

"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.

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A COURT OF TWO CRISES

RICHARD M. RE

The Supreme Court is presently ensnared in two intersecting crises.

The first is the “constitutional crisis” assertedly begun at the start of President Trump’s second term. The newly elected, populist President advanced startlingly aggressive claims of authority, some of which were surely illegal. Federal courts struggled to respond. Compounding this challenge, executive officials called for impeaching resistant judges or defying their decrees—events that would likely have dealt the rule of law, already beleaguered, a mortal blow.

The second crisis pertains to the judiciary’s own fraught claim to legitimacy in an era of political polarization. Because the Supreme Court now has such a strong ideological valence, it has become a natural target of partisan politics, with most criticisms coming from the left. And while many efforts at court reform respect the judiciary and aim to improve it, recent proposals often resemble deconstruction or capture. Most salient are partisan proposals that the Court itself be “expanded,” a euphemism for what was once called court-packing.

The two crises may exacerbate one another. In responding to rule of law challenges, the Supreme Court has lately jeopardized its own public esteem. For example, the Justices issued terse orders allowing the President to remove myriad agency officials with statutory tenure, thereby inviting ferocious criticism on both political and legalistic grounds. What is more, federal jurisdiction does not extend to many important facets of government, such as the initiation of war abroad. So perhaps the courts, through a combination of failure and inevitability, have not done enough to protect the constitutional order, as many critics allege.

But if the critics respond by weakening the courts, they may only set the stage for even greater populism and attendant disregard for the rule of law. For it is hard to deny that the federal judiciary, overseen by the Supreme Court, has repeatedly checked the present administration. Sometimes the justices themselves have acted; other times, they have left lower court rulings intact. Examples have involved free speech, due process, deportations, national guard deployments, birthright citizenship, partisan impeachments, tariffs, the Federal Reserve, and still more measures not even attempted under the judiciary's watchful eye. So even if the courts could have done more, they have certainly done quite a bit.

For all its faults, then, the federal judiciary has come to play a critical counter-majoritarian role within an increasingly majoritarian government. At the Founding, the federal government was both limited in strength and insulated from populism. Congressional powers were few and limited, while the president was selected by an Electoral College, and Senators by state legislatures. Over time, however, that small-r republican regime eroded away. The federal legislative power became vast during the New Deal, the Electoral College became a ministerial body, and the direct election of Senators rendered even the upper house populist.

So, in a closely divided polity, small vote margins can and do yield outsized political consequences. To wit, four of the last five presidential elections (2008, 2016, 2020, and 2024) have ushered in unified governments, with the political branches controlled by a single party. The Senate filibuster still curbs majoritarian federal legislation—but for how much longer?

Despite this trend toward majoritarianism, the federal courts continue to reflect the Founding-era vision of republican government. Of course, federal judges are selected through a political process, so their decisions often have democratic legitimacy. But because its membership changes only gradually, and because its personnel are relatively insulated from electoral pressures, the federal judiciary is often out of step with the politics of the day. Frequent disagreements between President Trump and his own first-term judicial appointees offer only the latest illustration.

But if the federal judiciary is among the few counter-majoritarian forces remaining in the United States government, its fate is now in doubt. The same populist pressures that have worked on other components of the original United States government are now poised to iron out its courts,

too. The danger here is long foretold. As Alexander Hamilton noted in *Federalist* 78, independent courts are “equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which” are fostered by “the arts of designing men.”

On reflection, however, each crisis offers a way out of the other. If it can navigate our time of polarized populism, the judiciary may thereby solve its own legitimacy problem. Scholars have argued that judicial independence largely springs from the long-term incentives of partisan actors. Parties in power today anticipate relying on the judiciary once they are out of power tomorrow. And, again, courts have lately offered respite for the loyal opposition. If that pattern persists and political tides turn, the judiciary may emerge stronger than ever.

True, some critics oppose the Supreme Court on principle, regardless of how it rules. But other critics are not hostile so much as jealous, essentially lamenting that the justices are insufficiently on their side. Proposals regarding court reform could even be performative, in that their real goal may be to moderate the Third Branch or “work the ref.” In all events, polls that measure Supreme Court approval suggest that many memories are short. If the judiciary would only re-prove its worth, it might be welcomed back with open arms.

History suggests much the same, as past moments of constitutional and judicial peril punctuate the long story of the Supreme Court. The partisan clash between Federalists and Jeffersonians gave rise to *Marbury v. Madison* (1803). Sectional strife over slavery set the stage for the disastrous ruling in *Dred Scott v. Sandford* (1857). And New Deal controversies yielded the “switch in time that saved nine” in *West Coast Hotel v. Parrish* (1937). Each time, the Supreme Court outlasted its own blunders as well as its critics—and soon was thriving again.

Two and a half centuries ago, the Declaration of Independence called for both expanded democracy and greater judicial power. History has followed that twin decree. Today, however, these trends are coming into conflict. Whether the Supreme Court can continue to check majoritarianism, including authoritarian populism, remains to be seen. But every time it succeeds, the odds increase that powerful courts, and the constitutional order, will ultimately endure. As H.L.A. Hart wrote in a related context, “Here all that succeeds is success.”