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# Stephen Presser's Love Letter to the Law, in Five Parts Book Reviews

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## STEPHEN PRESSER'S LOVE LETTER TO THE LAW, IN FIVE PARTS

**LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW.** By Stephen B. Presser.<sup>1</sup> St. Paul: West Publishing, 2017. Pp. xii + 486. \$48.00 (cloth).

*Jesse Merriam*<sup>2</sup>

This book on law professors, Stephen Presser writes in the Preface, is a “love letter to the teaching of law” (p. v). But this is no mere “love letter.” The twenty-four chapters read more like a break-up letter, sounding with each successive chapter the ominous tone of a betrayed lover—more like Søren Kierkegaard’s regretful reflections on losing Regine Olsen to a more decisive suitor, and less like Kierkegaard’s earlier romantic confessions of adoration for Regine.<sup>3</sup> Reading *Law Professors*, one gets the impression that, like Kierkegaard, Presser is writing his love letter with some bitterness, recalling the halcyon days of the legal academy when it was more insulated from the mass and welter of partisan politics.

Like all love letters contemplating the future of the relationship, *Law Professors* is essentially about change and loss,

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3. For Kierkegaard’s letters to Regine, see SØREN KIERKEGAARD, PAPERS AND JOURNALS: A SELECTION (Alastair Hannay ed., 1996). For an excellent review of a recent Danish book specifically on the relationship between Kierkegaard and Olsen, see Morten Høi Jensen, *A Keeper of Love’s Flame: Regine Olsen and Søren Kierkegaard*, L.A. REV. BOOKS (Apr. 9, 2014), <http://lareviewofbooks.org/article/keeper-loves-flame-regine-olsen-soren-kierkegaard>. This is a review of JOAKIM GARFF, REGINES GÅDE: HISTORIEN OM KIERKEGAARDS FORLOVEDE OG SCHLEGELS HUSTRU (2013), which translates to “Regine’s Mystery: The Story of Kierkegaard’s Fiancée and Schlegel’s Wife.” Garff’s book sounds fascinating, and I would also recommend it in addition to Jensen’s excellent review, but, alas, I do not read Danish.

making it ideal for a course on social movements and legal change.<sup>4</sup> These themes are all the more serious, given Presser's prominent academic status, holding joint appointments at Northwestern University<sup>5</sup> and having authored several casebooks—ranging from corporate law, to legal history, to constitutional law and theory—as well as two important, and controversial, books arguing for a reconsideration of various areas of constitutional law.<sup>6</sup> Presser's recent move to emeritus status gives this tome on law professors an even heavier tone, the ruminations of a legal giant on his thirty-plus years of experience in the legal academy.

While *Law Professors* is a ruminative book, it is also a thoroughly fun and playful one. Presser, in critiquing the prolixity and opacity of legal scholarship, quotes Ronald Rotunda's observation that “[r]eading about law is not often fun” (p. 7 n.13), a proposition with which this reviewer generally agrees. But there are exceptions, times when reading law can be as enjoyable as reading literature. And Professor Presser has provided such an exception in this book. Indeed, even knowledgeable readers will find in *Law Professors* trivia certain to titillate and amuse. Sure, you already knew about Posner's contributions to the law and economics movement, but did you know about Fang, his Norwegian elkhound (p. 308)? Or that James Wilson was the nation's third law professor (p. 32 n.77)? Presser even divulges some information about himself, such as that he is a Dr. Seuss fan, something that might surprise some followers of Presser's academic writing over the years (p. 137 n.445). Nearly every one of the 473 highly digestible pages, including the 1,384 unbroken sequential footnotes, bubbles with factoids that historically oriented, and indeed all intellectually curious, readers will enjoy.

The trivia keeps the book light, but the sense of change, and the resulting loss, creates an acute sense of betrayal, with three ominous themes reappearing throughout the work. One is the

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4. For example, I am considering using it for my seminar on the legal conservative movement.

5. Presser holds appointments at the Northwestern Pritzker School of Law, the Kellogg School of Management, and the Weinberg College of Arts and Sciences, Department of History.

6. See STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED* (1994); STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991).

evolving conception of law over the last 200 years. At various points in the book, Presser emphasizes how law professors have moved away from a natural theory of law (wherein legal norms inhere in the divine order of the world, thus creating a necessary relationship between law and morality) and toward a more positivistic understanding (wherein legal norms are ultimately traceable to positive political action, thereby severing the necessary connection between law and morality). Presser, through his careful chronicling of the American legal academy, documents how Oliver Wendell Holmes represented a dramatic departure from the natural law tradition, and indeed the entire American legal tradition. Strikingly, all of the pre-Holmes professors featured in the book make natural law a central feature of their understanding of law, and almost all of the post-Holmes professors reject this approach in favor of a more positivist, empirical, and court-oriented understanding. Nearly everyone reading this book will already be aware of this transition away from legal naturalism and formalism and toward positivism and realism, but even to the informed reader, it is startling to see in Presser's chronology how abruptly and comprehensively conceptions of law have changed within the legal academy.

A related theme intimated throughout the book is the increasing politicization of the legal academy, especially toward the left end of the ideological spectrum. Presser often alludes to how many of the 18th and 19th century scholars featured in the book did not make politics a central feature of their scholarship, in stark contrast with 20th and 21st century legal scholars. Indeed, the 21st century law professor is no longer expected simply to have the expertise to analyze and teach law, but to be especially well equipped to *make law*, too. This is vividly illustrated in Presser's chronology, with many of the post-Holmes scholars having worked in the executive branch, almost always to push legal reform for the advancement of a progressive agenda. This trend is represented most strikingly in Chapter 23, profiling President Barack Obama, the apotheosis of the progressive politician-professor.

The 2016 election put this new law professor identity on full display. Following President Donald Trump's victory, one thousand four hundred twenty-four law professors took the

unprecedented step<sup>7</sup> of joining a public statement condemning Trump's nomination of Jeff Sessions for attorney general.<sup>8</sup> Just a few months before that, in the month leading up to the election, many right-of-center law professors joined a statement, *Originalists Against Trump*, opposing the Republican nominee.<sup>9</sup> At the same time, some significant progressive law professors publicly called for secession, and even a military coup, in the event of a Trump victory.<sup>10</sup> And in February 2017, yet another law professor statement was circulated, this one condemning Trump for calling U.S. District Court Judge James L. Robart a "so-called judge," in light of Judge Robart's decision to enjoin Trump's first travel ban Executive Order.<sup>11</sup>

Such recent public gestures from the legal academy make Presser's book particularly timely and provocative. Presser asks throughout the book: What gives law professors the authority to evaluate public policy? More troubling, he probes, what gives law professors the skill to *engage* in policy, a question suggested by former CIA Director, Leon Panetta, in his criticism of President Obama's tendency to "rel[y] on the logic of a law professor rather than the passion of a leader" (p. 1). This issue, of what *skills* a law professor can bring to governance, and the related transition in the *identity* of the law professor, from natural lawyer to policy maker, are central to Presser's love letter.

A third theme, hinted at but not as expressly stated as the previous two, is the changing meaning of legal ideology over space

7. The only other instance in which law professors have been so outspoken on a presidential election was, perhaps not coincidentally, in response to the 2000 victory of the last Republican President, George W. Bush. Within days of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), over 600 law school professors wrote a public letter condemning the decision as violating their commitments "as teachers whose lives have been dedicated to the rule of law." See Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 110, 113 (Bruce Ackerman ed., 2002).

8. *Law Professors in Opposition to Jeff Sessions Nomination* (Jan. 9, 2017), [https://docs.google.com/document/d/167Ci3pVqwzOUe7\\_e7itlpew1qGcTo0ZD5dNICIbLQWA/pub](https://docs.google.com/document/d/167Ci3pVqwzOUe7_e7itlpew1qGcTo0ZD5dNICIbLQWA/pub).

9. *2016 Statement, Originalists Against Trump* (Oct. 17, 2016), <https://originalistsagainstrump.wordpress.com/2016-statement>.

10. Jacob Gershman, *Law Professors Grapple with Trump*, WALL ST. J. (Nov. 2, 2016, 2:25 PM), <http://blogs.wsj.com/law/2016/11/02/law-professors-grapple-with-trump/?ref=/blogs/law>.

11. *Letter from Attorneys Concerning President Trump's Attack on the Judiciary* (Feb. 8, 2017), [https://docs.google.com/forms/d/1JVcPW\\_mYa5jw6nm\\_R7XS2115igmBzfBONBFMmrOALs/viewform?c=0&w=1&edit\\_requested=true#responses](https://docs.google.com/forms/d/1JVcPW_mYa5jw6nm_R7XS2115igmBzfBONBFMmrOALs/viewform?c=0&w=1&edit_requested=true#responses).

and time. For example, Presser argues that Justice Story was “a great Burkean, and a great conservative” (p. 60), despite the fact that Story favored a robust and expansive judicial power, which of course is at odds with how many contemporary conservatives view the role of federal judges. For Presser—who is “nothing if not a traditionalist” (p. ix), what is often referred to in conservative thought as “a paleoconservative”<sup>12</sup>—the traditional meaning of legal conservatism favors “a moral, altruistic Burkean legal aristocracy” (p. 60), one in which courts are actively engaged in preserving the nation’s social mores and traditions for the stability and moral health of society. This is a view increasingly at odds with both the contemporary legal left (which generally favors judicial transformation of these values to promote greater equality) and legal right (which generally favors judicial disengagement from these values to promote democratic governance and decentralization).<sup>13</sup>

As Mark Pulliam, a prolific conservative legal writer, explained in a recent review of *Law Professors*, “Presser may be the most conservative law professor in America associated with a major law school.”<sup>14</sup> Although I am not quite as comfortable ideologically ranking professors, as that begs the question of what it means to be more or less conservative (a question on which many reasonable minds can and will disagree, especially as applied to legal issues), it is undoubtedly true that Presser is one

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12. Paleoconservatives (“paleocons”) generally are defined in contradistinction to a new (and decidedly more liberal) form of conservatism that emerged in the 1970s, a group now known as neoconservatives (“neocons”). Paleocons and neocons generally divide most sharply with regard to their ideological preferences on three issues: (1) the size of the federal government (neocons are much more accommodating of the welfare state), (2) the use of American military force abroad (neocons are much more likely to support interventionist policies), and (3) the role of egalitarian perspectives in conservatism (neocons view egalitarianism as central to, rather than antithetical to, conservatism). See Paul Gottfried, *Paleoconservatism*, in AMERICAN CONSERVATISM: AN ENCYCLOPEDIA 651 (Bruce Frohnen et al. eds., 2006).

13. But it should be noted that, among right-of-center law professors, there is an increasing push for more judicial engagement and less judicial restraint. This comes almost exclusively, however, from the libertarian strand, rather than the more traditionalist strand, of legal conservatism. See, e.g., RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845 (2012); SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787 (2011).

14. Mark Pulliam, *American Legal Thought in a Nutshell*, LAW & LIBERTY (Mar. 16, 2017), <http://www.libertylawsite.org/2017/03/16/american-legal-thought-in-a-nutshell>.

of the few remaining paleoconservatives left in legal academia.<sup>15</sup> With Presser's exit from the academy, this traditional version of conservatism has virtually no voice in legal scholarship, or in legal discourse altogether, giving a particularly poignant and literal meaning to the "paleo" prefix.

In the following pages, I will analyze how the book raises these three themes: the changing conceptions of law, the changing identities of law professors, and the changing meaning of legal ideology. I will do this by dividing the review into five parts, based on my placing the twenty-four chapters into five distinct categories. Chapters 1 through 4 constitute the romance of the love letter, what I have characterized as *Falling in Love*, the period when, to use Kierkegaard's words from one of his love letters, "a man sees the beloved object for the first time . . . [and] believes he has seen her long before."<sup>16</sup> This period—which Presser explores through such diverse thinkers as Blackstone, Wilson, Story, and Langdell—is characterized by legal naturalism, when law was imbricated in and tethered to nature. Chapters 5 through 8 cover the *Villain*, legal realism, which can be characterized as a period when law was denaturalized and thereby seduced away from Presser. The third period, *Reconciliation*, covers the effort to bring the law back home, through a middle-ground, process-oriented approach to law, explored most directly in Chapters 9 and 11. The fourth period, *A Second Infidelity*, covers another round of villains, the critical legal scholars, more radical but perhaps more interesting than the realists, explored in

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15. This, incidentally, is at least partly responsible for why Presser felt "lonely being a Donald Trump supporter in the legal academy," a position that, as Presser noted, "not more than a handful of" law professors were willing to take openly. Stephen Presser, *What American Law Professors Forgot and What Trump Knew*, CHI. TRIB. (Nov. 17, 2016), <http://www.chicagotribune.com/news/opinion/commentary/ct-law-professors-trump-scalia-supreme-court-conservative-perspec-1118-md-20161117-story.html>. In typical Presserian accuracy, he is not exaggerating or being metaphorical with the term "handful." Besides Presser, exactly five law professors in the country were willing to support the Republican nominee openly: F.H. Buckley, John C. Eastman, Bruce Frohnen, Lino Graglia, and Ronald Rotunda. See Chris Buskirk, *Scholars and Writers for Trump*, AMERICAN GREATNESS (Sept. 28, 2016), <http://amgreatness.com/2016/09/28/writes-scholars-for-trump>. Many of the right-of-center law professors in the nation publicly opposed Trump. See *supra* note 9. It should be noted that Trump received significant support from paleoconservatives, such as Presser, not because Trump represents a traditional mode of life (he most certainly does not, as a flamboyant, secular, thrice-married, real-estate mogul), but because he supports the three policy platforms that paleoconservatives tend to care about most: (1) military isolationism, (2) trade protectionism, and (3) immigration restrictionism. See *supra* note 12.

16. See KIERKEGAARD, *supra* note 3, at 100.

Chapters 14 through 17. Finally, the fifth period, *A Rocky Future*, looks ahead, examining the response to this second infidelity through various figures in the legal conservative movement (Chapters 18 through 20) and the triumph over legal conservatism in the Obama presidency (Chapters 22 and 23).

Two caveats before we begin, one about the book and the other about the following review. One, in reading *Law Professors*, the attentive reader will undoubtedly find reason to quibble over Presser's choices concerning the profiled scholars, an unavoidable product of his effort to capture the history of the American legal academy through a select set of figures. One may reasonably question, for example, why Presser includes one English law professor (Blackstone), one fictional one (Lewis Eliot), and one fictional American law professor (Kingsfield)—not to mention one president who was never a tenure-track law professor (but rather a lecturer who never published anything on law other than a six-page student note)<sup>17</sup> and several Supreme Court Justices who spent only a few years in the academy. As a result, Presser devotes a lot of space in *Law Professors* to the ideas and experiences of people who are not American law professors, which may be a bit startling given the book's title and theme. This comes at the cost of excluding many law professors who would have added to the narrative. For example, would Breyer, the pragmatist and "active liberty" proponent, satisfy Presser's call for law professors, and in turn judges, to be more grounded in and attentive to practical realities? Does Bork fit Presser's call for a more majoritarian sense of tradition in the academy? How would a discussion of Barnett's natural-law libertarianism complicate Presser's suppositions about the relationship between natural law and conservatism? These are questions obscured by Presser's decision to focus on select professors rather than general concepts in seeking to capture the ideological transformation of the legal academy over the last 200 years.

Two, this review will focus to a significant extent on what *Law Professors* can teach us about the role of ideology in legal discourse, which may suggest to the reader of this review that *Law Professors* is a polemical tract. I want to be clear on this point: *Law Professors* most certainly is not partisan or tendentious, in

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17. Jeffrey Ressler & Ben Smith, *Exclusive: Obama's Lost Law Review Article*, POLITICO (Aug. 22, 2008), <http://www.politico.com/story/2008/08/exclusive-obamas-lost-law-review-article-012705>.

any conceivable way. Rather, *Law Professors* is thoroughly kind and temperate in tone, and equitable and balanced in analysis. Nevertheless, in the course of the 473 pages, there are several places where Presser does reveal his thinking on various matters and scholars, more often through implication than explication. This has the salutary effect of permitting, on the one hand, readers uninterested in Presser's political and legal philosophy to gather a broad array of information about the legal academy without the sense of being harangued, while offering, on the other hand, sufficient insight into Presser's traditionalist perspective for more ideologically oriented readers. In the review, I will be focusing on this ideological dimension of the book—partly because of my own background as a legal theorist who studies social movements in the law, but also because a mere recitation of the profiled scholars would be unduly duplicative of Presser's book.

In sum, although some readers will surely quibble over Presser's inclusions and exclusions, and some will find insufficient or perhaps too much ideology in *Law Professors*,<sup>18</sup> the book works remarkably well in capturing: (1) how law professors think about law, (2) how this thinking continues to evolve, perhaps at an accelerated rate over the last fifty years, and (3) how these recent changes are arousing concern that the rule of law is in serious trouble. *Law Professors* is best read not by fixating on the actual persons profiled, which will inevitably lead the reader to cavil over some of the choices, but by focusing on the big ideas, with a particular attention on how those ideas have migrated and morphed across space and time.

With these caveats in mind, let us begin with when Presser “sees the beloved object for the first time.”<sup>19</sup>

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18. For example, Mark Pulliam's only criticism of the book is that it is an overwhelmingly “dispassionate overview of American legal thought,” and Pulliam would prefer for Presser to provide a “comprehensive critique of it.” Pulliam, *supra* note 14. Conversely, Dean Chemerinsky's principal criticism is that Presser's writing is too ideological, “especially as to the more contemporary portrayals.” Erwin Chemerinsky, *A Conservative's View of Law Professors*, Cal. Sup. Ct. Hist. Soc'y Newsl., Spring/Summer 2017, at 29, <https://www.cschs.org/wp-content/uploads/2015/01/2017-Newsletter-Spring-Conservatives-View.pdf>. Moreover, Chemerinsky finds it “disconcerting . . . that [Presser] asserts his [conservative] views as self-evident conclusions” and “disquieting that virtually all of th[e] profiled [professors] are white men.” *Id.* at 30.

19. See KIERKEGAARD, *supra* note 3, at 100.

## I. FALLING IN LOVE

If *Law Professors* is Presser's love letter to the law, the first three chapters—dedicated to Sir William Blackstone, James Wilson, and Joseph Story—form the romance of the story, outlining why and how Presser fell in love with the subject. In each of these thinkers, Presser finds a religious commitment to the foundation of law and an aristocratic commitment to social hierarchy, cultural tradition, and moral order—a view holding that there is no order without law, no law without morality, and no morality without religion. A well-ordered society, therefore, requires religion, and the healthy state must facilitate rather than subordinate that relationship.

In defending Blackstone, Wilson, and Story against their familiar opponents, Presser provides provocative and interesting connections that even the historically oriented reader might not have considered. In Chapter 1, for example, Presser defends Blackstone from the criticisms of Bentham, who waged a life-long attack on his former teacher for mystifying and deifying the common law.<sup>20</sup> Presser is generally dismissive of Bentham, characterizing his criticism of Blackstone as shallow and personal, but Presser is more eager to reconcile Blackstone and Thomas Jefferson, who lambasted Blackstone for being a conservative Tory. Here, Presser points out that Jefferson's own legal philosophy, which of course was characteristic of the Enlightenment view of law, was strikingly similar to that of Blackstone, in that while Jefferson resisted explicitly linking law with a Christian conception of God,<sup>21</sup> Jefferson was just as eager as Blackstone to ground law in the edicts of nature. This is expressed most famously in the *Declaration of Independence*, which Presser draws our attention to, given its close relationship

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20. In 1763, when only fifteen years old, Bentham began attending Blackstone's Oxford lectures (the lectures from which Blackstone's *Commentaries on the Laws of England* later emerged). A little more than a decade later, Bentham provided his first formal critique of Blackstone's *Commentaries*. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (Ross Harrison ed., Cambridge University Press 1988) (1776). At the age of 80, more than 50 years after publishing that criticism, Bentham wrote a more sustained criticism of Blackstone in his *A Familiar View of Blackstone*, a work that he was editing until his death, four years later. See J. H. Burns, *Bentham and Blackstone: A Lifetime's Dialectic*, 1 UTILITAS 22 (1989).

21. It should be noted that Jefferson, though skeptical of Jesus's divinity, clearly recognized his great philosophical and moral authority. See generally THOMAS JEFFERSON, JEFFERSON'S EXTRACTS FROM THE GOSPELS (Dickson W. Adams et al, eds. 1983).

to Blackstone's thinking in the *Commentaries* that law is "the plan of the Creator for the happiness of mankind" (p. 20 n.48).<sup>22</sup>

Similarly, in Chapter 2, on James Wilson (who was a law professor at what became the University of Pennsylvania while he served as one of the six original Supreme Court Justices), Presser writes how, just like Blackstone and Jefferson, Wilson viewed "liberty and life" as the "gifts of heaven" (p. 34 n.86). Indeed, Presser contends, Wilson may have inspired Jefferson's thinking in the *Declaration of Independence* (p. 34). And Wilson, rather than Madison, may be justly characterized as the principal author of the Constitution (p. 35), given that he spoke more at the Convention than did Madison (p. 35), many of Madison's specific proposals at the Convention were rejected (p. 35 n.96), and the initial drafts of the Constitution were apparently in Wilson's handwriting (p. 35). For Presser, Wilson is the American Blackstone, not only in his intellectual influence in shaping the American legal system, but also in his approach to law, which Presser characterizes as "conservative" (p. 38), due largely to Wilson's prioritizing common over statutory law in embodying the commands of nature.

But Wilson is the *American* version, meaning that he democratized Blackstone's understanding of sovereignty, transplanting it from the English monarchical system to the emerging American notion of a republican democracy. As Presser writes, quoting Knapp, "James Wilson literally invented the American people as a unitary sovereign entity" (p. 39 n.115). But this did not mean for Wilson that the law has the power to

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22. Presser also could have mentioned more broadly that God appears throughout Jefferson's thinking on individual liberty and moral order. *See, e.g.*, Thomas Jefferson, Bill for Establishing Religious Freedom (1779), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>(defending religious liberty on the ground "that Almighty God hath created the mind free" as the "Holy Author of our religion"); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XVII (1784), <http://xroads.virginia.edu/~hyper/jefferson/ch17.html> (proclaiming that although there is a right "to say there are twenty gods, or no god," because "[i]t neither picks my pockets nor breaks my leg," an atheist may justly be prohibited from testifying in court and be socially stigmatized if he "cannot be relied on"); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XVIII (1784), <http://xroads.virginia.edu/~hyper/jefferson/ch18.html> (questioning whether "the liberties of a nation [can] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God"). *See also* EDWIN S. GAUSTAD, SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON 135 (1996) (explaining why for Jefferson "[t]he connection [between religion and morality] seemed so close as to make the two virtually identical").

constrain merely because a majority of the sovereign consents. Instead of adhering to this simple majoritarianism, Wilson held that the validity of law also turns on its compliance with “the science of human nature,” an inquiry guided by traditions and customs—what Wilson dubbed “manners”—creating a link not only between the American and British experience, but a link that is traceable all the way back to the ancient Greeks and Romans (p. 42).

In the next chapter, Presser profiles another law professor-Supreme Court Justice, Joseph Story, who furthered Wilson’s project of synthesizing natural law with American republican democracy in the realm of constitutional law. Here, Presser introduces the first case discussed in the book, *Swift v. Tyson*,<sup>23</sup> a Justice Story opinion holding that federal courts must apply federal common law when exercising diversity jurisdiction. The *Swift* decision, which was based on the idea that federal judges have a unique insight into the commands of natural law, was overruled almost one hundred years later, in *Erie Railroad Company v. Tompkins*,<sup>24</sup> a decision that almost ineluctably followed once legal realism had overtaken the academy and judiciary, bringing with it a distrust of any effort to interpret law according to nature. Presser defends *Swift*, just as he defends Story’s *Commentaries on the Constitution*, as being essential to setting up a national system of government – not only for the mercantile purpose of facilitating commerce but for the broader purpose of constructing a unified American cultural identity.

Presser thus argues that Story was “deeply conservative, and deeply influenced by English thinkers such as Blackstone and Edmund Burke” (p. 52). Here, Presser views Story’s national constitutionalism as consonant with President Lincoln’s and Senator Sumner’s commitment to a “perpetual union,” but apparently at odds with thinkers we might characterize as Southern conservatives – thinkers like Jefferson, Calhoun, and Randolph, who emphasized the importance of agrarian and local communities in conserving tradition. In contrast to these Southern localists, Story’s national constitutionalism, Presser concludes, put Story in the company of “a nobler vision of conservatism, one that is not wholly absent in the work of other

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23. 41 U.S. 1 (1842).

24. 304 U.S. 64 (1938).

‘Republican’ [in both the old and new sense of the term] Justices, such as Samuel Chase, Richard Peters,<sup>25</sup> Rufus Peckham, and more recently William Rehnquist, Antonin Scalia, and Clarence Thomas” (p. 60). Presser does not make entirely clear, however, what makes this Northern, more mercantile, national constitutionalism a “nobler” form of legal conservatism than its Southern, more agrarian, localist counterpart. Nor does Presser clarify what exactly makes Rehnquist, Scalia, and Thomas similar to these 18th and 19th century judges.

A critical figure in Presser’s chronology of how the conception of law in the academy has changed, away from the natural and toward the positive, is Christopher Columbus Langdell, the first Dean of Harvard Law School and the architect of the case method. Although Presser provides a measured defense of Langdell’s efforts to systematize and professionalize legal education, Presser seems to agree with the prevailing view in the legal academy that Langdell misunderstood the nature of law in seeking to model legal studies after the natural sciences. Presser hints that the real fault in Langdell’s approach, however, is not its formalism, as the conventional critique generally holds, but its *scientism* – namely, that Langdell’s “law as science” approach cleared the way for the study of law to become the empirical study of judicial behavior, a transition completed by Oliver Wendell Holmes, for whom Presser arguably shows the most hostility in what is otherwise a thoroughly even-tempered book. Indeed, every romance novel must have a villain, threatening to seduce away the protagonist’s love, just as Johan Frederik Schlegel did to Kierkegaard’s Regine. And if Presser is our hero, Holmes is our villain.

## II. THE VILLAIN

Presser’s primary grievance against Holmes is that he was not simply skeptical about the extent to which legal norms can constrain judicial decision-making, as was the case for all of the realists, but he was also terribly cynical about human nature. Many biographical accounts of Holmes have attributed his

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25. There seems to be a typographical error in referring to Judge Peters as a Supreme Court Justice (p. 60). In 1792, President Washington appointed Peters to the United States District Court for the District of Pennsylvania, a position he occupied until his death in 1828.

cynicism to the Civil War, in which he fought valiantly after having enlisted while still a Senior at Harvard College. He was badly wounded in battle and some scholars have speculated that witnessing the despair and horror of a bloody ideological battle left him without a strong moral compass for the remaining 70 years of his life.<sup>26</sup> Indeed, his violent first-hand experience with what he would later call “fighting faiths”<sup>27</sup> seems to have transformed his youthful idealism, which bore some of the transcendentalism of Emerson,<sup>28</sup> into a more detached moral pragmatism, which often times approached a Nietzschean nihilism.<sup>29</sup>

Throughout *Law Professors*, Presser is overwhelmingly kind and respectful in his treatment of the profiled scholars, even those whom Presser criticizes, but, as mentioned above, he is perhaps the harshest on Holmes, in ways that may not be entirely defensible. Not only does Presser neglect important biographical details (such as some of the information above about Holmes’s involvement in and views on the Civil War) that may give the reader a more sympathetic understanding of his callousness,<sup>30</sup> but Presser may be guilty also of overstating Holmes’s agency in denaturalizing law.

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26. This horror is heart-breakingly captured on the back of an envelope of a letter a young Holmes wrote to his parents: “Write as often as poss. It is still kill-kill-all the time.” *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864* 137 (Mark De Wolfe Howe ed., 2000). Many years later, Holmes would write to Learned Hand that he did not have any children, because “this is not the kind of world I want to bring anyone else into.” G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 106 (1993). The memory of the Civil War seemed to haunt Holmes throughout his life, leading him, in 1932, when he retired from the bench at the age of 90, to cry while reading to Felix Frankfurter’s wife, Marion Frankfurter, a poem about the Civil War. As Holmes is reported to have told Lewis Einstein, “after the Civil War the world never seemed quite right again.” Lewis Einstein, *Introduction*, in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN*, at xvi (James Bishop Peabody ed., 1964).

27. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

28. On Emerson’s influence on Holmes, see ALLEN MENDENHALL, *OLIVER WENDELL HOLMES JR., PRAGMATISM, AND THE JURISPRUDENCE OF AGON: AESTHETIC DISSENT AND THE COMMON LAW* (2016).

29. On this connection between Holmes and Nietzsche, see Allen Mendenhall and Seth Vannatta, *The American Nietzsche? Fate and Power in the Philosophy of O.W. Holmes, Jr.*, 85 *UMKCL REV.* 187 (2016).

30. Presser does mention in passing Holmes’s involvement in the Civil War as an explanation for some of his “unsavory qualit[ies],” but he does not explore this explanation in any detail (p. 86). This is particularly surprising, given the detail and attention Presser gives to the other profiled scholars, bringing them to life in a way that inevitably complicates any criticism of their ideas.

On this latter point, that of Holmes's agency, three issues are worth addressing here. One, as Brian Tamanaha has argued, in his excellent book *Beyond the Formalist-Realist Divide*, many of Holmes's contemporaries argued that he had essentially created a strawman in critiquing Langdell,<sup>31</sup> because few practitioners had ever held such a strictly logical view of law, and even the purportedly formalist academics, like Langdell, were much more practically oriented and anchored to the ground than the realists later suggested they were. Two, Holmes, while mocking formalists for their logical rigidity, also took great pride in being constrained by law, famously professing, for example, that "[i]t has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits."<sup>32</sup> Three, given the relatively thin line between formalism and realism that existed in the real world, the complaints coming from the so-called realists could be understood as more political than theoretical in both content and purpose. That is, the realists were not as concerned with the interpretive methodology the so-called "formalists" employed, as they were with the fact that many of these formalists were political conservatives resisting the economic and cultural transformation wrought by rapid industrialization, bureaucratic centralization, and unprecedented levels of immigration. In other words, the realists, to advance their political agenda, used the logical nomenclature of formalism to signify that their opponents were driven by a mechanical simplicity that was out of a step with changing times. Understood in this light, cases like *Lochner v. New York*<sup>33</sup> were not bad because they were actually formalist decisions; rather, they were bad, in the realists' view, because they were based on bad economic policy.<sup>34</sup>

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31. For a discussion of many of these contemporaneous criticisms of Holmes, see BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 27–43 (2009). As an example of one of these contemporaneous criticisms, see, Jabez Fox, *Law and Logic*, 14 HARV. L. REV. 39, 42 (1900).

32. NORMAN DORSEN, *THE EMBATTLED CONSTITUTION* 58 (2013). Many have pointed to this quote as an example of Holmes's cruelty, in that he took pride in following the law even when it would undermine his notion of social justice. But this quote also weakens the idea that Holmes was a robust realist, eager to bend his understanding of the law to his will.

33. 198 U.S. 45 (1905).

34. Indeed, *Lochner*, which is often excoriated for invalidating labor laws based on a formalist theory about the "freedom of contract," was in fact much less formalist than, say,

This suggests that Presser's villain is not really Holmes but a time period, the ethos that came to pervade American law and politics in the early 20<sup>th</sup> century. To be sure, Holmes was eventually used to further this progressive agenda, but his actual ideas about law may have had little agency in creating that movement. As is often the case with the villain in a love story, the problem was in the relationship itself, as much as we might want to blame the villain for adulterating our vision of that relationship. To push this analogy further, there was already something wrong with late-19<sup>th</sup> century American law, from Presser's point of view, before Holmes, and there would have been something deeply wrong in 21<sup>st</sup> century American law even without Holmes. Presser's analysis therefore would have benefitted from a discussion of the surrounding changes in American public life—such as secularization and centralization—that almost certainly contributed more than Holmes to what Presser sees as the adulteration of American law. By ignoring these practical circumstances, and focusing instead only on the legal ideas themselves, Presser may be justly charged with committing the central vice that he condemns in his book—that of thinking too much like a law professor, in legal abstractions, detached from practical realities.

Presser's next few chapters are dedicated to other prominent legal realists—Wigmore, Pound, and Llewellyn. In these chapters, Presser emphasizes how they did not actually go quite as far as Holmes in repudiating legal traditionalism. Indeed, Presser notes, even Llewellyn, whose *Bramble Bush* is famous for its robust realism, did not accommodate himself to legal inconsistency in the way that Holmes had, despite defining law, similar to how Holmes had in *The Path of the Law*, as “[w]hat [legal] officials do about disputes” (p. 138).

These chapters are consistent with the points made above—*i.e.*, that many of the so-called realists were not nearly as devoted to uprooting conventional legal conceptions as some later theorists would have us believe. These chapters are also important

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*Roe v. Wade*, 410 U.S. 113 (1973), which derived a rigid trimester formula from an abstract concept of privacy, or *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which derived a highly complicated three-pronged test based on a theory of what it means to establish religion. *Roe* and *Lemon* are generally embraced by 21<sup>st</sup> century progressives, not because they are more anchored to practical realities, but simply because these decisions are generally viewed as having salutary outcomes of promoting gender equality and secularism.

reminders that the early realists were not principally concerned with constitutional law and theory. Wigmore of course was an expert in evidence law, Pound in tort law, and Llewellyn in contract law. While some early realists, such as Judge Jerome Frank, can certainly be charged with seeking to overhaul our legal system altogether, the majority of the realists during this period, including Wigmore, Pound, and Llewellyn, had more modest ambitions, seeking rather to refine and reform their particular areas of study.

Nevertheless, despite the fact that the individual agendas of Wigmore, Pound, and Llewellyn may have been relatively modest, and changing social and economic circumstances may have been more responsible than any of their respective ideas for what Presser perceives to be the adulteration of American law, all of these realists, along with Holmes, undoubtedly contributed to the notion that judges do, and should, exercise significant discretion in interpreting legal norms. And once this understanding of law became settled within the academy, the politicization of the judiciary verged on the inevitable, illustrated nicely in how the preponderance of the second half of Presser's book is dedicated to legal scholars devoted in one way or another to justifying the Warren Court agenda.

Two transitional figures along this path are Felix Frankfurter (profiled in Chapter 9) and Herbert Wechsler (profiled in Chapter 11).<sup>35</sup> Frankfurter and Wechsler are fascinating figures, made all the more intriguing by their placement in Presser's book, nearly half-way through the twenty-four chapters. After having read the entire book, the reader may leave with the impression that these two figures, and these two chapters, represent the true middle-point in Presser's narrative, in that both Frankfurter and Wechsler straddled legal formalism and realism, adhering to a Holmesian model of judicial restraint even after it had outlived its original purpose of permitting greater economic regulation. Frankfurter and Wechsler are, moreover, the first two Jewish scholars featured in the book, and they, ironically, stirred up controversy for their perceived insensitivity on constitutional issues relating to cultural pluralism. In Presser's romance with the law, we can think of these two thinkers as representing a

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35. C. P. Snow's fictional Lewis Eliot is sandwiched in between Frankfurter and Wechsler (in Chapter 10).

reconciliation of sorts, not quite fulfilling the promise of the honeymoon period, but cutting back on some of the excesses wrought by the realists.

### III. RECONCILIATION

The chapter on Frankfurter highlights how he contributed to the emerging political identity of the law professor. Indeed, as a Harvard Law School professor, before his 1939 appointment to the Supreme Court, Frankfurter had an active political agenda, even serving as a personal adviser to FDR. In stark contrast with this activist agenda as a professor, however, Frankfurter had a restrained constitutional vision as a Supreme Court Justice, holding that separation-of-power and rule-of-law principles severely circumscribe the power of judicial review, particularly in cases involving coordinate branches of the federal government. Frankfurter, unlike Holmes, was doctrinaire in applying this theory, because Frankfurter saw judicial restraint as a constitutional command, unchanging with time—not as a practical expedient, as the pragmatic Holmes viewed it. This led Frankfurter to take increasingly conservative positions over the years, as progressive scholars and judges, having established that economic legislation would not be subject to exacting scrutiny, began to push for closer judicial review of social legislation, particularly when such legislation had a deleterious impact on “discrete and insular minorities.”<sup>36</sup>

In covering Frankfurter’s transition, from New Deal virtuoso to Warren Court pariah, Presser focuses on Frankfurter’s *Barnette* dissent,<sup>37</sup> which is of course famous for its highly vitriolic, passionate, and personal language.<sup>38</sup> After that point, in which the Court made the abrupt decision of overruling itself only three years after *Minersville School District v. Gobitis*,<sup>39</sup> Frankfurter’s conservatism seemed to harden, though perhaps Presser is too hard on Frankfurter in alleging that “Frankfurter did not have the sympathy for racial and ethnic minorities which generally characterized the Warren Court” (p. 174). This might be an

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36. U.S. v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938).

37. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

38. He began the dissent by declaring that, as a Jew, he “belong[ed] to the most vilified and persecuted minority in history.” *Id.*

39. 310 U.S. 586 (1940).

overstatement, given that Frankfurter consistently demonstrated a strong compassion for the plight of African Americans,<sup>40</sup> but it is certainly true that Frankfurter wrote his *Barnette* dissent with an extreme insensitivity toward religious minorities, exhorting them to assimilate into the dominant American Anglo-Saxon Protestant culture just as he had. Generally, however, it's not so much that Frankfurter was unsympathetic toward minorities as much as he was an assimilationist, eager for everyone to conform to his Anglophilic ideal. Likewise, Frankfurter at times seemed indifferent, even hostile, toward his own Jewish descent, marrying a non-Jewish woman and regarding his Judaism as a mere "accident of birth" (p. 152), but he was, at least at one point, Presser notes, an ardent Zionist, lobbying for the Balfour Declaration and participating in the founding conference of the American Jewish Congress.

Presser suggests that Frankfurter has a mixed legacy with modern-day scholars because he was himself conflicted. Indeed, it seems that Frankfurter was, at heart, a Wilsonian and FDR Democrat, and he had difficulty adjusting to the emerging New Left, leading various elements of his brilliance to shine at different points on the ideological spectrum, not always in ways that we tend to find appealing in the 21st century.<sup>41</sup> There is at least some coherence to be found at the conclusion of his incredibly successful though enigmatic life, with Frankfurter asking his friend, Professor Louis Henkin, an Orthodox Jew, to speak at his funeral—as Frankfurter explained, "I came into the world a Jew and although I did not live my life entirely as a Jew, I think it is fitting that I should leave as a Jew" (p. 152 n.494).

Wechsler similarly contained many contradictions. Like Frankfurter, Wechsler was a liberal in many ways, but he assailed

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40. Indeed, Frankfurter was closely involved in founding the ACLU in 1920; he served as a legal and policy advisor on the NAACP's National Legal Committee in the decade preceding his appointment to the Supreme Court in 1939; and he hired the first African-American Supreme Court clerk nearly a decade later in 1948. Moreover, Frankfurter was indirectly responsible for *Brown v. Board of Education*, in recommending in 1930 that the NAACP commission one of his former students, Nathan Margold, to construct a 218-page report that mapped out a brilliant and highly successful litigation path toward desegregation. See STEPHEN WHITFIELD, *JEWISH FATES, ALTERED STATES, IN JEWISH ROOTS IN SOUTHERN SOIL: A NEW HISTORY* 304, 317 (Marcie Ferris et al. eds., 2006).

41. A case could be made that Frankfurter was essentially a proto-neoconservative, given his support for a powerful centralized government, his eagerness for global engagement, and his racially egalitarian but assimilationist leanings.

the most cherished progressive principle, racial egalitarianism, and he did this by challenging the constitutional validity of its greatest triumph, *Brown v. Board of Education*.<sup>42</sup> Presser devotes several pages to exploring why and how Wechsler advanced his nearly blasphemous view—in *Toward Neutral Principles of Constitutional Law*,<sup>43</sup> one of the most controversial law review articles of all time—that *Brown* was an illegitimate exercise of judicial review because it did not rest on neutral principles of law. In that article, Wechsler defined a “neutral principle” as consisting of two elements—content generality and equal applicability. Applying these criteria, Wechsler argued that a principled decision rests on “reasons quite transcending the immediate result that is achieved,”<sup>44</sup> and applies to all parties equally, “whether a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist.”<sup>45</sup>

In analyzing the Wechsler article, Presser may be charged with seeing too much conservatism in the argument. Wechsler’s argument, after all, was ostentatiously disinterested in *stare decisis*, federalism, originalism, and majoritarianism.<sup>46</sup> To the contrary, Wechsler’s principal problem with the *Brown* decision was its lack of neutrality—specifically how, in distinguishing the *Plessy* line of cases, the Court limited its reasoning to public education and grounded this distinction on highly questionable social science. At the end of the article, Wechsler claimed that whereas the *Brown* decision could not be defended on equal-protection grounds, it arguably could be justified through a freedom of association for people who desired integration. But that led Wechsler to wonder how a court could justify the right to integration in freedom-of-association principles, without also giving rise to the complementary right, that of segregationists *not* to associate with other races. Wechsler conceded that he “[w]ould

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42. 347 U.S. 483 (1954).

43. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

44. *Id.* at 15.

45. *Id.* at 12.

46. Indeed, Wechsler specifically conceded that several things that bothered other critics of the decision did not bother him. In particular, Wechsler explained that he was not bothered that *Brown* implicitly overruled long-settled precedent, that it required the transformation of social traditions prevailing in a large swath of the nation, that it was ostensibly at odds with the original meaning of the 14th Amendment, that it was contrary to popular will, and that it may have been premature in preempting congressional action. *Id.* at 31–32.

like to think there is [only the right to integrative association], but I confess that I have not yet written the opinion”<sup>47</sup> demonstrating how preferring the integrationist’s over the segregationist’s freedom of association would be a neutral principle. Writing such an opinion, Wechsler concluded, is the “challenge of the school-segregation cases.”<sup>48</sup>

Presser may have overstated Wechsler’s conservatism in overlooking the extent to which Wechsler engaged here in the very type of reasoning that he was condemning – the crafting and tailoring of doctrines with an eye constantly averted toward particular policy outcomes. As later scholars would point out, Wechsler’s neutral principles project was doomed from the start, because it did not consider requiring courts to derive such neutral principles through *neutral interpretive methodologies*.<sup>49</sup> This realization gave rise to the interpretive crises of the 1970s, which Presser explores in Chapter 14 by examining six leading scholars within the Critical Legal Studies movement (“CLS”), and in Chapter 15 by profiling University of Chicago Law Professor and Seventh Circuit Judge Richard Posner, the principal architect of the Law and Economics movement (“LE”).

Both CLS and LE represent what we may characterize as a second infidelity to Presser’s traditional view of the nature of law. And just as how a second infidelity almost invariably relates to the first, but may be more audacious, pushing the boundary of the relationship to challenge the sustainability of the marriage, we see in both CLS and LE two brazen and radical extensions of legal realism.

#### IV. A SECOND INFIDELITY

On the surface, the LE and CLS movements represent radically divergent ideological perspectives, with LE making efficiency the central criterion of a legal system and CLS arguing that such an emphasis on efficiency promotes inter-personal alienation through the instantiation of structural economic exploitation (to use the CLS Marxist nomenclature). But in fact LE and CLS—both born in the 1970s, following the triumph of

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47. *Id.* at 34.

48. *Id.*

49. *See, e.g.,* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

legal realism in the academy and the Warren Court over the nation—share a view of law that was at one time utterly foreign to the American legal academy: the view that law is nothing more than an instrument for political power. This view, expressed most stridently in the CLS dictum “law is politics,” represents the total denunciation of the traditional view that law is the expression of a divine order naturally inhering in human relations.

Thus, when Presser questions whether it could be that CLS and LE scholars “actually live in different legal worlds” (p. 296), it may be one of the few times when Presser’s prose misses the mark. CLS and LE occupy the exact *same* legal world—one where law is merely an instrument of power—but they occupy different *political* worlds. Whereas LE sought to impose objectivity on the law, it held, just as CLS, that this order did not necessarily inhere in nature or legal norms themselves. For LE, it was the duty of judges to create that order, and the LE scholars sought economically savvy judges like Posner to perform that task. CLS scholars, by contrast, thought that any such efforts to impose objectivity and order would fail, and, moreover, would inevitably result in class, gender, and racial exploitation and alienation. The Critics therefore sought judges who would reject all pretensions of legal objectivity and consistency, in an effort to overcome and eradicate the surface-level distinctions responsible for inter-subjective alienation.

Essentially, then, LE and CLS scholars disagreed simply on *how* to achieve a well-ordered society. Their disputes over economic models and human alienation were, at bottom, political and indeed moral disagreements. This, of course, is what has generated the truism, “We are all legal realists now”—which in fact has become such a truism that it is difficult to attribute the quote to a single source,<sup>50</sup> leading Michael Steven Green to make the meta-observation that it “has become a cliché to call it a ‘cliché.’”<sup>51</sup> Whether law is politics, or law is economics, both CLS and LE represent the same legal world: a world where law is not law.

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50. Presser is one of the few scholars to cite a source, (p. 134 n.433), tracing it to Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988). To my knowledge, this is the first time the phrase was used.

51. Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005).

It is worth noting here that Presser chose to cover Ronald Dworkin in Chapter 12, immediately after the Wechsler chapter, apparently under the reasoning that this placement was ideally suited to demonstrate how Dworkin used his “law as moral principle” approach to combat Wechsler’s “neutral principles” assault on the Warren Court legacy. But it may have made more sense for Presser to discuss Dworkin after the CLS and LE chapters, in addition to after the chapters on the related critical scholars Catharine MacKinnon (Chapter 17) and Patricia Williams (Chapter 21), given that so much of Dworkin’s work sought to defuse the CLS attack on the objectivity of legal thought, while still legitimizing many of its policy goals. Indeed, the astute reader will notice how Chapter 16 (on Bruce Ackerman and Akhil Amar) works in consonance with Chapter 12 (on Dworkin) to illustrate how these post-Crit thinkers developed highly sophisticated and arguably formalistic theories of law, in an effort to rise above the nihilism of CLS, while still, coincidentally, defending legal positions that match up almost perfectly with the political goals of CLS, and moreover, entirely with the Democratic Party’s agenda over the last 50 years.<sup>52</sup>

The back-and-forth in these late chapters creates a dizzying effect, which plays into Presser’s wonderful and meandering way of unfolding his narrative, but perhaps at the price of telling a more coherent and linear story, whereby the Crits responded to the supposed neutrality of the Wechsler “process school” by extending and radicalizing realism in a way that was later justified and legitimated by progressively minded scholars like Ackerman and Dworkin.

Presser astutely notes how although CLS may be dead (in the sense that very few legal scholars still write with the radical tone and esoteric style as people like Kennedy, Gabel, and Unger did

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52. One might even sense from these chapters the implication that Dworkin and Ackerman did more to distance a traditionalist like Presser from American legal discourse than CLS did or ever could have, because while critical scholars sought a candid and transparent exploration of power relations in American law and politics, Dworkin and Ackerman sought to justify transformations of power, such as the expansion of federal authority in the New Deal or the rights revolution of the Warren Court, under cryptic appeals to underlying moral principles and popular sovereignty. That is not to take anything away from either Dworkin’s or Ackerman’s account of law – to the contrary, both projects are highly interesting and compelling. But if one looks at them ideologically, in terms of how they serviced the progressive cause of making legal discourse more egalitarian, Dworkin and Ackerman may have done more than CLS to render any challenge to progressive politics outside the legal mainstream.

in the 1970s and 80s), CLS politics are very much still alive. As a primary example of this, Presser points to the Obama Presidency, arguing in the chapter on CLS, and alluded to again in the chapter on the President himself, that Obama represents “the unfolding of some of the ideas promoted by critical legal studies”—particularly how “legal actors can reshape the institutions of the market economy and even of democracy itself” (p. 295). Presser could have made an even more radical claim here, one that does not so unfairly single out President Obama as bearing particular responsibility for pushing this agenda.

That radical claim is this: The bulk of the legal academy, not just a few radical outliers, can be characterized as responsible for carrying the CLS torch, at least in terms of policy goals and ideological orientation. If you consider, for example, the Merrick Garland-inspired wish lists recently issued by Critics like Tushnet<sup>53</sup> and progressive non-Crits like Chemerinsky,<sup>54</sup> as they contemplated what the Supreme Court’s agenda might be like under a Hillary Clinton presidency, their visions were almost identical: Both involved the full deployment of federal resources to pursue race-conscious and wealth-redistributive policies in an effort to secure a truly egalitarian society.

Understood in this light, CLS was not necessarily that radical in its politics, but rather in its *theory* of what law is and how we should talk about it. Put differently, once the hard part of transforming power relations within the legal academy and the broader legal culture was complete, so that nearly every law school in the country became associated with various progressive causes, CLS, as a deconstructive theory of power in law, had little to offer the legal left, which after this power transition was faced with the different task of legitimating and justifying its newfound power on more permanent grounds. This project was pursued under more formalistic theories, such as Dworkin’s underlying principles, Ackerman’s constitutional moments, and Amar’s common-law constitutionalism.

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53. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKANIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html>.

54. Erwin Chemerinsky, *What If the Supreme Court Were Liberal?*, THE ATLANTIC (Apr. 6, 2016), <https://www.theatlantic.com/politics/archive/2016/04/what-if-the-supreme-court-were-liberal/477018>.

That raises a related point that would have been interesting for Presser to pursue here: If we understand CLS as a theory of power relations in law, as opposed to a specific set of desired policy outcomes, what makes it necessarily a left-wing movement? The Crits, themselves, to be sure, were all leftists, seeking to use critical theory for the thoroughly egalitarian purpose of deconstructing the various class, race, and gender hierarchies structuring the American legal system. But their *theory* of law need not be deployed for such ends. Indeed, CLS is in many ways the Anglo-American adaptation of a philosophy of law that first appeared, and is still much more common in, Continental Europe, where it is not thought of as inherently progressive—in fact, it is most often associated with the right-wing German theorist, Carl Schmitt.

Three distinct but related patterns underlying the transformation of American legal, political, and social power may make critical legal theory a particularly good fit for how conservatives think about legal texts and judicial authority in 21st century America. *Law Professors* suggests but does not explicate these points. I will briefly do so here, for the purpose of highlighting what I believe to be a critical theme underlying the book.

One, there are few—and decreasingly few—voices in the academy and judiciary representing a traditionally conservative view of law. Presser notes in various places how much the legal academy has changed demographically and ideologically over the last seventy-five years—going from overwhelmingly Christian, and, at least in some sense, socially conservative, to disproportionately Jewish and radically progressive (p. 153 n.495, p. 320, p. 348).<sup>55</sup> On this point, Presser cites a study finding that 82

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55. The ethnic component of this transformation is largely due to the fact that, well into the 1950s, there were rigid quotas on the number of Jewish students and professors at elite universities. For a fascinating historical account of the Jewish experience in Ivy League universities, particularly at Yale, see DAN A. OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* (1986). See also Stephen Steinberg, *How Jewish Quotas Began*, *COMMENTARY* (Sept. 1, 1971), <https://www.commentarymagazine.com/articles/how-jewish-quotas-began>. The transformation of the American legal academy after the Jewish quota was lifted is perhaps represented most strikingly in that Frankfurter was the only full-time Jewish faculty member at Harvard Law School until at least 1929. But just 41 years later, after the quotas had been lifted, Robert Burt observed how, despite representing only two percent of the overall population, Jews represented 25 percent of all American law school professors and 38 percent of “elite” American law school professors (p. 153 n.495). For a more comprehensive study of gender, ethnic, and political diversity in

percent of law professors identify as Democrat voters (p. 320), but as striking as that number is, he could have pushed this point much further. The percentage is actually much higher if the few right-leaning and Christian schools are excluded from the calculation. And the percentage is even higher than that at the most elite law schools, demonstrated in Nick Rosenkranz's recent observation that 98 percent of the Georgetown Law faculty can be fairly characterized as left-wing, with one of the three right-of-center faculty members being the socially progressive libertarian Randy Barnett.<sup>56</sup>

Two, as a result of there being almost no traditionalists left in the academy, the few scholars endorsing natural law or originalism are overwhelmingly socially progressive, more often identifying as libertarian than conservative.<sup>57</sup> There are precious few scholars practicing Bork's brand of originalism, structured by a traditional cultural framework. Presser generally ignores this distinction between libertarians and traditional conservatives,<sup>58</sup> which is a shame, because it is an increasingly significant distinction in conservative legal thought, particularly as the distinction relates to theories of originalism, natural law, and judicial review.<sup>59</sup>

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the legal academy, underscoring the unrepresentativeness of its demography and ideology, see James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89, 118 (2016) ("By ratios, the most overrepresented group is white male Jewish Democrats. They are overrepresented by a ratio of nearly 28 to 1.").

56. Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 HARV. J.L. & PUB. POL'Y 137, 137 (2014) ("We are a faculty of 120, and, to my knowledge, the number of professors who are openly conservative, or libertarian, or Republican or, in any sense, to the right of the American center, is three—three out of 120. There are more conservatives on the nine-member United States Supreme Court than there are on this 120-member faculty. Moreover, the ideological median of the other 117 seems to lie not just left of center, but closer to the left edge of the Democratic Party. Many are further left than that.") (internal citations omitted).

57. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2013). On the growing convergence between mainstream (i.e., progressive) constitutionalism and libertarian constitutionalism, see David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS. 43 (2015).

58. Presser explores libertarianism only obliquely—through Posner's work in law and economics, and Sunstein's (ostensibly oxymoronic) "libertarian paternalism" (ch. 22).

59. For that reason, it is regrettable that Presser's only discussion of right-of-center libertarianism is through Posner's pragmatic and decidedly non-natural law contributions to the LE movement. Had Presser included Randy Barnett among the profiled law professors, it would have given Presser an opportunity to explore the increasingly fractured coalition between traditionalists and libertarians, both within law and the larger

Three, because most originalist scholars now are not traditionalists, a “New Originalism” has emerged, opening up a path for libertarian-oriented scholars to make socially progressive arguments, such as for open borders<sup>60</sup> and same-sex marriage.<sup>61</sup> But just as Presser overlooks the increasingly important distinction within the legal right between traditionalists and libertarians, Presser treats originalism as a monolithic theory, overlooking the many variations that have arisen in originalism scholarship over the last decade—almost all of which point toward the left-end of the ideological spectrum.

Thus, given these three transformations within the legal academy relating to tradition, natural law, and originalism, Presser’s CLS analysis would have benefitted from a more creative and forward-looking exploration of whether a critical approach to law may eventually become more aligned with the legal right than the legal left. To be clear, that is not to suggest the possibility of conservatives becoming full-fledged Critics who see law, in its essence, as nothing more than power. There is obviously something about conservatism that ultimately requires seeing the “permanence” in things, as Russell Kirk so eloquently put it.<sup>62</sup> But if conservatives now truly see the “irremediable corruption of our legal culture,”<sup>63</sup> as Justice Alito recently alleged in his *Obergefell* dissent, conservatives may very well conclude that conventional

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conservative movement. The traditionalist-libertarian fracture on natural law is largely traceable to Robert Bork’s objection to natural law as a guide for judicial decisionmaking.

60. See, e.g., Ilya Somin, *Immigration and the US Constitution*, OPEN BORDERS (Mar. 18, 2013), <https://openborders.info/blog/immigration-and-the-us-constitution>.

61. See, e.g., Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016); Michael Ramsey, *Is There an Originalist Case for Same-Sex Marriage?*, THE ORIGINALISM BLOG (Mar. 25, 2013), <http://originalismblog.typepad.com/the-originalism-blog/2013/03/is-there-an-originalist-case-for-same-sex-marriage-michael-ramsey.html>; Ilya Somin, *Originalism Is Broad Enough To Include Arguments for a Constitutional Right to Same-Sex Marriage*, VOLOKH CONSPIRACY (Jan. 28, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/originalism-is-broad-enough-to-include-arguments-for-a-constitutional-right-to-same-sex-marriage/?tid=a\\_inl&utm\\_term=.39a1adc906fc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/originalism-is-broad-enough-to-include-arguments-for-a-constitutional-right-to-same-sex-marriage/?tid=a_inl&utm_term=.39a1adc906fc).

62. RUSSELL KIRK, *What Is Conservatism?*, in THE ESSENTIAL RUSSELL KIRK: SELECTED ESSAYS (George Panichas ed., 2014) (“The Permanence of a state, roughly speaking, is its conservative interest . . .”).

63. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2643 (2015) (Alito, J., dissenting). On the significance of Justice Alito’s reference to the “irremediable corruption of our legal culture,” particularly in signifying the failures of constitutional conservatism, see Nelson Lund’s excellent essay. Nelson Lund, *The Corruption of Constitutional Conservatism*, CLAREMONT REVIEW OF BOOKS (Feb. 29, 2016), <http://www.claremont.org/crb/basic-page/the-corruption-of-constitutional-conservatism>.

modes of conservative legal reasoning, such as formalism and originalism, will serve only to reinforce the liberal cultural and legal hegemony.

Presser comes the closest to addressing how a critical approach to law can provide insight into this transformation of power when Presser argues that CLS can best explain why President Obama, along with Attorney General Eric Holder, felt justified in using the authority of the Department of Justice to weigh in on the Ferguson controversy (in favor of the black victim and against the white police officer) before the facts involving the shooting had been resolved (p. 290 n.877). Presser also could have mentioned here other examples of the Obama Administration interpreting the law and legal events through the subjective, thereby weakening the notion that objectivity and certainty inhere in legal norms.<sup>64</sup> If Presser is right in characterizing the Obama Administration as a CLS presidency, it would suggest that, in the forty years since the height of the CLS movement in the 1970s, the power dynamics of the nation have undergone such an enormous shift that CLS values, particularly as applied to matters like racial justice and sexual identity, have become part of the very power structure the Critics assailed.

If CLS values are indeed forming a new power structure, and that is certainly a plausible proposition in light of the transformations of the legal academy covered in Presser's book,<sup>65</sup>

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64. For example, after being charged that his "Justice Department went easy in a voting rights case against members of the New Black Panther Party because they are African American," Attorney General Holder dismissed the charge on the ground that any threat to the voting rights of non-blacks was not comparable to the disenfranchisement of "my people." Josh Gerstein, *Eric Holder: Black Panther Case Focus Demeans "My People,"* POLITICO (Mar. 1, 2011), <http://www.politico.com/blogs/under-the-radar/2011/03/eric-holder-black-panther-case-focus-demeans-my-people-033839>. Similarly, after Trayvon Martin's tragic death, President Obama claimed that "it is absolutely imperative that we investigate every aspect of this, and that everybody pulls together—federal, state and local—to figure out exactly how this tragedy happened." Obama severed the link between legal norms and the subjective by exhorting the nation to legal action while contemplating that "[i]f I had a son, he'd look like Trayvon." Krissah Thompson & Scott Wilson, *Obama on Trayvon Martin: "If I Had a Son, He'd Look Like Trayvon,"* WASH. POST (Mar. 23, 2012), [https://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQApKPPVS\\_story.html?utm\\_term=.d28004f93d00](https://www.washingtonpost.com/politics/obama-if-i-had-a-son-hed-look-like-trayvon/2012/03/23/gIQApKPPVS_story.html?utm_term=.d28004f93d00).

65. A fascinating parallel can be found in the positions of civil liberties organizations like the ACLU—which was founded in 1920 to protect political dissidents and civil liberties from majoritarian authority, but now often works in tandem with government to penalize dissidents who violate non-discrimination norms. See, for example, the ACLU's participation with Washington State in a lawsuit against a florist who, for religious reasons, refused to create a floral arrangement for a same-sex wedding. See Kirk Johnson, *Florist*

that power transformation may eventually change the way that legal concepts like formalism and originalism relate to the ideological spectrum.<sup>66</sup> This is a particularly timely point in light of the 2016 populist revolt and the attendant judicial resistance against President Trump's immigration agenda. Presser cannot be faulted for completing his book before the ideological shake-up wrought by the 2016 election. But long before that election there were signs of the dissolution of *National Review*-style conservatism.<sup>67</sup> And Presser's analysis would have been more provocative, timely, and compelling had it strayed more from conventional partisan talking points and considered what this dissolution might augur for our understandings of the legal academy, CLS, and the legal right.

Similarly, just as Presser's analysis would have benefited from probing the relationship between CLS and the legal left, it likewise would have benefited from questioning what makes LE a right-wing school of thought, as it is often represented. Indeed, Presser notes how Posner, before he was so critical of originalism and various social conservative causes, was "a darling of the right," thereby earning a federal judicial nomination from President Reagan in 1981 (p. 303). But Presser does not explore why Posner was, and to some extent still is, considered conservative. This is especially curious given Presser's affiliation with paleoconservatism, which has been characterized by just as much skepticism toward big business and the fetishization of capital, as skepticism toward capital's confiscation and redistribution. For paleocons, unlimited global capitalism and statist centralization are equally problematic because they can be equally destructive of community and family life.

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*Discriminated Against Gay Couple, Washington State Supreme Court Rules*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/florist-discrimination-gay-couple-washington-court.html>.

66. Indeed, some recent trends in American law and culture have led legal scholars to observe a growing left-wing patriotism and interest in originalism. For a fascinating argument on this point, linking an emerging "liberal originalism" with the racial and cultural dynamics of the Broadway hit *Hamilton*, see Richard Primus, *Will Lin-Manuel Miranda Transform the Supreme Court?*, THE ATLANTIC (June 4, 2016), <https://www.theatlantic.com/politics/archive/2016/06/lin-manuel-miranda-and-the-future-of-originalism/485651>.

67. On the decreasing currency of *National Review*-style conservatism among the American electorate, see GEORGE HAWLEY, *RIGHT-WING CRITICS OF AMERICAN CONSERVATISM* (2016).

The crux of why paleoconservatives like Presser have so little in common with libertarians of Posner's (or Barnett's) ilk is that such libertarians make *choice* the ultimate touchstone of human freedom, without apparently considering that choice in a world untethered to and deracinated from social connection and cultural meaning will have little relationship to what many human beings want out of that freedom. For this reason, at least some concern for a nation's tradition and cultural heritage is critical to a legal version of paleoconservatism, a concern that libertarians like Posner often times seem to lack. In fact, when framed in this light, the Crits and paleocons have much more in common with each other than either does with LE or libertarianism, at least in terms of the importance to human happiness of living a spiritually fulfilling and meaningful life. Although a Crit like Tushnet and a paleocon like Presser would agree on very little in designing a blueprint for constructing that meaning, they at least would have a lot to discuss in terms of making the law fulfill this need, a conversation in which many LE and libertarian scholars would have little interest in participating.

And while the Crits and paleocons would agree on very little, they would certainly agree on *some* things, and moreover, these would almost certainly be things on which they would sharply disagree with LE types. This is evident, for example, in Presser's sympathetic treatment of Catherine MacKinnon's argument that pornography is a social evil that must be regulated, a view that LE scholars generally reject because it undermines individual choice—no matter how much that choice undermines a life with meaning, for both men and women alike, pornographic actors as well as viewers.

Probing such ideological mash-ups would have enriched Presser's love letter, just as reflecting on past romances and connections can yield new realizations about one's current relationship. This is a point we will return to in our final section, on the rocky future of the relationship between traditionalism and law, where we will see that perhaps the real villains for traditional conservatives like Presser are not necessarily the realists and Crits. The real villain is the culture that has prevented legal conservatism from conserving the cultural and moral core of the American legal system.

## V. A ROCKY FUTURE

Three of the closing chapters (Chapters 18-20) cover diverse members of the legal conservative movement. That movement, born in the early 1980s with the creation of the Federalist Society, sought to reverse much of the Warren Court's legacy, while grounding that reversal in a distinctly conservative theory of law—what came to be known as originalism in the constitutional context and textualism in the statutory context. Chapter 18, on Mary Ann Glendon, is a magnificent dedication to a brilliant woman, one who does not get enough attention in commentary on the most prolific legal scholars—partly, perhaps, because her work has focused on family law rather than the glamour and glitz of constitutional law and theory.<sup>68</sup> One of Glendon's greatest contributions is *Rights Talk*,<sup>69</sup> which pointed to the dark underbelly of rights—namely how they often serve to atomize and sever individuals from a life with meaning. Presser notes how Glendon's interrogation of rights discourse has some resonance with the CLS critique of law, but “with Glendon it has a strongly conservative rather than a strongly progressive coloration” (p. 364).<sup>70</sup> Glendon, more than any of the scholars included in the book, understands that many of America's problems, those that concern people across the ideological spectrum, are, at their core, cultural, and as such, are not easily susceptible to resolution by law professors – or indeed, by the legal system at all.

Chapters 19 and 20 focus on two particularly controversial law professors—Paul Carrington and Antonin Scalia. Carrington is controversial for his commentary on legal education, including his desire to shorten law school matriculation, his questioning whether the Crits belong on law school faculties, and his criticism of affirmative action in law school admissions. In the Carrington chapter, one can perhaps most brightly see the arc of Presser's love letter, with Carrington representing a lost era—the southern romantic more concerned with public virtue than academic prestige.<sup>71</sup> Presser quotes extensively from Carrington's

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68. Presser hints at a more sinister explanation for the neglect of Glendon's work – that she is a “conservative Christian woman” (p. 347), perhaps the most underrepresented demographic in the entire legal academy. See Lindgren, *supra* note 55, at 148.

69. MARY ANN GLENDON, *RIGHTS TALK* (1991).

70. As mentioned above, Presser's analysis would have benefitted from exploring in greater depth these overlaps between critical legal theory and traditional conservatism.

71. In distinguishing Carrington from many of the other scholars profiled in the book, Presser notes how Carrington “has never had tenure at a Northeastern or Ivy League institution,

controversial article, *Diversity!*,<sup>72</sup> to let Carrington's striking prose and provocative arguments speak for themselves, bubbling over with verve in inveighing against the diversity enterprise that has picked up significant momentum in the 25 years since the article was published. Carrington's iconoclastic style dovetails nicely into the most iconoclastic and stylistic writer ever to sit on the Supreme Court, Antonin Scalia, covered in Chapter 20.

Given the overall purpose of the book—to explore and chronicle changes in the legal academy—Chapter 20 may be faulted for focusing too much on Justice Scalia and too little on Professor Scalia. This chapter would have benefitted from a deeper exploration of what kind of professor he was, both in and outside the classroom.<sup>73</sup>

If there is any conceptual fault in the Scalia chapter, it is the one appearing in various parts of the book—Presser's propensity to hew too closely to conventional partisan narratives. For example, Presser distinguishes Scalia from Dworkin, on the ground that Scalia rejected “the essentially legislative role [for courts] praised by Ronald Dworkin” (p. 388). This of course fits with how conservatives often caricature these two great minds, with Scalia putatively representing the hard-line *Federalist 78* view of the role of judges, and Dworkin succumbing to the sirens of judicial activism. But, whatever one's take on Dworkin's political leanings, it must be conceded that he argued strenuously that adjudication is an enterprise distinct from legislation, and he made this point, quite compellingly, in arguing that principle, and not policy, must animate judging. Conversely, Scalia can be charged with failing to hew the line between judging and legislating – given his inexplicable (and perhaps indefensible) acceptance of non-originalist precedent only some of the time (which is something Presser notes only in passing).<sup>74</sup>

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or one on the West Coast,” (p. 367). Nevertheless, as dean of one of the most prestigious law schools south of the Mason-Dixon line (Duke Law School), Carrington was well situated within the legal hierarchy.

72. Paul D. Carrington, *Diversity!*, UTAH L. REV. 1105 (1992).

73. Scalia was a law professor at the University of Virginia School of Law from 1967 to 1971, and at the University of Chicago Law School from 1977 to 1982. It would have been interesting for Presser to explore Scalia's professorial contributions to the primary legal conservative organization (as the first faculty adviser to the Federalist Society) and the conservative movement's primary legal theory (originalism).

74. Justice Scalia never resolved this issue. Shortly after he was appointed to the Court, he defended his derogation from originalism based on his being a “faint-hearted originalist,” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989),

Moreover, after having documented all the changes in the law over the last 225 years, Presser's analysis might have benefitted from considering whether Dworkin and Scalia, though occupying radically different perspectives in our 21st century ideological spectrum, have much more in common with each other than they do with the real targets of Presser's affection, Wilson and Story. Indeed, seeing the legal academy through Presser's chronology illustrates how much of our modern-day fighting—such as the disagreement between Scalia and Dworkin featured in the classic, *A Matter of Interpretation*<sup>75</sup>—centers on narrow interpretive questions arising from the counter-majoritarian difficulty, particularly as that problem relates to the Warren Court legacy. This has led several scholars to argue that the difference between Scalia and Dworkin is not really between originalism and non-originalism, or adjudication and legislation, or even rules and principles. The difference is rather of a much narrower variety—between what some have dubbed Scalia's "expectation originalism," whereby the *expected applications* of the constitutional drafters bind later interpretations, and Dworkin's "semantic originalism," whereby the *purposes* driving the creation of the text are what bind later interpretations.<sup>76</sup> Dworkin's semantic originalism has given rise to Jack Balkin's "living originalism," which similarly uses original purposes and principles to achieve progressive goals,<sup>77</sup> leading some to quip that, if originalism is this inclusive, so as to encompass a whole range of historical modes of interpretation, we are all originalists now.<sup>78</sup> Depending on how one views the original purpose of originalism, the emergence of this inclusive originalism might signal the triumph, or death-knell, of this theory of constitutional interpretation.

Whatever one's take on originalism as a theory of interpretation, however, the reader will likely get the impression

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but he later repudiated this argument. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10>.

75. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

76. On Dworkin's semantic originalism, see Jeffrey Goldsworthy, *Dworkin as Originalist*, 17 CONST. COMMENT. 49 (2000); Larry Alexander, *Was Dworkin an Originalist*, in *THE LEGACY OF RONALD DWORKIN* (Wilfrid J. Waluchow & Stefan Sciaraffa eds., 2016).

77. JACK BALKIN, *LIVING ORIGINALISM* (2014).

78. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 437 (2013); see also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

from Chapters 18-20 that the arc of the legal conservative movement was short-lived, having failed to achieve its goals, a point concretized in the fact that the final three scholars profiled are Patricia Williams (Chapter 21, representing critical race studies, alluded to above), Cass Sunstein (Chapter 22, on “libertarian paternalism”), and President Barack Obama (Chapter 23, in many ways the apotheosis of the progressive professor-politician, also discussed above). That this trio of thinkers represents the foreseeable future of the legal academy is made all the more solemn by Justice Scalia’s death in February 2016, shortly before Presser completed the book. Indeed, although the three contemporary conservatives profiled in the book – Carrington, Glendon, and Scalia – undeniably provided outstanding contributions to how we think about the law, it must be conceded that, in terms of actual outcomes, they managed to produce very little practical change with regard to their particular causes.

For example, Presser spends significant attention on how provocative Carrington’s charges against affirmative action were, but Presser elides over the fact that the criticism, as biting as it may have been in law school faculty lounges, turned out to be largely ineffectual in practice. Indeed, 25 years after the publication of *Diversity!*, the constitutionality of affirmative-action law is now firmly settled into the Court’s precedents, with several Republican-appointed Justices accepting diversity as a compelling state interest.<sup>79</sup> Not only does it seem extraordinarily unlikely that this controversial issue is going to go away anytime soon, certainly not by the conclusion of the 25-year window hoped for by Justice O’Connor in her *Grutter* opinion,<sup>80</sup> but in the time since Carrington’s publication, racial grievances have only intensified, evidenced by the growing movement for reparations, a movement that has accelerated and spread far beyond what even the Critics were willing to seek openly in the 1970s.<sup>81</sup>

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79. See *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

80. See *Grutter*, 539 U.S. at 343 (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

81. Ta Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 24, 2014), <https://www.theatlantic.com/projects/reparations>. Cultural, legal, and economic reparations to African Americans is one of the primary demands of Black Lives Matter.

Likewise, 30 years after Glendon's searing indictment of American family law, in *Abortion and Divorce in Western Law*,<sup>82</sup> the American family is struggling more than ever, as the national out-of-wedlock birthrate has skyrocketed to over 40 percent, with the rate for African-American mothers approaching an incredible 75 percent.<sup>83</sup> Moreover, abortion remains a constitutionally protected right, due in part to a plurality of Reagan- and Bush I-appointed Justices (Kennedy, Souter, and O'Connor) affirming in *Casey* the "essential holding" of *Roe* through the "undue burden" standard (a result in which Justices Blackman and Stevens, two more Republican-appointed Justices, concurred on the ground that they preferred the stronger *Roe* trimester framework).<sup>84</sup> As much as the Republican Party may complain about abortion and single motherhood, it must be acknowledged that it has done incredibly little, in terms of judicial appointments and public policy, in furthering Glendon's arguments about the sanctity of life and family.

Finally, it is hard to find any issue central to Justice Scalia's agenda that will have a lasting effect on American law in terms of outcomes. Even originalism, which may be Scalia's greatest contribution, is unlikely to have much of a lasting impact, at least in terms of conserving American traditions and culture, given that most contemporary originalists now subscribe to "New Originalism," a more theoretical and open-ended form of interpretation that has been used principally to pursue a libertarian rather than conservative agenda.<sup>85</sup>

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*See Reparations, BLACK LIVES MATTER*, <https://policy.m4bl.org/reparations>. Even some conservative commentators are starting to consider reparations, though perhaps as part of a bargain for eliminating affirmative action. *See* Ross Douthat, *A Different Bargain on Race*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/opinion/sunday/a-different-bargain-on-race.html>.

82. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

83. Roger Clegg, *Latest Statistics on Out of Wedlock Births*, THE CORNER (Oct. 11, 2013), <http://www.nationalreview.com/corner/360990/latest-statistics-out-wedlock-births-roger-clegg>.

84. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

85. In fact, of the nine Justices appointed by Republican presidents since the formal birth of originalism in Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980), only two (Scalia and Thomas) have made originalism their principal modality of constitutional interpretation. Moreover, many scholars have questioned whether even these two Justices should count as true originalists. *See, e.g.*, SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (2002) (arguing that Justice Thomas interprets the Constitution against the libertarian background of the natural-law guarantees expressed in the Declaration of Independence); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted"*

That is not to deny categorically Steven Calabresi's statement, quoted by Presser, that Scalia was "the most important justice in American history—greater than former Chief Justice John Marshall himself" (p. 403). In terms of style, character, and charm, Scalia's greatness is undeniable. And in terms of legal wisdom and methodology, his greatness is certainly arguable, depending of course on one's ideological orientation and preferred mode of legal interpretation.<sup>86</sup> Indeed, for a traditionalist like Presser, Scalia was the model Justice, as "the late twentieth and early twenty-first century's greatest judicial traditionalist, and perhaps its greatest champion of the rule of law" (p. 403). But in terms of persuasive efficacy, especially in producing traditionalist outcomes, Scalia's importance is often overstated. Notwithstanding his abundant brilliance, he could not manage to keep the boulder on top of the mountain, when the entire legal culture was driving and impelling it downwards. At least one can hope that, to borrow Camus' analysis of Sisyphus, Scalia was happy in pursuing his endeavor, no matter how futile it may have been.<sup>87</sup>

#### CONCLUSION

The concluding chapter of *Law Professors* leaves the reader with Presser's not unexpectedly pessimistic ruminations on the status of the American legal academy and law in general: "Lady Justice may no longer be wearing her blindfold" (p. 460), which for Presser constitutes a serious threat to the rule of law. The critical reader might resist Presser's diagnosis here, however, on the ground that Lady Justice was never blindfolded—and perhaps for good reason: As President Obama famously described the arbitration of justice, it is messy and gritty, requiring an eye

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*Originalism*, 75 CIN. L. REV. 7 (2006) (arguing that Justice Scalia is not truly an originalist, given his "faint-hearted" derogations from original meaning).

86. For an example of one argument against Scalia's wisdom, see Gary Peller's vituperative response to Dean Traynor's press release mourning Scalia's death on behalf of the Georgetown Law community—in particular, Peller objected on the ground that Scalia "was a defender of privilege, oppression and bigotry, one whose intellectual positions were not brilliant but simplistic and formalistic." David Lat, *Controversy Erupts at a T14 Law School Over How (Or Even Whether) To Mourn Justice Scalia*, ABOVE THE LAW (Feb. 17, 2016), <http://abovethelaw.com/2016/02/controversy-erupts-at-a-t14-law-school-over-how-or-even-whether-to-mourn-justice-scalia/2>.

87. ALBERT CAMUS, *THE MYTH OF SISYPHUS: AND OTHER ESSAYS* 123 (First Vintage International ed., 1991) (1955) ("The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy.").

constantly on the scales to ensure that the law lives up to its highest purposes.

Most readers of *Law Professors* likely will not conclude the book in absolute agreement with Presser's diagnosis that the rule of law in America is actually on the verge of being destroyed by law professors and their judicial accomplices. Partisanship has, to be sure, invaded the legal academy and judiciary in a way that was previously unheard of, and legal scholarship and judicial craftsmanship have certainly changed over time. But overall, the rule of law, that fuzzy contestable concept that at its core simply requires a sovereign to follow legal texts and comply with legal authorities,<sup>88</sup> is not categorically different now than it was one or even two hundred years ago. As much as we might complain that our current president, just like his predecessor, neglects legal commands,<sup>89</sup> both of these supposed authoritarians<sup>90</sup> have followed judicial decisions and legal processes, no matter how much they have griped about it.<sup>91</sup>

So is Presser simply a Cassandra, needlessly worrying about a legal system that is as healthy as ever? Not at all. Something has indeed been lost, something precious. And it is increasingly hard to imagine that thing being recovered. In reading *Law Professors*, particularly the conclusion, one may hear traces of one of Justice Scalia's great quotes (in dissent of course): "The Court must be living in another world," Scalia wrote. "Day by day, case by case, it is busy designing a Constitution for a country I do not

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88. See generally BRIAN TAMANAHA, *ON THE RULE OF LAW* (2004). On the contestability of the rule of law, see Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002).

89. Presser discusses Obama's many derogations from the law (pp. 443–54). For a more extensive discussion, suggesting that Obama's disregard for legal constraints verged on authoritarianism, see DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015); see also JOSH BLACKMAN, *UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER* (2016).

90. Indeed, it is quite astonishing how frequently commentators refer to both of these presidents as authoritarian. See, e.g., David French, *Despite the Hysteria, Trump Is Trending Less Authoritarian Than Obama*, NATIONAL REVIEW (Feb. 23, 2017), <http://www.nationalreview.com/article/445185/trump-less-authoritarian-obama>.

91. For example, after complaining of the "travel ban" decision by the "so-called judge," President Trump did not ignore the ruling. Instead, Trump issued a narrower executive order, designed to comply with the decision. That second executive order was subsequently invalidated by multiple federal courts, prompting President Trump to issue a third executive order to comply with those rulings. That third executive order has also been invalidated by lower courts and it is currently before the U.S. Supreme Court.

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recognize.”<sup>92</sup> What is unrecognizable to a traditionalist like Presser is not so much the machinery of the rule of law or the missing blindfold on Lady Justice, but the identity of the nation itself.

That is what has been lost: that shared sense of meaning and understanding, anchored in tradition and belonging. Professor Presser’s powerful account of the legal academy demonstrates how, over the last 225 years, that identity has been slipping away. In 21<sup>st</sup> century America, there is certainly the rule of law, and it is perhaps as strong and healthy ever, but it is operating in a markedly different way, running a system where diversity, change, and individualism are more integral to the legal order than commonality, stability, and community.

The book thus leaves the reader with the indelible impression that what really matters in the 21st century is not so much that we’re all realists or all originalists. What matters is that we’re all multicultural progressives now. For a traditionalist, this does not necessarily mean that American law cannot survive, or even that we cannot practice or teach law within this system. Perhaps we can even learn to love it. But it also may be the case that we can really only fall in love once, for no person or thing can replace, as Kierkegaard wrote, “my heart’s sovereign mistress (‘Regina’) stored in the deepest recesses of my heart, in my most brimmingly vital thoughts, there where it is equally far to heaven as to hell—unknown divinity.”<sup>93</sup>

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92. Board of Comm’rs, Waubensee Cty. v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

93. See KIERKEGAARD, *supra* note 3, at 100.