

Book Review

Stephen B. Presser, *Law Professors: Three Centuries of Shaping American Law*, St. Paul, Minn.: West Academic Publishing, 2017, pp. 502, \$48.00.

Reviewed by Scott Douglas Gerber

Law professor Nicholas Quinn Rosenkranz quipped at a Federalist Society conference on intellectual diversity in the legal academy that his leftist colleagues at Georgetown felt that three conservatives on a law faculty of 120 was “plenty—and perhaps even one or two too many.”¹

Regrettably, Georgetown may be the rule rather than the exception in the culture war in American legal education. A number of the same leftist law professors who teach students in their First Amendment classes about the evils of “viewpoint discrimination” practice it. Many of the same institutions that tout tenure as a way to encourage free thought censor it by not allowing conservative and libertarian faculty candidates who think freely to get in the door. I once suggested on the ConLawProf group email list that law schools need to hire more conservative and libertarian candidates (with “more” meaning, at a minimum, at least *one*). The reaction? One law professor posted that I was “nuts” to suggest such a thing. As a British friend joked, “It is not yet criminal to be a conservative lawyer in America, but it is certainly unconstitutional.” Clearly, as I see it, the vast majority of America’s law schools have no interest whatsoever in the type of diversity they should value most: intellectual diversity.

Stephen B. Presser, the Raoul Berger Professor of Legal History Emeritus at Northwestern University’s Pritzker School of Law and a scholar who has been called by the Liberty Fund’s *Library of Law and Liberty* “the most conservative law professor in America associated with a major law school,”² is profoundly concerned about the consequences of what I regard as the *Kulturkampf* in American legal education. Presser’s new book, *Law Professors: Three Centuries of*

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1. Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 HARV. J.L. & PUB. POL’Y 137, 137 (2014).
2. Mark Pulliam, *American Legal Thought in a Nutshell*, LAW & LIBERTY, March 16, 2017, <http://www.libertylawsite.org/2017/03/16/american-legal-thought-in-a-nutshell/>.

Shaping American Law, provides the intellectual history of how America's law schools have been transformed from what should be their *raison d'être*—teaching students about the law—to, in my opinion, political action committees for the Democratic Party. As Presser concisely puts it in the opening page of his remarkably temperate book:

This book is a love letter to the teaching of law. It is a biographical examination of American (and two English) law professors, but its purpose is to illuminate what holds American society together, and to further the understanding of shared American values, in an age when those values are more at risk than at any time for the last sixty years. One way of understanding the current American political turmoil is to see it as a struggle over the manner in which the law ought to be understood and administered, a struggle as old, really, as our republic itself. Our two major political parties now understand the rule of law very differently, and these two approaches to the law and to the American Constitution provide consistent threads to the analysis offered here. Anyone seeking to understand American law, the Constitution, or American legal education must come to grips with this basic disagreement about law and legal institutions. One view of the law, one reaching all the way back to Plato, if not before, is that it is a reflection of divine order, but another (also offered by Plato) is that the law is nothing but the will of the powerful in society (v).

Presser is best-known in law school circles for compiling the first-ever casebook for courses in American legal history. That casebook, now in its eighth edition, is titled *Law and Jurisprudence in American History*,³ and I always assign it when I teach American legal history.⁴ Presser's most recent book, like his landmark casebook, is a testament to the interconnection among legal history, biography, and jurisprudence. *Law Professors* surveys American law from its English common-law roots to the present via twenty-three chapter-length sketches of influential law professors, organized chronologically, from Sir William Blackstone to Barack Obama, who worked for twelve years as a senior lecturer at the University of Chicago Law School before being elected President of the United States.

Presser demonstrates that for Blackstone, and for the many English and early American lawyers who depended on Blackstone's *Commentaries*—including James Wilson and Joseph Story, both of whom served simultaneously as U.S. Supreme Court justices and law professors—the common law's function was to secure person and property so as to promote the happiness of mankind in accordance with God's plan (14-15, 53-54). Harvard's Christopher Columbus Langdell, Presser suggests, subsequently originated the "case method" in the late nineteenth century to preserve the insights of the English common law and to rework those insights to enable the rise of a professional class of American

3. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (8th ed. 2013).
4. Scott Douglas Gerber, *Teaching the Legal History You Write About*, 53 AM. J. LEGAL HIST. 410, 411 (2013).

lawyers who could help meet the needs of a maturing capitalist economy (61, 65-67).

Law professors who employ the case method typically assign several cases for students to read from a casebook assembled for the subject matter of the course. (The casebook idea also originated with Langdell.) Law professors then ask students questions in class about the assigned cases to ascertain whether the students have identified and understood the correct legal rule from the cases. As Presser points out, this did not sit well with Oliver Wendell Holmes, Jr., and the rest, as the saying goes, is history.

Holmes is unquestionably the antagonist of Presser's compelling story. Holmes had attacked Langdell in a widely read book review for what Holmes deemed Langdell's dependence on logic and for being a legal "theologian."⁵ As Holmes put it in the most famous phrase in the history of American legal scholarship, "The life of the law has not been logic: it has been experience."⁶ For Holmes, the law "at any given time pretty nearly corresponds [to] . . . what is then understood to be convenient," and considerations of policy are the "secret root" from which judicial decisions flow.⁷

Holmes, Presser goes on to demonstrate, set the stage for the *Kulturkampf* (my word, not Presser's) that followed in America's law schools: legal realism, critical legal studies, radical feminism, and critical race theory, to mention the most prominent of the leftist theories that have been incubated under the cloak of tenure that affords law professors the academic freedom to stop teaching about law. The leftist law professors Presser discusses in this part of his book include Karl Llewellyn, Duncan Kennedy, Mark Tushnet, Peter Gabel, Morton Horwitz, Robert Gordon, Roberto Unger, Catharine MacKinnon, and Patricia J. Williams.⁸ Although these celebrated law professors and their respective jurisprudential schools differ in sometimes significant ways, they all share, as Presser further demonstrates, two fundamental characteristics: first, each traces to Holmes's moral relativism, which equates law with nothing more

5. *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (anonymous review written by Oliver Wendell Holmes, Jr.).

6. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW I* (ABA Publishing, 2009) (1881).

7. *Id.* at 2.

8. I respect and admire all the law professors discussed in Presser's book. Mark Tushnet and Catharine MacKinnon have been particularly kind to me. For example, Tushnet "blurb" my edited book about the Supreme Court before John Marshall, and MacKinnon "blurb" my legal thriller about the pornography industry. See SCOTT DOUGLAS GERBER, ED., *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* (1998) (Tushnet: "This useful collection of biographical essays, bracketed by splendid treatments of John Jay and Oliver Ellsworth, goes a long way toward establishing that the first justices of the Supreme Court were an impressive collection of political and constitutional thinkers who did much, before and during their service on the Court, to construct the constitutional order"); SCOTT DOUGLAS GERBER, *THE LAW CLERK: A NOVEL* (2007) (MacKinnon: "As eye-opening as it is page-turning, Scott Gerber's Grisham-style legal thriller takes us behind the scenes of the pornography industry and the judicial system, revealing often-hidden realities of each as well as how they can converge").

than the policy positions of those empowered to promote them; and second, the policy positions they always seem to promote—and I mean *always*—are the redistributionist policies of the far left. Merit matters little in some quarters within American legal education. Ideology is what counts. Indeed, Harvard’s Tushnet, a self-described Marxist⁹ who served a term as president of the Association of American Law Schools (a nice guy, but a Marxist nonetheless), candidly admitted the following when asked about what he might do if he were a judge: “I am invariably asked, ‘Well, yes, but how would you decide the X case?’ . . . My answer, in brief, is to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory.”¹⁰

Presser devotes several chapters to conservative law professors who share his concerns about the radicalization of American legal education; namely, Herbert Wechsler, Antonin Scalia, Paul Carrington, and Mary Ann Glendon. Wechsler, who taught at Columbia Law School, published an article in 1959 criticizing the Warren Court’s landmark decision *Brown v. Board of Education* for drifting too far afield from the “neutral principles” that the rule of law requires (Wechsler opposed racism, but he also opposed legislating from the bench).¹¹ Scalia, who taught in the law schools at the University of Virginia and the University of Chicago before becoming a federal judge, was for decades before his death in 2016 the intellectual leader of the conservative legal movement.¹² Carrington, the former Dean of Duke Law School, was a harsh critic of the critical legal studies movement because, in his judgment, it endeavored to indoctrinate law students into the misguided view that law provided no restraint on power. Carrington himself put it better than anyone possibly could: “[T]his is the sort of philosophy that has given bullshit a bad name.”¹³ Mary Ann Glendon, who served as U.S. ambassador to the Holy See during the administration of President George W. Bush and also holds the Learned Hand Professorship at Harvard Law School, insisted in a book that Presser lauds that the left was talking too much about “rights” and not enough about “responsibilities.”¹⁴

9. See, e.g., Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96 (1978).
10. Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981). More recently, Tushnet wrote a widely discussed book arguing that the Constitution should be amended to abolish judicial review so that the conservative federal judiciary cannot roll back the victories the left had achieved during the Warren Court and Burger Court eras. See Scott D. Gerber, *The Judicial Brezhnev Doctrine*, 24 HARV. J.L. & PUB. POL’Y 209 (2000) (reviewing MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).
11. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
12. See, e.g., Scott D. Gerber, *Justice Scalia and a Supreme Court “Happily Filled,”* HUFFPOST, Feb. 15, 2016, http://www.huffingtonpost.com/scott-d-gerber/justice-scalia-and-a-supr_b_9233758.html.
13. Paul D. Carrington, *Paul D. Carrington to Robert W. Gordon*, 35 J. LEGAL EDUC. 9, 12 (1985).
14. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 76-

Presser concludes *Law Professors* on a mixed note. He mentions that it “is encouraging that other members of the legal academy are beginning increasingly to understand the need for a return to what some have called ‘First Principles’” (471). (He flatters me in that conclusion by quoting the title of my book about Justice Clarence Thomas’s jurisprudence).¹⁵ But he also suggests that the modern constitutional theory promoted by leftist law professors, to the extent that it aspires to circumvent the original meaning of the Constitution or further empower the administrative state, is “dishonest” (470).

I have only one significant criticism of Presser’s terrific book about the history of the law professoriate: He understates the seriousness of the left’s *Kulturkampf*. Several examples come quickly to mind.¹⁶

To return for a moment to the topic that opened this review—the law faculty hiring process—jobs are frequently set aside for minorities and women, and conservative and libertarian white males need not apply, or so it seems.¹⁷ I have heard of faculty searches at various law schools in which a member of the faculty or administration has stated that his or her law school has an open position, but that the position *must* (not “could”) be filled by a minority or a woman. In fact, the faculty hiring process has gotten so out of hand that one law school did not immediately disqualify a minority candidate who recently had failed the bar examination. (You read that correctly: a law professor who failed the bar exam.) Another note of concern is this: Race and gender are used much more aggressively in faculty hiring than in student admissions—and that is saying something—in large part because there are far fewer faculty positions available than there are admissions slots. One law school with which I am familiar was criticized by both the ABA and the AALS for not hiring enough minority faculty, even though that law school had (i) invited every minority faculty candidate listed in the AALS faculty recruitment registry to interview

108 (1991).

15. See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (expanded ed. 2002).
16. The examples are drawn from some of my prior work. See, e.g., Scott Douglas Gerber, *Affirmative Action and the Crisis in Higher Education*, 6 AKRON J. CONST. L. & POL’Y 27 (2015); Scott Douglas Gerber, *The Law Professors Versus Sen. Jeff Sessions*, CLEVELAND PLAIN DEALER (Jan. 8, 2017, 10:06 AM), http://www.cleveland.com/opinion/index.ssf/2017/01/the_law_professors_versus_sen.html.
17. See, e.g., David E. Bernstein, *Affirmative Blackmail*, WALL ST. J., Feb. 11, 2006, <https://www.wsj.com/articles/SB113962366620071496> (“An even greater irony, however, is the ABA’s role in all of this. One can be quite certain that despite the plain language of the ‘interpretations’ quoted above, the ABA will claim that it is not really trying to force law school faculties and administrations to violate both the law and their consciences in pursuit of racial ‘diversity.’ But in the past, ABA accreditation officials have bullied law schools into precisely that position, even in the absence of written authority backing their demands. The new written standards will only embolden the accreditation bureaucracy, composed mainly of far-left law professors, to demand explicit racial preferences and implicit racial quotas—all in brazen defiance of the law.”).

with the law school at the hiring conference in Washington, D.C., (ii) asked every minority faculty candidate who interviewed with the law school in D.C. to fly back to campus, all expenses paid, to interview further, and (iii) offered a job to every minority faculty candidate who accepted the invitation to visit the campus. In short, the law school could do little else to try to recruit minority faculty candidates—and what it did was illegal—but that still was not good enough for the accrediting bodies.¹⁸

Although Presser was apparently not privy to the troubling anecdotes chronicled in the preceding paragraph, he does discuss in *Law Professors* his Northwestern University colleague James Lindgren's well-known surveys documenting that Republicans and Christians, rather than women and minorities, are the groups most underrepresented in the law professoriate (320).¹⁹ If the small handful of right-leaning and Christian law schools is excluded from the data set, the problem is actually worse than even Presser seems to appreciate.

The illegality of the law faculty hiring process notwithstanding, the most powerful example of the radicalization of American legal education involved the U.S. Supreme Court case *Rumsfeld v. Forum for Academic and Institutional Reform, Inc.* In that case, a coalition of leftist law professors filed a First Amendment challenge to the constitutionality of the Solomon Amendment, the federal law that strips federal funding from colleges and universities that prohibit on-campus military recruiting. A fair-minded position on this controversy was available: If law professors wished to protest the military's "don't ask, don't tell policy"—a policy that has since been further liberalized—or any other policy they do not like, they were free to do so. They could stand near, but not block, on-campus military recruiters' doors with a sign saying "Don't go in. This employer discriminates against gays." But they should not be allowed to rob students who disagree of the opportunity to meet with these recruiters, and they should not be permitted to deprive the recruiters of the chance to meet with the talented future lawyers that our military needs. On-campus recruiting is supposed to be about law students finding jobs, not law schools impeding students from doing so. And legal education is supposed to be about teaching and learning the law, not about advancing the left's political agenda. Fortunately, longstanding constitutional principles prevailed when the Supreme Court unanimously ruled against the leftist law professors' ill-conceived position.²⁰ As Chief Justice John Roberts bluntly put it: "We have held that high school students can appreciate the difference between speech a

18. Some law schools engage in additional practices to avoid hiring faculty who are not minorities or women, including but not limited to endeavoring to persuade minorities and women who are happily committed to practicing law to join their faculties and creating visiting assistant professorship programs so that "diversity" hires can get paid by the law school while they try to learn how to write legal scholarship and teach.

19. See generally James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89 (2016).

20. See *Rumsfeld v. Forum for Academic and Institutional Reform, Inc.*, 547 U.S. 47 (2006).

school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy Surely students have not lost that ability by the time they get to law school.”²¹

Last but not least was the “Open Letter” signed by more than 1400 law professors urging the Senate Judiciary Committee to reject Senator Jeff Sessions (R-Ala.) as President Donald Trump’s attorney general, citing what they called a lousy record on civil rights and that time he was rejected as a federal judge for being, they claim, too racist.²² “Nothing in Senator Sessions’ public life since 1986 has convinced us that he is a different man than the 39-year-old attorney who was deemed too racially insensitive to be a federal district court judge,” read the letter, whose signatories included such leftist luminaries of the law professoriate as Harvard’s Laurence Tribe, Chicago’s Geoffrey Stone, and UC-Irvine’s Erwin Chemerinsky.²³ Revealingly, the law professors’ letter was not much longer than a grocery list, and the half-dozen or so charges they levied at Sessions—a man who had been elected to the U.S. Senate by the people of Alabama on four separate occasions (most recently without opposition)—were equally as generic. Fortunately, fair-mindedness prevailed and Sessions was confirmed by the Senate as attorney general.

Although Presser has apparently never written anything about the Solomon Amendment litigation, he has had plenty to say about the left’s “Open Letter” smearing Sessions. In an op-ed for the *Chicago Tribune* written shortly after his *Law Professors* book was published, Presser thundered:

It is time . . . for law professors to emerge from the smugness and self-delusion in which they have been mired for some time, and to recommit themselves to the still noble task of teaching the law as a repository of timeless truths, and as something above politics, and certainly above character assassination.²⁴

Unfortunately, this was not the first time that leftist law professors had tried to influence Congress with what are best understood as partisan arguments. To mention but the most celebrated instance, during the Bill Clinton impeachment imbroglio a flood of law professors, including a number who signed the letter smearing Sessions, reported to Congress that lying under oath, as President

21. *Id.* at 65. Richard A. Posner was equally blunt when he characterized the law professors’ litigation as “embarrassingly inept.” RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 227 (2016).

22. See Letter to Chairman Charles E. Grassley and Ranking Member Dianne G. Feinstein, Jan. 9, 2017, https://docs.google.com/document/d/167CipVqWzOUe7_e7itlpew1qGcT0oZD5dNICIbLQWA/pub (last visited Nov. 1, 2017).

23. *Id.* Chemerinsky has since moved to Berkeley Law as dean.

24. Stephen B. Presser, *Sen. Sessions and the Smug Self-Satisfaction of the Law Professoriate*, CHI. TRIB. (Jan. 6, 2017, 6:19 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-jeff-sessions-smug-law-professors-perspec-0109-md-20170106-story.html> (last visited Nov. 1, 2017). See also Stephen B. Presser, *Do Law Professors Really Understand American Law?*, 43 OHIO N. U. L. REV. 373 (2017) (Ohio Northern University Law Dean’s Lecture based on Presser’s *Law Professors* book).

Clinton had done in the Paula Jones litigation, and obstructing the judicial process, as President Clinton also had done, were not impeachable offenses. Certainly, the framers of the Constitution would have characterized that sort of behavior as an “offense against the state”—their definition of a “high crime or misdemeanor.”²⁵ Succinctly put, lying in federal court is, and ought to be, an impeachable offense.²⁶ The House of Representatives agreed, and voted to impeach President Clinton for it: A fact that the academic left conveniently failed to mention during the most recent presidential campaign in which they did everything they could to elect Hillary Clinton President and defeat Donald Trump.²⁷

Presser himself devotes about twenty-five pages of his legal history casebook to the left’s attempt to whitewash President Clinton’s perjury and obstruction of justice. More specifically, in a section Presser styles “Postmodern Neopragmatic Constitutional Law” he contrasts his own testimony to the House of Representatives that what Clinton did was impeachable with Cass R. Sunstein’s completely dissimilar take on it.²⁸ Both influential law professors had their testimony reprinted in a *George Washington Law Review* symposium on the Clinton impeachment.²⁹ Presser titled his contribution “Would George Washington Have Wanted Bill Clinton Impeached?” Presser’s answer is “yes” because, he insists, an “oath, and the virtue of one swearing to it, perhaps lightly regarded by many today, were not so lightly regarded at the time of the Constitution’s framing.”³⁰

As the media have been reporting for several years now, America’s law schools are in serious financial trouble because not enough students are applying for admission. Lobbying Congress in such transparently partisan terms, as my leftist colleagues are prone to do—Sessions is a Republican, so he must be evil; Bill Clinton is a Democrat, so it was OK for him to commit perjury—only makes us look worse to prospective students.

25. See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 144-49 (1995).

26. See, e.g., Scott D. Gerber, *Would the Framers Impeach President Clinton?*, 8 *LAW & COURTS* 4 (1998) (cited during the Nov. 9, 1998, U.S. House of Representatives hearing on “the Background and History of Impeachment”).

27. The Senate did not remove President Clinton from office. However, he was held in contempt of court and sanctioned by a federal judge, and reprimanded by the Arkansas Supreme Court and had his law license suspended for five years.

28. PRESSER & ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY*, *supra* note 3, at 1336-60. Presser includes a chapter about Sunstein in *Law Professors*.

29. See Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 *GEO. WASH. L. REV.* 666 (1999); Cass R. Sunstein, *Impeachment and Stability*, 67 *GEO. WASH. L. REV.* 699 (1999).

30. Presser, *supra* note 29, at 680. Sunstein argued that impeachment ought to be reserved for a narrow category of offenses that does not include lying about sex with a White House intern. See Sunstein, *supra* note 29.

It is time to start behaving like professors again. I can think of no better way to begin than by recommending that everyone who cares about the current state of American law—and we all should care a lot—read Stephen Presser’s intellectual history of the law professoriate. After all, we cannot solve a problem until we understand its origins.