200 Years

200 Books
On the occasion of Yale Law School’s 200th anniversary, librarians Fred Shapiro and Nicholas Mignanelli have assembled an exhibit of 200 books authored or edited by faculty and alumni. This is not an exhibit of the “best” or “most important” books, but rather it is intended to be a selection illustrating the variety of published volumes by members of the Yale Law School community. Many of the works listed are scholarly monographs. Others are legal treatises. Still others are casebooks. It is difficult to give examples of these three genres, or of the “nonlegal” books, because so many of them transcend categories. In the hands of Yale Law School authors, scholarly monographs may be powerful arguments on public policy or brilliant tools for instruction. Treatises may be masterpieces of scholarship. Casebooks may define new fields. The nonlegal volumes may motivate lawyers in a multitude of ways.

Of course, the major role of books at Yale Law School has been to disseminate scholarship, teaching, and activism. A large portion of the legal ideas and reforms of the last century have sprung from books written by Yale Law School professors and alumni. The law and its ideas have been inspired, synthesized, and communicated by these volumes. In addition, the range and talent of the School’s affiliates have spilled over into nonlegal works of public policy, social science, literature, and even popular culture.

Although categorization can be difficult, taking notice of some remarkable items is irresistible. Arthur Corbin’s (Class of 1899) *Corbin on Contracts* has been called “the greatest law book ever written.” Louis Loss’s ‘37 *Securities Regulation* shaped the law of securities. Walter Lord’s ‘46 *A Night to Remember* is the definitive account of the sinking of the Titanic. Michael Harrington’s ‘50 *The Other America* inspired Lyndon Johnson’s “War on Poverty.” Boris Bittker’s ‘41 pioneering *The Case for Black Reparations* was edited by a young Random House editor named Toni Morrison. Catharine MacKinnon’s ‘77 landmark *Sexual Harassment of Working Women* was based on a Law School student paper. Oliver Williamson’s *The Economic Institutions of Capitalism* helped win its author the Nobel Prize in Economics. James Forman Jr.’s ‘92 *Locking Up Our Own* was awarded a Pulitzer Prize. Robert Post’s ’77 *The Taft Court* derived funding from Oliver Wendell Holmes Jr.’s bequest to the United States of America.

See the full list of books on the following pages.
SURVEY OF BOOKS

Here’s 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.

When “Small” Wars Are a Prelude to Atrocities

Legal history of conflict

In her new book *They Called It Peace*, Lauren Benton charts the history of so-called small wars in European empires. She describes a state of perpetual war in which fighting occurred in seemingly discrete conflicts between interludes of unstable peace. The book shows that “small” violence often served as a prelude to atrocities in empires.

Benton, the Barton M. Biggs Professor of History and Professor of Law, traces these patterns across five centuries. Early conquests featured cycles of raids, sieges, truces, and horrific acts of reprisal. In the 19th century, imperial armies and navies acted as enforcers of global order. They turned series of brief interventions into sustained campaigns of violence against Indigenous communities.

Benton describes her book as a legal history, not a study of military tactics. She approaches the evolution and application of the laws of war from the perspective of European and Indigenous participants in colonial conflicts. The result, Benton writes, is to treat law as “bigger than doctrine and less tidy than systems of rules and norms.”

Still, Benton is careful in describing what the book can teach about war and peace today. Histories of imperial violence, she suggests, mainly serve to warn us “to temper our expectations about humanity’s capacity to keep small wars small.” They also remind us that even seemingly minor conflicts make fertile ground for atrocities.
Ignacio Cofone
The Privacy Fallacy: Harm and Power in the Information Economy
Cambridge University Press, 2023

Cofone '89 LLM, '98 JSD examines why the existing framework of privacy law fails to prevent profit-driven actors from exploiting data and exposing people to grievous harm. Whereas privacy law today assumes the relationship between corporations and online users to be contractual, Cofone theorizes privacy through the lens of tort law. He defines the "privacy fallacy" as the tendency to prioritize privacy only when tangible consequences are at stake. Cofone urges the law to recognize privacy's intrinsic value.

Avihay Dorfman and Alon Harel
Reclaiming the Public
Cambridge University Press, 2024

Dorfman '06 LLM, '08 JSD and Harel '89 LLM present a political theory of the public. The co-authors discuss the limits that characterize existing theories about the legitimacy of political authority and the nature of law. They argue that public institutions must reflect the perspectives of citizens, and that the public is responsible for the decisions made by such institutions. They also describe the goods that public institutions must provide. Finally, they contend that AI-generated decisions cannot qualify as public.

Richard Falk
Liberating the United Nations: Realism with Hope
Stanford University Press, 2024

Falk '55 and von Sponeck argue that the United Nations must be reformed to meet the moral imperatives of its mission. The co-authors discuss the organization's history, recounting pivotal moments that precluded the U.N. from becoming more just and egalitarian. Falk and von Sponeck consider three case studies of intervention — in Palestine, Iraq, and Syria — to assess what role the U.N. has come to play in global politics. Liberating the United Nations draws from both authors' experiences as high-level U.N. diplomats.

Michael Klauser and Guhan Subramanian
Deals: The Economic Structure of Business Transactions
Harvard University Press, 2024

Klauser '81 and Subramanian explain the economic concepts that underpin successful business deals and develop a framework to grasp how such transactions work in practice. The co-authors discuss a range of real-world examples, which span from entertainment to software. They demonstrate how deals can fulfill their twofold objective: to maximize combined value and share that value across parties. The co-authors draw from their extensive experiences teaching and advising on business deals.

Scott Hershovitz
Law Is a Moral Practice
Harvard University Press, 2023

While law and morality are often thought to be separate, Hershovitz '04 argues that law fundamentally concerns moral questions. He investigates the moral principles that underpin the judicial system, explaining how courts assess the rights and responsibilities that one party owes to another. Hershovitz also traces the moral contours behind contemporary debates about how to interpret the Constitution and what obligation individuals have to follow the law. His account bridges the schools of positivism and natural law.
Defending the Condemned

Four capital punishment cases argued by Stephen Bright

In his book *Demand the Impossible: One Lawyer’s Pursuit of Equal Justice for All*, Robert L. Tsai ’97 chronicles how Yale Law School's Harvey L. Karp Visiting Lecturer in Law Stephen B. Bright has confronted staggering injustice in the criminal legal system. To trace his subject’s remarkable career as a civil rights litigator, Tsai narrates the four capital punishment appeals that Bright has argued — and won — before the U.S. Supreme Court.

Tsai delves into the world of each case, recounting how Bright uncovered grievous miscarriages of justice against Black, disabled, and indigent defendants. In the first three appeals, Bright demonstrated that prosecutors had committed race discrimination in jury selection. In the fourth, Bright proved that the state had illegally denied his client an independent mental health expert during trial. Tsai examines the principles of equal justice that propelled each case — while also introducing readers to the death-sentenced clients whom Bright represented.

*Demand the Impossible* considers the lessons that Bright’s distinctive ethos of legal advocacy holds for social change today. Bright and his allies, Tsai notes, faced strong crosswinds in each case, which spanned from 1988 to 2017. In an era when mass incarceration held sway across the political spectrum, Bright exposed the realities of systemic racism, prosecutorial misconduct, and indefensible barriers to legal representation. Bright’s lifelong efforts to advance equal rights, Tsai argues, give reason for hope.
A Towering Figure

In long-awaited volume, Post tells story of the Taft Court in its own time

After 35 years and 1,608 pages, Sterling Professor of Law Robert C. Post ‘77 has written the definitive history of the U.S. Supreme Court under Chief Justice William Howard Taft.

The Taft Court: Making Law for a Divided Nation, 1921–1930 is the long-awaited 10th volume of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States.

In 1920, voters elected Warren G. Harding president on a platform of returning the country to normalcy after the massive changes produced by the first World War. “Jazz, flappers, radio, and cars burst onto the scene,” Post writes. “Yet so did Prohibition, fundamentalism, the KKK, and 100 percent Americanism.” In the 1920s, Americans sought both to resurrect old pieties and vigorously to pursue brave new innovations.

Harding appointed four new justices in less than 18 months. He conceived of the Court as an instrument for returning the country to antebellum principles. Foremost among these were the restoration of the constitutional values of substantive due process and federalism. The federal government exercised more detailed economic control than ever before or since.

President Woodrow Wilson’s wartime policies were considered both terrifying and necessary. They opened new possibilities that were attractive and yet profoundly disorienting. “The Taft Court was charged with the thankless task of constructing law for a society that was deeply confused about what it wanted,” Post writes. Thus, the Taft Court sustained the Transportation Act of 1920, which converted the ICC into the governor of virtually all railroads, both interstate and intrastate, and yet it struck down the Child Labor Tax Act.

In an effort to restore antebellum values, the Taft Court revived the doctrine of Lochner v. New York, which put the burden of justifying social and economic regulation squarely on the government. The Court’s doctrinal innovations were so severe that they would lead directly to the crisis of the New Deal during the next decade.

Plights of the Postmodern Era

Political divisions in the internet age

“What should I make of my life?” “Who am I?” “Does the earth move around the sun?” According to Sterling Professor of Law and Political Science Bruce Ackerman ’67, finding answers to such existential questions requires looking at the virtual and physical realities that make up a modern-day life. In his latest book, The Postmodern Predicament: Existential Challenges of the 21st Century, Ackerman explores the heightened complexities of existentialism brought forth by the technological era and the impact these have on political alienation today.

Broken into three parts, the book studies the fragmented reality that has developed out of the internet age, where behaviors exhibited in an online forum don’t align with those presented in the physical world. The result, according to Ackerman, leads to increased political divisions. The first part examines if a virtual reality can truly take the place of real-world experiences, while the second part asserts that it can’t, stating there are ‘fundamental aspects of human experience that are threatened by our postmodern effort to escape the dilemmas of real-world existence by endlessly clicking into virtual reality.”

One concern Ackerman mentions is the influx of misinformation on the internet which, in some cases, stems from corrupt politicians and contributes to societal divisions. Like the philosophers Simone de Beauvoir and Jean-Paul Sartre, Ackerman considers the fragmentation of modern life as a central source of contemporary anxieties, particularly as they pertain to politics. In the third and final part of the book, he proposes concrete reforms that could mobilize broad-based support for democracy against demagogic assaults on its very foundations.

Some of these include universal childcare, which Ackerman contends “reinvigorates democracy by demonstrating its capacity to respond decisively to an existential dilemma that almost every voter recognizes,” and “Deliberation Day,” a national holiday that would encourage citizens to discuss political issues ahead of an election, thus upholding their democratic responsibilities.

THE POSTMODERN PREDICAMENT EXISTENTIAL CHALLENGES OF THE TWENTY-FIRST CENTURY

Bruce Ackerman

The Postmodern Predicament: Existential Challenges of the 21st Century

Yale University Press, 2024
FACULTY BOOK SPOTLIGHT

The Constitution and Collective Memory

Balkin argues that history is shaped through the arguments law makes.

In his book *Memory and Authority: The Uses of History in Constitutional Interpretation*, Jack M. Balkin argues that debates about constitutional interpretation are often debates about collective memory — the stories that members of a community tell each other about the meaning of their shared past. Lawyers and judges are memory entrepreneurs; they try to persuade people to remember things differently. Each of the familiar forms of constitutional argument produces constitutional memory, engaging in a mixture of remembering and forgetting. Lawyers and judges construct — and erase — memory to lend authority to their present-day views; they make the past speak their values so they can then claim to follow it.

Balkin, the Knight Professor of Constitutional Law and the First Amendment, explains how the standard forms of legal argument shape how lawyers and judges employ history and what they look for in history. Lawyers and judges’ use of history is rhetorical, aimed at persuading audiences. They invoke the past to establish the authority of their positions and to undermine opposing ones. “There is no single modality of ‘historical argument,’” Balkin writes. “Rather, history is useful for making many different kinds of constitutional arguments, and the way that people use history is shaped by the kind of argument they are making.” By understanding how lawyers channel the past through standard forms of argument, historians can better join issue with lawyers about historical matters in constitutional interpretation.

Originalism and living constitutionalism seem to be opposed approaches to the past. But Balkin argues that they are actually mirror images of a single phenomenon — how lawyers use history to adapt an ancient constitution to a constantly changing world.

No New Taxes

How the antitax movement has increased inequality

In his book *The Power to Destroy: How the Antitax Movement Hijacked America*, Michael J. Graetz argues that resistance to taxes has corroded U.S. politics far more than is often assumed.

Graetz, the Justus S. Hotchkiss Professor Emeritus of Law, writes that the campaign to curtail taxation has, for nearly 50 years, secured success by trafficking in racist tropes, stoking cultural flashpoints, and promoting questionable economics.

“Resistance to taxes in the United States,” he writes, “has a long pedigree: it is as American as apple pie and fried catfish.” *The Power to Destroy* takes its title from Chief Justice John Marshall’s statement in *McCulloch v. Maryland*, a landmark 1819 Supreme Court case that addressed disputes over federal and state taxation, that the power to tax involves “the power to destroy.” But while taxes have long been contested, Graetz argues that they only recently became a cudgel that would fracture the nation.

To chronicle how the antitax movement amassed its influence, Graetz begins in 1978, the year that California voters amended the state’s constitution to curb any increase in property taxes. Proposition 13, as the measure was known, proved to be a watershed, spurring political operatives nationwide to seize on taxation.

In tandem with the Republican Party’s infamous Southern strategy using racist rhetoric to increase political support, antitax activists argued that white taxpayers were being made to subsidize Black welfare recipients. From there, the notion that taxes threaten freedom went mainstream.

“Contrary to common views,” he writes, “taxation is not solely about economics: cultural values are also at stake.” Noting that more Americans pay taxes than vote in presidential elections, Graetz considers what tax policies reveal about the public’s collective priorities and commitments. He argues that how the government levies taxes, and to what ends it uses them, are social and moral questions as much as economic and partisan ones.

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The Importance of Voting

An analysis of U.S. Supreme Court cases on voting rights

It was the spring semester of 2020. Sterling Professor Emeritus of Law Owen M. Fiss was teaching his class A Community of Equals, engaging students in discussions on civil rights laws pertaining to various topics, including voting. Fiss, who helped implement civil and voting rights laws in the 1960s, left the classroom discussion inspired and resolved to write his newest book, Why We Vote.

Shortly after, Fiss found himself not only with an idea but a newfound abundance of time to write due to the COVID-19 pandemic. His work would prove to be timely, as the 2020 presidential election and Jan. 6, 2021, insurrection unfolded while penning the book.

Fiss starts by outlining why the U.S. Supreme Court has a responsibility to uphold the democratic ideal of the Constitution, then delves into recent events that have threatened it.

In the introduction, Fiss stresses the importance of voting: “Unlike the mob that stormed the Capitol on Jan. 6, 2021, those who do not vote or refrain from voting do not threaten violence. Nor do they obstruct the functioning of a governmental institution. Yet through their inaction, they too impair the political freedom of America that arises from the democratic character of its government and thus violate their elemental duty of citizenship. We vote to preserve democracy and thus our own freedom.”

Each chapter in Why We Vote focuses on Supreme Court cases that sought to enlarge the freedom that democracy generates, pointing to rulings that allowed citizens to vote, facilitated the exercise of their right to vote, ensured the equality of votes, and provided feasible access to the ballot for independent candidates and new political parties.

In a concluding chapter, Fiss writes, “The right to vote is the means by which the ruled participate in the process of selecting their rulers and thus is essential for the fulfillment of the democratic purpose of the Constitution. It presumes that one person’s right to vote is as worthy as another’s.”

Fiss credits Cara Meyer ’22, one of the students from his A Community of Equals class, for her role in the discussion that led to Why We Vote and for serving as his editor and research assistant.