

Daniel Markovits  
**The Meritocracy Trap:  
 How America's Foundational  
 Myth Feeds Inequality,  
 Dismantles the Middle Class,  
 and Devours the Elite**  
 Penguin Press, 2019



# The Gilded Cage of Meritocracy

The human cost of the current hierarchy

**Meritocracy** — the idea that a person's hard work and abilities determine one's rewards in society — sits at the very center of the American ideal. But meritocracy is a failure, writes Guido Calabresi Professor of Law Daniel Markovits '00 in his book *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite*.

In a time of profound political polarization, the concept of meritocracy continues to be idealized by both sides of the political spectrum. It promises equality and opportunity by opening elite status to everyone based on their talents and ambitions. But Markovits argues that meritocracy no longer operates as we think it does. In his book, Markovits explains how rising inequality, class conflict, discrimination, and social and political dysfunction are all the end product of our current beliefs about meritocracy.

*These divisions, Markovits says, sow discord that has led to our divided political climate. As the current system hastens inequality, “it drives the middle class to resent the establishment and seduce the elite to cling to the corrupt prerogatives of caste.”*

Meritocracy fails because it both oppresses the middle class and hurts the elite, he writes. Most of all, the differences in the way the elite educate their children affects how hugely disadvantaged children in lower income brackets are compared to their richer counterparts. Middle-class children cannot afford the expense of an elite education and face discrimination in the labor market without one. Rich children enter a grueling and competitive education regimen from a young age, resulting in record high rates of depression and anxiety in young adults. Once adults in the labor force, they suffer burnout from the pace and pressures of an elite workplace.

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To address the meritocracy trap, Markovits advocates for reforms to both education and work.

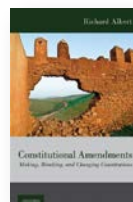
More open and inclusive education and less competitive admissions policies would increase social mobility and opportunity. Returning mid-skilled labor to the center of the economy through changing regressive tax policies and enacting reforms to encourage employers to create mid-skilled jobs, for example, could “reestablish the middle class in its central role in economic and social life.”

But reforming the current system will not come easily or quickly, Markovits explains.

“The meritocracy trap was constructed over generations and will take generations to dismantle,” he writes. Such changes, if enacted together and working over time, could help shore up the middle class and reduce societal divisions. “A more equal social and economic order would therefore make everyone — both the rich and the rest — better off,” Markovits says.

## SURVEY OF BOOKS

Here’s just a sampling of the many other books recently written or edited by our alumni, faculty, staff, and students. We welcome your submissions. Please contact us: [lawreport@yale.edu](mailto:lawreport@yale.edu).



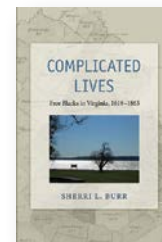
Richard Albert  
**Constitutional Amendments:  
Making, Breaking,  
and Changing Constitutions**  
*Oxford University Press, 2019*

Albert '03 offers a blend of theory and practice to answer three important questions: What is an amendment, what are amendments for, and how should constitutional designers build the procedures of constitutional change? The book provides a blueprint for building and improving the rules of constitutional change and a roadmap to navigate the intellectual universe of amendment.



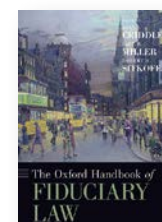
Ady Barkan  
**Eyes to the Wind:  
A Memoir of Love and Death,  
Hope and Resistance**  
*Atria Books, 2019*

This powerful memoir by Barkan '10 traces his battle with ALS and rise as a prominent figure in the progressive movement. Barkan finished this memoir, a memento for his son Carl, using Eyegaze technology that lets him use a tablet computer with only his power of sight. This story of hope and resistance is Barkan's final message about the power of progressive change in the bleakest moments.



Sherri Burr  
**Complicated Lives:  
Free Blacks in Virginia,  
1619–1865**  
*Carolina Academic Press, 2019*

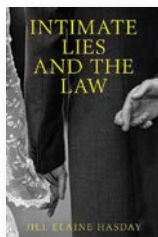
Through her research, Burr '85 disproves the assumption that all Blacks in the South before the Civil War were slaves. In fact, many were indentured servants. Burr's book looks at the lives of Free Blacks through the lens of her own ancestors and others.



Evan J. Criddle, Paul B. Miller,  
and Robert H. Sitkoff, eds.  
**The Oxford Handbook  
of Fiduciary Law**  
*Oxford University Press, 2019*

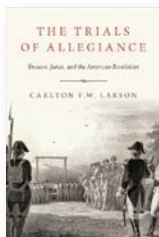
Criddle '03 and co-editors have curated a collection of essays that cover a range of topics centered on fiduciary law. The book examines 18 different fields of law, including agency law, trust law, corporate law, pension law, bankruptcy law, family law, employment law, legal representation, health care, and international law.

## SURVEY OF BOOKS



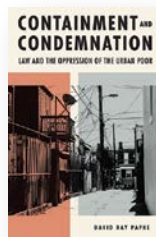
Jill Elaine Hasday  
**Intimate Lies and the Law**  
*Oxford University Press, 2019*

Hasday '97 examines deception in intimate relationships and the overlooked but far-reaching body of laws that govern this duplicity. She argues the law has placed too much emphasis on protecting intimate deceivers and that it can do more to recognize, prevent, and redress the injuries intimate deception can inflict.



Carlton F.W. Larson  
**The Trials of Allegiance: Treason, Juries, and the American Revolution**  
*Oxford University Press, 2019*

Larson '00 analyzes the American Revolution from the perspective of the law of treason, connecting the topic to the power to detain, the authority of military commissions, and the composition of juries. The author drew from extensive archival research in Pennsylvania.



David Ray Papke  
**Containment and Condemnation: Law and the Oppression of the Urban Poor**  
*Michigan State University Press, 2019*

This book examines how law works for, against, and with regard to the urban poor. Papke '73 argues that legal proceedings and institutions can create, expand, and perpetuate contemporary urban poverty.



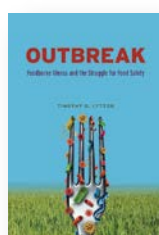
Jennifer Prah Ruger  
**Global Health Justice and Governance**  
*Oxford University Press, 2018*

Prah Ruger '11 MSL presents a new theory of global health justice and governance. The book reveals gaps in existing attempts to address health issues through in-depth analysis of current theories and presents a vision for a new global health architecture.



Brian C. Kalt  
**Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment**  
*Oxford University Press, 2019*

Kalt '97 provides an in-depth explanation of the 25th Amendment, which has become a frequent topic of public discussion. Dispelling inaccuracies, the book offers a clear understanding of presidential incapacity under the Amendment. Kalt provides hypothetical scenarios and their outcomes.



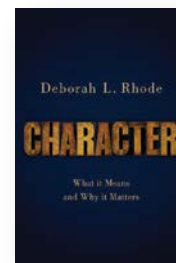
Timothy D. Lytton  
**Outbreak: Foodborne Illness and the Struggle for Food Safety**  
*University of Chicago Press, 2019*

Lytton '91 analyzes the U.S. food system through examining efforts to reduce foodborne illness. Each chapter explores a different facet of this system: its origins, the influence of media on public perception and policy, a select history of government regulation, and enduring problems with managing food safety. Lytton offers practical reforms to strengthen the food safety system's capacity to learn from mistakes and identify cost-effective food safety efforts capable of producing public health benefits.



Peter Pfister, et al.  
**Eva & Otto: Resistance, Refugees, and Love in the Time of Hitler**  
*Purdue University Press, 2019*

Pfister '73 and fellow family members drew from diaries and letters to tell this true story of Eva Lewinski Pfister (1910–1991) and Otto Pfister (1900–1985). The pair worked with a German political group that resisted and fought against Hitler in Germany before 1933 and then in exile in Paris before the German invasion of France in May 1940. As revealed in recently declassified records, Eva and Otto later worked with the U.S. Office of Strategic Services (OSS) in support of the Allied war effort.



Deborah L. Rhode  
**Character: What it Means and Why it Matters**  
*Oxford University Press, 2019*

Rhode '77 provides a comprehensive account of character in the legal field. Drawing on portraits of individuals from Mother Teresa to Thurgood Marshall, the author argues for the importance of fostering good character.

## SPOTLIGHT

## Project or System?

Paul W. Kahn reconceptualizes the nature of legal order

In his new book, *Origins of Order: Project and System in the American Legal Imagination*, Robert W. Winner Professor of Law and the Humanities Paul W. Kahn '80 examines how two different concepts of order—project and system—shape the American social imagination.



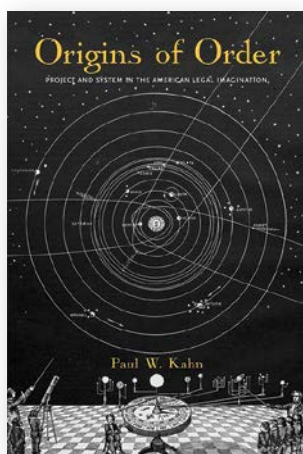
In a project, order is the result of an intentional act; in a system, order is immanent. In the former, order is constructed according to a plan or idea; in the latter, order is discovered in the world. These competing perspectives echo the great theological debates of the medieval era about the nature of God's relationship to the world. Is the order of the world to be accounted for by God's intention or does the world display an immanent order of reason? By 1776, these concepts of project and system were being applied to social phenomena.

That was the year of the Declaration of Independence, which declared politics to be a project of the people. It was also the year of Adam Smith's *Wealth of Nations*, which described the economy as a system following an immanent order that was the result of no one's intention. From then on, scholars and judges have been arguing whether society should be approached as project or system.

Kahn uses these two concepts to explore the American legal tradition. He shows that the revolutionary tradition of project carries forward in American law through the middle of the 19th century. The concept of project provides an organizing idea for the emerging constitutionalism and the practice of judicial review. Around the time of the Civil War, however, the concept of system becomes the organizing principle

of the legal order. The written constitution — the product of a project — is displaced from attention by the “unwritten constitution,” which is the spontaneous order that develops as the law of a free people. “System informs the growth of the social sciences and animates the birth of the new American law school under Christopher Langdell at Harvard,” Kahn said. “By the end of the century, we lose the idea that the Revolutionary project represented a break with British law, as constitutionalism and common law converge as similar systems.”

Kahn's philosophical inquiry into project and system suggests a range of continuing investigations into contemporary legal issues, including the nature of international law, the reasons for jurisprudential disagreement, the nature of criminal responsibility, the competition between interpretive approaches, and the grounds of the regulatory state.



Paul W. Kahn  
**Origins of Order:  
Project and System in  
the American Legal  
Imagination**

Yale University Press, 2019

## American Higher Education

A discussion of the role of universities in a rapidly changing nation

**Sterling Professor of Law Anthony T. Kronman '75** argues that the feverish egalitarianism gripping college campuses today is out of place in institutions devoted to the promotion of excellence and the education of young people for leading roles in our vibrant democracy.



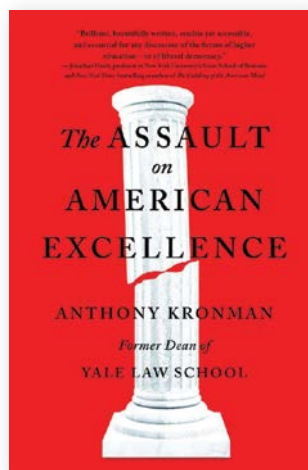
Kronman is no stranger to recent controversies on American campuses. In his time at Yale, he has watched students march to protest the names of campus buildings and seen colleagues resign over emails about Halloween costumes. But where many see only the suppression of free speech, the coddling of students, and the drive to bury the imperfect parts of our past, Kronman recognizes in these on-campus clashes a deeper threat to our democracy.

As Kronman argues in *The Assault on American Excellence*, the founders of our nation understood that in order for this country to have a robust democratic government, its citizens must be resilient, independent minded, and able to win arguments not on the basis of emotion but reason instead.

Kronman examines today's campus debates in the light of America's historic values, drawing on figures like Alexis de Tocqueville and John Adams to show how these modern controversies threaten the best of our intellectual traditions. His tone is warm and optimistic, that of a humanist and a lover of the humanities who is passionate about educating students

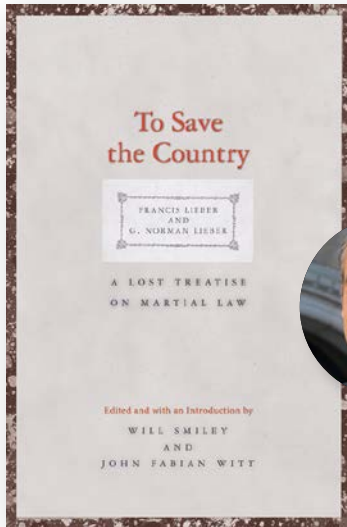
capable of living up to the demanding requirements of our fractious and robust democracy.

*The Assault on American Excellence* makes the argument that to produce the leaders our democracy needs, our colleges and universities must respect their historical commitment to the advancement of excellence and the pursuit of truth. In remaining faithful to this responsibility, they serve themselves and the larger society as well.



Anthony T. Kronman  
**The Assault on  
American Excellence**

Free Press, 2019



John Fabian Witt and  
Will Smiley, eds.

**To Save the Country:  
A Lost Treatise  
on Martial Law**

Yale University Press, 2019



## Rediscovering a Lost Treatise on Martial Law

Insight into the Civil War

For a century, a manuscript by Francis Lieber, political theorist and legal adviser to Abraham Lincoln, lay lost in the recesses of the National Archives — until it was discovered by Allen H. Duffy Class of 1960 Professor of Law John Fabian Witt '99 and Will Smiley '14.

Drafted by Lieber and his son, G. Norman Lieber, the manuscript grapples with the use of emergency powers during the Civil War and with the role of law and emergency constitutionalism more generally. Smiley and Witt also found a previously unknown fragmentary edition of General Orders No. 100,

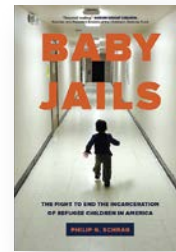
Lincoln's 1863 instruction to Union soldiers in 1863 dictating conduct during wartime, annotated in Francis Lieber's hand.

The two manuscripts are collected in a new book edited by Smiley and Witt, *To Save the Country: A Lost Treatise on Martial Law*.

The manuscript found by Smiley and Witt was started by Francis Lieber and expanded after the war, but remained disorganized after his death in 1872, "more a collection of arguments and insights than a coherent text," according to the editors. Lieber's son Norman, who served as Judge Advocate General and as the chair of the law department at West Point, worked on it further. At some point, Norman put away the manuscript. He died in 1923. The manuscript ended up in the papers of the Judge Advocate General.

"The Liebers' Civil War experience helped them see how the constitutional norms of the republic...would shape and condition the ways in which emergencies play out in constitutional democracies," write Smiley and Witt in their introduction to the Liebers' work.

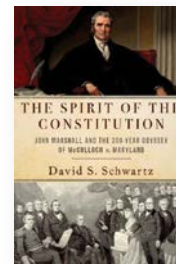
According to Smiley and Witt, the newly found manuscripts "substantially revise the tradition of American thinking about moments of emergency." Influenced by John Locke, the Liebers argue in their writing on martial law and emergencies for a continuation of the fierce mandate set out in Article 5 of General Orders No. 100: "To save the country is paramount to all other considerations." But the manuscripts add a powerful constraint: the public reason of the country's constitutional order. To violate the basic reason of the republic was not to save the country at all, but to destroy it. The result was a fierce and distinctive liberalism that the Liebers believed had proven itself up to the task of governing in a time of grave crisis.



Philip G. Schrag  
**Baby Jails:  
The Fight to End  
the Incarceration of  
Refugee Children**

University of California Press, 2020

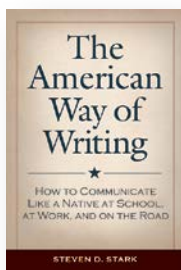
*Baby Jails* is a 30-year history of the legal and political struggle of immigrant and refugee advocates resisting the detention of migrant children. Schrag '67, the director of Georgetown Law's asylum law clinic, gives insight into the troubling legacy of jailing and separating families and children that began with the Reagan administration. Following the historical exposé, he provides recommendations for reform.



David S. Schwartz  
**The Spirit of  
the Constitution:  
John Marshall and  
the 200-Year Odyssey of  
McCulloch v. Maryland**

Oxford University Press, 2019

Although *McCulloch's* doctrine of implied powers has long been considered foundational in questions of judicial supremacy and federalism, Schwartz '86 shows how *McCulloch* has been interpreted, or ignored, to fit the varying spirits of the Constitution. His analysis of the 200-year legacy of the case reaffirms the case's importance in constitutional law but unveils the ambiguity of the original position taken by the Marshall Court.



Steven D. Stark  
**The American  
 Way of Writing**  
*Praeger, 2019*

Stark '79 provides a roadmap for non-native English speakers who want to become better communicators in the American context. He explores how American English is shaped by the distinct culture and geography of the United States and also offers a window into the use of English in different professional contexts.

Joseph Amiel '62  
**Fearsome Destiny:  
 Brothers and Sisters**  
*Lambent Publishing LLC, 2019*

Michael Bennet '93  
**The Land of Flickering Lights:  
 Restoring America in an  
 Age of Broken Politics**  
*Atlantic Monthly Press, 2019*

Alan Dershowitz '62  
**Guilt by Association:  
 The Challenge of  
 Proving Innocence  
 in the Age of #MeToo**  
*Hot Books, 2019*

Reginald Dwayne Betts '16  
**Felon: Poems**  
*W.W. Norton & Company, 2019*

Ronan Farrow '09  
**Catch and Kill:  
 Lies, Spies, and a Conspiracy  
 to Protect Predators**  
*Little, Brown and Company, 2019*

## ALSO OF NOTE

Jonathan Greenberg '89 MSL  
**America 2034:  
 Utopia Rising**  
*Informing to Empower Media, 2019*

Richard L. Kaplan '76  
**Elder Law in a Nutshell,  
 7th ed.**  
*West Academic, 2019*

Uwe Kischel '93 LLM  
**Comparative Law**  
*Oxford University Press, 2019*

Jerry L. Mashaw  
**Reasoned Administration  
 and Democratic Legitimacy:  
 How Administrative Law  
 Supports Democratic  
 Government**  
*Cambridge University Press, 2018*

Beverly Parsons,  
 Lovely Dhillon '90,  
 Matt Keene, eds.  
**Visionary Evaluation for  
 a Sustainable, Equitable Future**  
*Information Age Publishing, 2019*

Lisa Schenck '98 LLM, '07 JSD  
**Modern Military Justice:  
 Cases and Materials (3rd ed.)**  
*West Academic, 2019*

Alexander Shapiro '91  
**The Consolations of History:  
 Themes of Progress and  
 Potential in Richard Wagner's  
 Götterdämmerung**  
*Routledge, 2019*

Gus Speth '69  
**What We Have Instead**  
*Shires Press, 2019*

Allan Topol '65  
**The Washington Operator**  
*Independent, 2019*

Kim Treiger-Bar-Am '89  
**Positive Freedom and the Law**  
*Routledge, 2019*

Hardy Wieting Jr. '68  
**30 Birds**  
*C-G-L Press, 2019*



Daniel C. Esty, ed.  
**A Better Planet:  
 40 Big Ideas for a Sustainable Future**  
*Yale University Press, 2019*

## Bipartisan Solutions to Climate Change



**Hillhouse Professor of Environmental Law and Policy Daniel C. Esty '86** brings together more than 40 leading scholars and practitioners to provide a sweeping sense of new pathways to a sustainable future. Reframing the polarized debate on environmental policy, the book focuses on modernizing the approach to ecological protection through actionable, bipartisan solutions based on analytical research. It systematically reassesses how to balance environmental progress and economic security without losing sight of the imperative to find sustainable solutions to contemporary challenges. Esty and company write to invigorate a spirit of creative thinking and reform by laying the groundwork for big ideas for a sustainable future. They invite readers to reflect on the concepts and join the conversation at [environment.yale.edu/dialogue](http://environment.yale.edu/dialogue).