

"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

PROPERTY OF THE MIT PRESS
FOR PROOFREADING, INDEXING, AND PROMOTIONAL PURPOSES ONLY

AMERICA UNFINISHED

PROPERTY OF THE MIT PRESS
FOR PROOFREADING, INDEXING, AND PROMOTIONAL PURPOSES ONLY

AMERICA UNFINISHED

250 YEARS OF LAW AND GOVERNANCE

AN ESSAY COLLECTION FROM HARVARD
LAW FACULTY

EDITED BY ALEXANDRA NATAPOFF AND
GUY-URIEL E. CHARLES

The MIT Press
Cambridge, Massachusetts
London, England

The MIT Press
Massachusetts Institute of Technology
77 Massachusetts Avenue
Cambridge, MA 02139
mitpress.mit.edu

© 2026 Massachusetts Institute of Technology

This book was set in ITC Stone Serif Std and Trajan Pro by New Best-set Typesetters Ltd. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data is available.

ISBN: 9780262060431

10 9 8 7 6 5 4 3 2 1

EU Authorised Representative: Easy Access System Europe, Mustamäe tee 50, 10621
Tallinn, Estonia | Email: gpsr.requests@easproject.com

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

3

CONSTITUTING DEMOCRACY: INVESTING IN A VIRTUOUS CIRCLE

MARTHA MINOW

William Hastie, a U.S. civil rights advocate and later federal judge, once explained, “Democracy is a process, not a static condition. It is becoming rather than being. It can be easily lost, but never is fully won. Its essence is eternal struggle.” The project of self-governance requires setting up and maintaining institutions and also cultivating and sustaining individual capacities—attitudes and behaviors connected with participating in the political order while preserving its values. Institutions such as election boards, city councils, legislatures, courts, and administrative agencies alone do not work without the participation of people bringing their commitments and skills. Conversely, individuals’ virtues and qualities cannot produce stable practices to persist through daily tumult and periods of strain. The qualities of thinking, listening, cooperating, and tolerating needed to support and sustain democratic institutions themselves need laws and organizations, such as schools and media organizations, for cultivating and renewing the capacities of individuals.

Democracy—rule by the people—is a government system with goals that are also its preconditions. Respect for individual freedoms of speech and association; political participation and rights to vote in fair elections for all adults; and elected governmental representatives accountable to the electorate for their decisions comprise the “procedural minimum” that Robert Dahl in his *A Preface to Democratic Theory* defined as preconditions for democracy. Constitutional democracy aims to produce what it also presumes: equal respect for self-governing members of society. Such a virtuous cycle does not start and nor does it continue without genuine investments. Meaningful education regardless of family resources, reliable news sources amid shifting technologies and competition for

attention, day-to-day security, and norms of reciprocity each demand not only initial but ongoing contributions of time and money to serve as sustaining ingredients for constitutional democracy. Civic virtues require infrastructures of education, information, personal safety, and political and economic fair play, as well as the mechanisms of constitutional democracy, such as voting rights and checks and balances of governmental institutions.

Even ardent supporters of constitutional democracy emphasize the daunting obstacles to make it work at any time and any place. To engage and equip large numbers of people to govern themselves, to cultivate leaders who can earn and keep respect, to manage conflicts without violence, and to cultivate respect for the rights of others may be simply too hard to sustain, even if a system with such claims can get off the ground. Framers of the U.S. Constitution knew that popular sovereignty would not always serve long-term interests of the nation much less rights for individuals. Top of mind for them were prior republics that had not endured. They devised a structure to tackle the challenges they anticipated. The project of constitutional democracy can inscribe expectations through fragile ideals, captured in words of fallible human beings that at least set standards for judging failures of underlying commitments.

This already fragile arrangement is under attack. Increasingly in constitutional democracies across the globe, a kind of “playbook for authoritarians” appears to guide leaders: blame others, attack, foment social divisions, undermine trust in institutions, and demonize any source of authority other than themselves. Rising generations express the most profound disaffection about democracy. Among 18- to 29-year-olds in the United States, only 57 percent told a prominent pollster that keeping the nation a democracy is very important. Those coming of age in recent years have witnessed democracies roiled by economic instability and record-breaking inequality, refugee and immigration crises and violent government actors claiming to address them, environmental catastrophes, fumbling responses to the COVID-19 pandemic, global wars, and elections flooded with dark money and allegations of corruption. People of varied views and backgrounds—people who disagree about many matters—converge in seeing political and economic systems of the United States as rigged and expressing high levels of distrust of

institutions, neighbors, and one another. As individual leaders and their supporters accumulate personal power and wealth, they hollow out democratic institutions, constitutional values, and trust essential to both.

Irony reigns as major anniversaries of the U.S. Declaration of Independence, Constitution, and Bill of Rights unfold now amid the apparent fragility of freedom, law, and rights. Leading U.S. officials attack elections, education, and journalists. Masked and armed government employees unleash violence and fear in the name of immigration law enforcement. Officials dismantle historic markers of both racial injustice and legal commitments to overcome it. Government threats and corporate consolidations shrink independent news reporting. Debates over whether the nation has a constitutional crisis seem clueless. Law firms, universities, businesses, and their leaders compromise their values, suppress their criticisms, and try to lay low. The rights and structures imagined by the U.S. Constitution in the eyes of many do not guard against entrenched power and do not attain effective self-government.

The Constitution enables judicial enforcement, authorizes elections, and divides governmental power to check tyranny. It imagines a virtuous circle, checking power while enabling self-government and individual rights. The rights and structures of constitutional democracy presuppose capacities among leaders and groups in society, including the attitudes, beliefs, and practices enabling voting, compromising, turn-taking, and tolerating differences and disagreements.

Today, those capacities are strained and the ideals of constitutional democracy seem remote. But the same was true during past vehement social conflicts, periods of corruption, a brutal civil war, and slavery. The seeds of freedom and core values of both self-governance and power-checking institutions remain inspiring.

Struggles for constitutional democracy in the United States are still worth it, even as any serious effort requires new and continuing investments of considerable resources, time, and hope. Those struggles cannot be confined to political parties or elections. They also must involve people pursuing the public good as they see it. Discussion of preconditions for constitutional democracy is an invitation to participate in those struggles.