, *Why Wages Aren’t Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), <https://hbr.org/2017/10/why-wages-arent-growing-in-america> [<https://perma.cc/9JP8-FNER>]. The share of wealth controlled by those in the top 0.1 percent of the wealth distribution has considerably increased in recent decades, from 7 percent in 1978 to 22 percent in 2012. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence From Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 520 (2016). The top 1 percent of households own more wealth than the bottom 90 percent combined. Christopher Ingraham, *The Richest 1 Percent Now Owns More of the Country’s Wealth Than at Any Time in the Past 50 Years*, WASH. POST: WONKBLOG (Dec. 6, 2017), [http://wapo.st/2jZS69P?tid=ss\\_tw&utm\\_term=.dbcd0be4188c](http://wapo.st/2jZS69P?tid=ss_tw&utm_term=.dbcd0be4188c) [<https://perma.cc/C6AH-VK97>]. Whereas the poor and middle class saw the largest income growth in 1980, the very affluent see the largest income growth today. David Leonhardt, Opinion, *Our Broken Economy, in One Simple Chart*, N.Y. TIMES (Aug. 7, 2017), <http://www.nytimes.com/interactive/2017/08/07/opinion/leonhardt-income-inequality.html>.
  46. See generally Richie Bernardo, *2017’s Best & Worst State Economies*, WALLETHUB (June 5, 2017), <https://web.archive.org/web/20171222155716/https://wallethub.com/edu/states-with-the-best-economies/21697/> [<https://perma.cc/9TAK-8ZS9>]; *Census Shows Central Valley Areas Among Poorest in Nation*, MERCURY NEWS (Sept. 20, 2012, 2:38 PM), <http://www.mercurynews.com/2012/09/20/census-shows-central-valley-areas-among-poorest-in-nation> [<https://perma.cc/2RDR-FCBY>] (describing how the Fresno, Modesto, and Bakersfield-Delano areas “are among the top five U.S. regions with the highest percentage of residents living below the poverty line”); Margaret Talbot, *The Addicts Next Door*, NEW YORKER (June 5 & 12, 2017), <http://www.newyorker.com/magazine/2017/06/05/the-addicts-next-door> [<https://perma.cc/49MD-JA6K>] (describing how the opioid epidemic has devastated communities in West Virginia, which has the highest overdose death rate in the country).
  47. For interesting accounts of these differing geographic realities, see MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016); ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016); GEORGE PACKER, *THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA* (1st paperback ed. 2014); J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016).

divergent experiences can showcase just how much safeguards depend on more than merely the government's credible commitment to honor protections against arbitrary, invidious exclusion from civic life. The public's perception that safeguards matter almost certainly depends as well on the legitimacy generated by the government's demonstrated capacity to mitigate risks and deliver reasonably effective societal outcomes. Capacity affects everything government does—building infrastructure, fielding an army, organizing a public school, and solving a host of shared problems with scarce resources that might seem to the public as relatively unconstrained. Obviously, the concentration of government capacity with few or no constraints is rarely if ever an entirely happy or risk-free development. Yet, as I have described elsewhere concerning the immigration law context, weakened agencies, discredited legislative chambers, plodding governmental responses to crises, and the resulting loss of public legitimacy can risk creating cycles in which agencies fail, constitutional frameworks seem less meaningful, and public support for state capacity further erodes.<sup>48</sup> Although the erosion of government legitimacy and diminished capacity may seem relatively familiar to observers of recent American history, the pattern is far from unique to the United States.

#### IV. MEANINGFUL CONSTITUTIONAL SAFEGUARDS RAISE NUANCED INSTITUTIONAL DESIGN AND IMPLEMENTATION QUESTIONS

The various extrajudicial factors affecting constitutional democracy raise intricate questions about norms and institutions for lawyers, judges, policymakers, and society. While constitutional doctrine articulated by courts and select other entities with authority can help society identify ideals around which to coordinate and resolve technical implementation difficulties, none of these activities occur in a vacuum. The process depends on norms and institutions supporting the kind of "virtue" without which law is relatively meaningless. Such virtues encompass, for instance, a person's concerns about responsibility and compliance with institutional decisions despite an objectively low (but not necessarily miniscule) risk that the government will detect a failure to comply. These norms likely also include the sense that factional political advantage outweighs longer-term concerns about institutions' viability and a willingness to make some trade-offs such as

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48. See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 74–78 (2012).

showing up for jury service in the name of a larger, somewhat anonymous, civic community. Court decisions and other official pronouncements of law are quite likely important as a means of offering technical instructions and articulating values around which people and groups can organize. That importance is contingent and limited by the relevance of other institutions with competing agendas, the crucial role of groups and the public who must accept certain broad norms, and the realities of life in a noisy, uncertain world. Take these ideas seriously, and at least two tentative implications follow.

First, it is worth questioning the comforting idea that American institutions are fundamentally resilient merely because the country has seen much worse. It is true that the country's experience with episodes such as the Civil War sheds meaningful light on national strengths and vulnerabilities. It is also true enough that American society almost certainly would not resegregate the civil service or see outright secession, and central cities are not burning. But constitutional risk is not distributed evenly across time any more than civic opportunity is. Economic grievances and fraying norms are not fake news, and it is a foolish bet that an elegant Madisonian balance of powers will, given time, generate by itself coherent solutions to problems involving American constitutional democracy's viability.

When groups and individuals respond to such problems through litigation or public discourse, they may seek to sound constitutional alarms. Triggered too often, such alarms may produce exhaustion and disengagement. But risk also arises from allowing tepid responses to normalize behavior sharply at odds with norms of institutional restraint supporting constitutional democracy. Consider, as one example, the steps through which corrosion might weaken subtle norms limiting the scope of executive control of specific prosecutions or investigations.<sup>49</sup> Key buffers such as the attorney general or the FBI director are weakened or delegitimized, perhaps—hypothetically—through the partial release of classified information. Lawmakers from the executive's party fail to raise concerns, in part because democratic politics selects for politicians who want to stay in office, and they are in districts drawn to keep them safe in general elections which makes them vulnerable to more extreme challenges during primaries. Criticism of executive actions is increasingly treated as shrill partisanship, especially since it does not cut across political divides. And gradually, it becomes less difficult to explain to a

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49. For a thoughtful discussion of the mix of formal and less-formal constraints underlying such norms, see generally Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).



sufficiently attentive public just what the difference is between having the White House emphasize, for example, the importance of prosecutions by the Medicare Fraud Strike Force versus the president achieving sufficient control to refocus or prematurely wind down an investigation of his business associates or his own possible obstruction of justice.

The resulting constitutional risks are sometimes exacerbated by the understandable desire of some actors and institutions—universities, courts, individuals with ties to law enforcement—to stand apart from conventional partisan politics.<sup>50</sup> Such reluctance is laudable in most contexts. Dilemmas arise for professors regarding the line between scholarly or pedagogical commentary and political opinion, for instance, or for a judge seeking to thread the needle at a UCLA symposium when alluding to transgressions of norms by elected officials. That this balance means sometimes officials who must stay away from partisan politics cautiously engage the issues of the day—or that a sitting FBI director might end up publicly clashing with the president—is, at core, a reminder that norms are largely in the hands of public officials willing to send costly signals of their concern by speaking out, resigning, or going against perceived interests. Such norms become tangible when White House officials threaten to resign to stop a president from firing a special counsel, or people with the same party affiliation as an irresponsible, norm-defying political figure threaten to reject or disavow that individual's actions. Take away the possibility of political backlash from staff or erstwhile allies concerned (for example) about a president berating the Attorney General for failing to stop legitimate investigations of politicians from the president's own party, or reduce the credibility of a meaningful backlash from other policymakers or the larger public, and a core presumption of American constitutional democracy falls away.

How societies address changing norms also depends on their communications infrastructure, including large commercial Internet “platforms.” With enormous influence over advertising and the spread of information and vast numbers of users, these entities may do little to foment reasoned deliberation or baseline norms of societal trust.<sup>51</sup> The challenges are becoming painfully familiar. Russian bots and other Russia-linked accounts made

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50. Regarding the importance of avoiding the partisan fray for institutions such as research universities, see GERHARD CASPER, *THE WINDS OF FREEDOM: ADDRESSING CHALLENGES TO THE UNIVERSITY* (2014).

51. See generally Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017) (arguing that populist nationalist movements have risen in the void left by the disintegration of legacy institutions, such as the mainstream media and political-party organizations).

perfectly predictable use of Facebook's technology to send politically charged messages seen by vast numbers of Americans. In some respects, what cuts against reasoned online deliberation is the very architecture of technology designed to leverage and even shape user "tastes" to spur more use. Zeynep Tufekci pointed out that she is never "hardcore" enough for YouTube, for example, given how its algorithms seem to steer users toward automatically viewing ever more extreme content.<sup>52</sup> The steering may be motivated by nothing more than a desire to keep user attention as long as possible. Yet, whether or not the externalities implicate anything in constitutional law's heartland, they surely affect constitutional safeguards associated with norms and state capacity because these factors nearly always depend on the nature of public deliberation, which in turn is affected by communications infrastructures.

Communications technologies' impact matters despite the fact that—and in some ways all the more because—ordinary members of the public are not particularly knowledgeable or engaged.<sup>53</sup> For one, elites shaping public opinion are themselves affected by communications platforms. Even if the public is relatively limited in its knowledge, the informational environment activating the public in some settings can inflame its passions and shape its values, perceptions, and preferences. And the possibility of coordination, among elites and the public, in response to transgressions of legal doctrines or shared values depends on mass communications. The televised clash between Welch and Senator McCarthy wounded the angry Wisconsin Senator, and images of Selma and civic efforts such as the work of the National Advisory Commission on Civil Disorders (Kerner Commission) shaped the national conversation about policing and criminal procedure.<sup>54</sup> Given the extent of concentration in market power among some leading communications (and particularly technology)

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52. Zeynep Tufekci, *We're Building a Dystopia Just to Make People Click on Ads*, TED (Sept. 2017), [http://www.ted.com/talks/zeynep\\_tufekci\\_we\\_re\\_building\\_a\\_dystopia\\_just\\_to\\_make\\_people\\_click\\_on\\_ads/up-next](http://www.ted.com/talks/zeynep_tufekci_we_re_building_a_dystopia_just_to_make_people_click_on_ads/up-next) [<https://perma.cc/YCK5-S74K>].

53. See CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 21–51 (2016) (discussing the public's relatively limited and often-superficial political information).

54. The Kerner Commission Report's release in February 1968 also appeared to have some effect on the Court's decision in *Terry v. Ohio* in June 1968 (where the Court, at least obliquely, dealt with the police-citizen encounter's explicit racial implications). See Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOWARD L.J. 567, 572–76 (1991). But cf. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3–6 (1997) (describing the forces that shape criminal procedure, such as crime rates, the definition of crime, and funding decisions).

platforms today, antitrust law may become a particularly relevant aspect of the discussion about constitutional safeguards. Crucial to that discussion will be appreciating the limitations of a vision of competition policy grounded almost entirely in price as a proxy for the mix of interests and concerns associated with a more robust understanding of consumer welfare.

Second, some processes requiring a measure of insulation from the rough-and-tumble of ordinary politics—whether they involve adjudication or rulemaking—may also benefit from engagement with the often-messy world of public discourse and political action. We should not reject ideals of adjudicatory fairness or careful analysis of technical data, but neither should we accept a view that makes paramount the highest possible insulation of adjudication that produces legal doctrine. Of course, constraints are important to protect integrity and safeguard guarantees to individuals and the public. But as we have seen, the context in which those constraints are articulated matters in maintaining constitutional values: geopolitics, institutional capacity to solve public problems and mitigate a measure of economic risk, and the role of the public and intelligible public discourse.

Taking this context seriously raises some interesting questions and possibilities. Perhaps constitutional analysis and adjudication would do well to recognize more explicitly the importance of arrangements that are not necessarily constitutionally required, but constitutionally inspired. There may be room to consider—even if cautiously, as in modern procedural due process doctrine and perhaps in the incorporation of concerns for institutional stability in statutory interpretation—how a mix of legislative and adjudicative activity associated with public benefits and procedural due process helps societies manage risk and reduce economic uncertainty for the larger public. Where ethically appropriate, lawyers, policymakers, and judges can be explicit about what they take to be the norms of civility, restraint, comity, and decency underlying the institutions within which they are operating, or to which they are contributing through their work. At a minimum, judicial opinions can embody the distinctive contributions of the civic institution most responsible for explaining the basis for its decisions by being easily accessible to the public. These contributions risk becoming mere abstractions without opinions written clearly enough to convey the essential “why” of how disputes are resolved so laypeople, directly or through the media, can at least occasionally understand what those justifications imply about society’s painful trade-offs and subtle vulnerabilities.

## V. CONSTITUTIONAL DEMOCRACY'S STRENGTH DEPENDS ON RECOGNITION OF ITS FRAGILITY

Those vulnerabilities arise for both internal and external reasons. Because no sensible response is possible without awareness of the norms, institutional realities, and historical and geopolitical context we have surveyed, bolstering the resilience of constitutional democracy probably depends, ironically, on first understanding its fragility. So candid discussions of constitutional democracy must consider not only the often-contested relationship between law and social welfare in all industrialized countries, but the United States's increasingly contested position as a major geopolitical power.

To channel Oliver Wendell Holmes, when Americans think about constitutional safeguards they benefit from considering not only about which ones distinguish us from geopolitical rivals,<sup>55</sup> but also what those rivals might conceivably endeavor to do to the United States.<sup>56</sup> How might they exacerbate distrust between elites and the public, or among elites? Just what institutions or institutional brands could they tarnish? What is the long-term payoff of fomenting wholesale distrust of electoral boards or intelligence agencies, and what new weaknesses may emerge in the wake of a terrorist attack or a natural disaster? These Holmes-style questions matter not because those geopolitical rivals always will seek to undermine us through such disruption—though it is madness to ignore they have done so—but because of what the inquiry might reveal about our collective values, their strength, and their fragility even in light of internal divisions.

Over the next few years, many conversations about how complex societies govern themselves will almost certainly focus greater attention on authoritarian systems less hamstrung by robust democratic practices or constitutional constraints on official coercion, as in China and Singapore. Such discussion will also focus on the question of how technocratic forms of governance relying on ever more elaborate artificial intelligence architectures can help societies achieve more social welfare at a lower cost. Singapore's Prime Minister does not tweet

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55. See, e.g., *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”).

56. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

much, and a legally empowered AI platform designed to maximize some intelligible version of social welfare likely will favor repealing stricter fuel efficiency standards.

Constitutional democracy will sometimes fit awkwardly into that conversation. Rightly so, because its core rationale is best understood not as a means of optimizing an uncontroversial metric of social welfare, but as a response—like some forms of nationalism, but without some of the drawbacks—to fractured, contradictory ideas about social welfare only painfully and partially reconcilable. It is because achieving this ambition implies a life of asymptotic approximation to ideals that may remain just on the horizon that discussions of constitutional safeguards ring so hollow when they focus merely on safeguarding as protections of existing guarantees. Juxtaposed against the confidence of technocratic, nationalist, or, for that matter, radical libertarian projects, functioning constitutional democracy therefore questions the confidence with which any person, organization, or faction declares that the parameter to maximize in the optimization function is easily chosen, or asserts that the questions about dignity and equality are easily handled. That the American version of it allows citizens to reflect productively on the persistent gap between aspirations and reality in how we handle those tensions is likely the system's most essential feature. Unlike many people who live elsewhere in the world, Americans are not relegated to trusting a regime insisting on the benevolence of its goals even as it prioritizes subversion of collective action.<sup>57</sup> When the commitment to self-government is as carefully reasoned as it is intellectually honest, it encompasses an effort not only to achieve that reconciliation, but also to carry it out through a process respecting individual dignity and (a measure of) equality.

Yet even if these qualities are foundational to how our society channels conflict into institutions, serious reflection also reveals it to be more fragile than perhaps normally understood. Some safeguards limit government capacity that further dissipates under intense political division. Norms supporting constitutional democracy may be weakened by some aspects of technology and foreign interference. And ultimately, certain features of constitutional democracy—from voting to elaborate deliberative procedures to the protection of minority rights—impose material costs on individuals and society. The American system's resilience in the increasingly fraught and open global

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57. See, e.g., Gary King, Jennifer Pan, and Margaret E. Roberts, *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 1 (2013) (documenting how Chinese censorship of Internet activity prioritizes targeting and disrupting efforts to engage in collective action).

conversation about how the planet is governed depends on how that fragility is handled.

The United States contributes to that global conversation not only through the public's choices at the ballot box, but through the pivotal place its institutions assign to courts and judges. This contribution is less a reflection of words printed in the federal and state constitutions, and more a function of our adjudicatory institutions' actual capacity to handle millions of cases a year<sup>58</sup> and to generate judicial decisions that routinely command public respect and compliance.<sup>59</sup>

Yet in most cases, the story of how American constitutional democracy grows its capacity to form a more perfect Union depends on some of the very same factors affecting the implementation of court decisions: safeguards rooted in public democratic sentiment, the opposition's legitimacy, state capacity, and resilience against economic and security shocks. McCarthyism's dark spell in the 1950s reflected public fear and political opportunism linking legislative staffers and civil society (among others), not just delays in judicial support for greater procedural fairness. And important though they were in the story of Jim Crow's demise, federal courts would have been ill equipped to shoulder the burden alone, bereft of public support from certain quarters and engagement from federal executive branch officials. What is at stake when serious pressure arises on institutions and norms is not simply the protection of individual or group rights, but the system's capacity to support learning from these episodes, reflection on how they happened, and a concern for the people affected.

Together these factors contribute to an environment with familiar but sometimes elusive qualities: in which not all political faultlines converge, power is divided but public problems are addressed; widespread beliefs exist among families and the larger public that they not only share a stake in society but have capacity to navigate its risks and opportunities; and leaders are subject to meaningful, potent criticism leveled with respect for the positions they occupy. The threats to this environment come from more than merely wrong policy choices or stark ruptures of doctrinal sensibility. The silent but no less serious specter is the slow undoing of extraconstitutional factors on which constitutional doctrine—and ultimately, law itself—depends for relevance.

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58. See, e.g., JUDICIAL COUNCIL OF CAL., 2017 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2006–2007 THROUGH 2015–2016 (2017).

59. See Clifford J. Carrubba & Christopher Zorn, *Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*, 72 J. POL. 812, 822–23 (2010).

## CONCLUSION

The responsibility for avoiding constitutional democracy's long-term decline is shouldered not only by courts, but also by the "weak and the powerful" to whom Shklar refers in *The Liberalism of Fear*: the people leading other civic institutions such as U.S. Congress and state legislatures, organized interests weighing the risks of securing short-term advantage against the risks of contributing (by act or omission) to civic corrosion, and a larger public frequently tempted by cynicism or futility. This more robust understanding of constitutional safeguards does not for a moment dismiss the significance of the solicitor general's emphatic argument to the Supreme Court in the *Steel Seizure* case—but it treats the dispute as no more than a single strand of a tapestry depicting our society's capacity for self-improvement through self-government. As depicted in that particular tapestry, the outcome appears less as a major source, and more as a specific expression, of the societal norms and institutional practices allowing key actors to overcome social or ideological divisions to support limits on arbitrary official coercion. Almost inevitably, candid reflection about such constitutional norms brings to the fore questions about the proper scope of constitutional doctrine in a second-best world,<sup>60</sup> the fraying of norms and the responsibility of people with power to communicate clearly about that, the evolving impact of communication platforms on public attitudes, and the resilience of society and institutions in light of economic uncertainty and geopolitical pressures.

The United States faces these questions at a time when tensions over inequality and economic risk are growing. A foreign power has perfected the means of leveraging technology platforms and existing societal divisions to exacerbate internal political conflict and sow doubt about public institutions. Those institutions are rife with internal hostility and distrust, almost certainly undermining their capacity and at times perceptions of their legitimacy. And the public is becoming habituated to a civic discourse replete with rank distortions and lies from political leaders at the highest levels. To expect formal legal commitments interpreted by courts to serve as the preeminent safeguard in a system of constitutional democracy—especially under these circumstances—is to focus far too much on constitutional law and too little on constitutional safeguards.

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60. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.").