

"A valuable contribution to understanding America at a critical moment."

—BRYAN STEVENSON

AMERICA UNFINISHED

250 YEARS OF LAW
AND GOVERNANCE



AN ESSAY COLLECTION
FROM HARVARD
LAW SCHOOL FACULTY

EDITED BY Alexandra Natapoff and Guy-Uriel E. Charles

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We dedicate this book to the principles and promise of academic freedom, and to all the people who have risked and sacrificed so much over the centuries so that we may still exercise it.

CONTENTS

ACKNOWLEDGMENTS	xiii
DECLARATION OF INDEPENDENCE	xv
GETTYSBURG ADDRESS	xvii
INTRODUCTION	xix
Alexandra Natapoff and Guy-Uriel E. Charles	

PART I: DEMOCRACY 1

1. THE UNENDING WORK OF DEMOCRACY 3
Noah Feldman
2. MAKING AMERICANS: A HISTORY 7
Annette Gordon-Reed
3. CONSTITUTING DEMOCRACY: INVESTING IN A VIRTUOUS
CIRCLE 10
Martha Minow
4. DEMOCRACY IS A NEGOTIATION 13
Sheila Heen
5. FROM INDEPENDENCE TO INTERDEPENDENCE: THE EVOLUTION OF
THE AMERICAN PROJECT 17
Rachel A. Viscomi

PART II: FREE SPEECH AND DISSENT 21

6. THE BAN ON VIEWPOINT DISCRIMINATION 23
Cass R. Sunstein
7. FEAR OF WITCHES: FREE SPEECH AND DISTRUST OF GOVERNMENT
SPEECH RESTRICTIONS 26
Rebecca Tushnet
8. EFFECTIVE DISSENT 30
Laura Weinrib

9.	REINVIGORATING THE RIGHT TO PETITION	35
	Sharon Block	
10.	ON AMERICAN EXCEPTIONALISM AND THE ACADEMIC FREEDOM TO LEARN ABOUT HISTORY'S "BAD" PARTS	39
	Tomiko Brown-Nagin	
PART III: AMERICAN IDENTITY, CITIZENSHIP, AND RACE		43
11.	ONE PEOPLE: THE AUDACIOUS PROVOCATION OF AMERICA	45
	Guy-Uriel E. Charles	
12.	WHAT IS AMERICA?: THE PRESUMPTIONS THAT LAW MAKES	49
	Kenneth W. Mack	
13.	BICENTENNIAL MELANCHOLIA	54
	Randall Kennedy	
14.	THE FOUNDERS' CHOICE IS NOT YET IN THE PAST	57
	John Coates	
15.	THE RENAISSANCE OF OPEN WHITE SUPREMACY	62
	Michael Klarman	
PART IV: THE SUPREME COURT		67
16.	DECLARING INDEPENDENCE FROM JUDICIAL SUPREMACY	69
	Nikolas Bowie and Daphna Renan	
17.	A COURT OF TWO CRISES	73
	Richard M. Re	
PART V: THE FEDERAL GOVERNMENT		77
18.	A FEDERAL GOVERNMENT TRANSFORMED	79
	Jody Freeman	
19.	FACING OUR FISCAL CHALLENGES AT 250	85
	Howell E. Jackson	
20.	"MERCILESS INDIAN SAVAGES" OR "DISTINCT, INDEPENDENT POLITICAL COMMUNITIES"?	90
	Joseph William Singer	
PART VI: ELECTIONS		95
21.	OUR BULWARKS AGAINST LOSING—OR IMPROVING—OUR DEMOCRACY	97
	Nicholas O. Stephanopoulos	

22. REBUILDING THE ARCHITECTURE OF PRESIDENTIAL ELECTIONS 102
Larry Schwartztol

PART VII: CRIME, PUNISHMENT, AND STATE POWER 107

23. AMERICAN CRIMINAL LAW: FROM INEQUALITY TO IMPUNITY 109
Alexandra Natapoff
24. RESTORING THE POWER OF THE PEOPLE IN THE CRIMINAL PROCESS 113
Adriaan Lanni
25. THE LAST FEDERAL PROSECUTORS 116
Andrew Manuel Crespo
26. THE FUTURE OF CAPITAL PUNISHMENT 121
Carol S. Steiker
27. DECARCERATING IMMIGRATION 125
Sabrineh Ardalan and Philip L. Torrey

PART VIII: THE ENVIRONMENT 129

28. MEETING THE CHALLENGE OF ADDRESSING CLIMATE CHANGE 131
Richard J. Lazarus
29. FOUNDING IDEALS AND THE FUTURE OF AMERICAN FOOD POLICY 136
Emily M. Broad Leib
30. THE LAW AGAINST THE LAND 140
Kristen A. Stilt

PART IX: THE FUTURE OF ECONOMIC GOVERNANCE 143

31. CORPORATE GOVERNANCE AND PRIVATE POWER 145
Mariana Pargendler
32. AMERICA'S ANTI-CORPORATE, ANTI-FINANCE POPULISM: YESTERDAY AND TODAY 150
Mark J. Roe
33. SOCIAL DEMOCRACY AGAINST LIBERAL OLIGARCHY 155
Yochai Benkler
34. LAW FOR ORGANIZING: COMBATING THE CRISIS OF INEQUALITY 159
Benjamin Sachs

35. THE REVOLUTIONARY CHALLENGE OF EQUALITY: TOWARD A REDESIGN OF AMERICAN MONEY	163
Christine Desan	
36. AMERICA'S COURTS OF LAST RESORT: THE BANKRUPTCY SYSTEM	167
Jared Ellias	
PART X: NEW TECHNOLOGIES AND THE FUTURE OF KNOWLEDGE AND DEMOCRACY	
171	
37. THE FAILURE OF OUR CONSTITUTIONAL DESIGN AND THE THREAT OF AI	173
Lawrence Lessig	
38. GAINING POWER, LOSING CONTROL: RETHINKING THE CONSTITUTION'S VALUES AMIDST NEW TECHNOLOGIES	176
Jonathan Zittrain	
39. INTELLECTUAL PROPERTY AND LAYERED SOVEREIGNTY	181
Ruth L. Okediji	
40. REPRODUCTIVE TECHNOLOGIES AND THE FEDERAL CONSTITUTIONAL VACUUM	185
I. Glenn Cohen	
PART XI: THE INTERNATIONAL LEGAL ORDER	
191	
41. FOREIGN RELATIONS AND THE FAILURES OF FORESIGHT	193
Kristen E. Eichensehr	
42. THE UNITED STATES WILL NEED INTERNATIONAL LAW	197
Gerald L. Neuman	
43. AMERICAN POWER AND THE FUTURE OF HUMAN RIGHTS	200
Susan H. Farbstain	
44. THE UNITED STATES AND INTERNATIONAL CRIMINAL JUSTICE: THE END OF A LONG RELATIONSHIP	205
Alex Whiting	
45. THE UNITED STATES, INTERNATIONAL ENGAGEMENT, AND THE NEED TO LOOK BOTH BACK AND OUTWARD	210
Bill Alford	
PART XII: WAR	
215	
46. DO U.S. PRESIDENTS HAVE THE POWER TO DECLARE WAR?	217
Jill Lepore	

47. A DECLARATION FOR THOSE IN UNIFORM 222

Daniel L. Nagin

PART XIII: LEGAL REASONING IN A DEMOCRACY 227

48. THE “LEGAL MIND” AS CULTURAL ACHIEVEMENT 229

Benjamin Eidelson

49. THE LIVING HAND 233

Stephen E. Sachs

50. TOM, MEET MAX 236

John C.P. Goldberg

51. PALLADIUM OF LIBERTY: CONSCIENTIOUS ACQUITTAL AND THE
RESTORATION OF THE AMERICAN JURY 239

Charles R. Nesson

52. ANTEBELLUM SHARĪ‘A, CIVIL RIGHTS SHARĪ‘A, AND AMERICAN
FREEDOM 243

Intisar A. Rabb

53. REAL LEGAL NIHILISM 249

Scott Brewer

PART XIV: THE LEGAL PROFESSION, LEGAL EDUCATION, AND THE RULE
OF LAW 253

54. REIMAGINING PROFESSIONAL INDEPENDENCE 255

David B. Wilkins

55. LAW, LEGAL EDUCATION, AND STRUCTURAL INJUSTICE 259

Eloise P. Lawrence

56. HUMANIZING THE ACCUSED IN THE PURSUIT OF THE RULE
OF LAW 263

Dehlia Umunna

57. ON CATS, CODICES, AND THE COMMON LAW CURRICULUM 266

Elizabeth Papp Kamali

PART XV: COMMUNITY AND CIVIC VIRTUE 271

58. A NATION OF DOCUMENTS 273

Stephen Breyer

59. ON CIVIC VIRTUE 277

Ronald S. Sullivan, Jr.

60.	EMPIRICAL TRUTH AND THE DECLARATION OF INDEPENDENCE	280
	D. James Greiner	
61.	HISTORY AS POWER	283
	Bruce H. Mann	
62.	PROPERTY LAW IN PURSUIT OF COMMUNITY	287
	Maureen E. Brady	
	CONTRIBUTOR LIST	293

2

MAKING AMERICANS: A HISTORY

ANNETTE GORDON-REED

Who can lay claim to being an American? A common view holds that one born in the United States of America, or one who comes to live in the country, accepts American values, and gains formal citizenship, *is* an American. President Ronald Reagan often reflected on the way the United States differed from other countries on this point. He endorsed a passage in a letter that stated it was possible for a person to live in France, but never really be considered French. The same holds true for other countries around the globe because the people in those countries believe that their identity as citizens is firmly tied to ancestry and ethnicity.

The United States, Reagan claimed, stood alone in its approach to national identity. Being an American was not a matter of ancestry. It was about one's beliefs that were bound to a set of ideals and principles set forth in the founding documents of the United States of America, principally, the Declaration of Independence and the Constitution of the United States. America was a nation based upon a creed rather than notions of blood. The Declaration's statement of the "self-evident" truth that "all men are created equal," and basing the right to create a new country on that concept, opened the door to a new way to think about how nations are constituted. Reagan certainly was not the first person to depict the United States as a nation based upon ideals. That claim has been made over the course of 250 years, and it has been made with great insistence and pride by people of all races, creeds, colors, and political persuasions.

Of course, there have always been Americans who have sharply dissented from the United States-as-a-creedal-nation construction, denying that there can ever be such a thing. Nations, in their view, are built through the process of making and living in communities over a long

period of time; communities that share a common ancestry, language, traditions, and culture. Proponents of what is often called the “blood and soil” or the “heritage American” perspective note that it was people of European descent who, by their numbers, were primarily responsible for creating the United States. Even more specifically, they argue that because those people were mainly Anglo-Protestant, the United States of America should be recognized and—this is critical, particularly for the development of law—*preserved as* an Anglo-Protestant nation. People of color, Catholics, Jewish people, Indigenous people, could live in America, but could never be considered as real Americans. The word Anglo, as does the word “ancestry”, creates an explicitly racial understanding of American identity and represents the primary challenge to the idea that Americanness is based upon a belief in a set of ideas. After all, people who were not born Protestant can become Protestant. People who are not Anglo, according to the definition that those who focus on ancestry would apply, cannot “become” Anglo.

These warring viewpoints on American identity have shaped arguments and understandings about the substance and possibilities of American law. Americans profess to have created “a government of law and not of men,” under a written Constitution that safeguards and details the powers and rights of citizenship. If the Anglo-Protestant character of American identity is foundational and has to be preserved, can any steps be taken to alter that commitment? Many Americans would answer “no” to that question.

Perhaps no more salient discussion of this question can be found than in Chief Justice Roger Taney’s infamous majority opinion in *Dred Scott v. Sandford* (1857). Taney explained why people of African descent—whether enslaved or free—could not be American citizens, employing an ancestry-based and racialized view American identity. No matter what a Black person believed, no matter that Black men had served in the Continental Army of the United States—and in the militia in some states—in the struggle against Great Britain, they were forever disqualified from being real Americans. This was not about their civic status as enslaved people. Blacks who had been born free were equally foreclosed. Justice Benjamin R. Curtis’s strong dissent corrected Taney’s faulty history on the question of Blacks’ place in early America to no avail. Later, in his

Gettysburg address, Abraham Lincoln laid the philosophical groundwork to prepare the nation to formally move beyond Taney and embrace what Lincoln called a “new birth of freedom.” He used the Declaration of Independence’s statement about equality to justify bringing African American people into the polity and cementing their identity as full Americans. It would take the United States Army’s successful prosecution of the Civil War (with the aid of nearly 200,000 Black soldiers) to create the conditions that allowed for the legal settlement of Blacks’ place in American civic life. The Thirteenth, Fourteenth, and Fifteenth Amendments ended racially-based legalized slavery, made Black people full citizens, and prohibited interference with their right to vote.

We know the sad story of how the promise of equality through law was thwarted in the decades immediately following the end of the War, largely by people who adhered to the blood and soil view of American identity. Indeed, as a result of the failure to fully implement the post-War legal measures to ensure Blacks’ rights, W.E.B. Dubois could confidently state in *The Souls of Black Folk* (1903) that “the problem of the 20th Century is the problem of the color line.” In his native United States, Blacks and their White allies, turned to law to solve that problem, instituting a movement that is often referred to as a Second American Revolution that was, in many respects, successful.

There was then, and there is now, ferocious opposition to using law to help the nation live up to the Declaration’s creed. One hears blood and soil rhetoric at the very highest level of government. The frenzy of the effort to deport immigrants, particularly brown-skinned immigrants, hints at a not too far below the surface desire to rid the nation of non-White people, to live the fantasy of a White Christian nation. This is all very far away from the lofty aspirations of the Declaration and its belief in the power of ideas. It is also far from the words of the Declaration’s author, written fifty years after 1776, when he predicted that the Declaration would one day apply to people the world over. Now more than ever, we need our legal traditions of idealism, equality, and inclusion to resist the current tide of racism and reactionaryism.