

## A Conservative's View of Law Professors

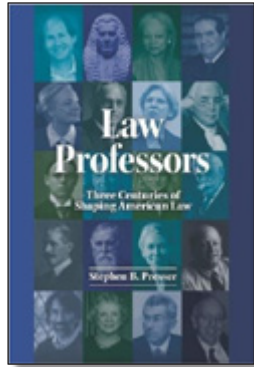
BY ERWIN CHEMERINSKY\*

STEPHEN B. PRESSER

### LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW

502 pages, \$45.64 (hardcover), \$28.44 (Kindle)  
West Academic Publishing, 2016

AS A LAW school dean and a law professor, I obviously welcome a book that focuses on law professors and overall portrays them in a favorable way. Professor Stephen B. Presser's new book, *Law Professors: Three Centuries of Shaping American Law*, is, as he says, the first "single book treating law professors in general, much less a



comparative treatment of the biographies of the most important American law professors." The first sentence of the book says that it "is a love letter to the teaching of law." In many ways, the book is exactly that, filled with mostly favorable biographies of luminaries in legal academia. Yet, I found that Professor Presser's staunch conservative views greatly influenced how he presented some of the biographies and wished, especially as to the more contemporary portrayals, that he had been less ideological.

The book is divided into 22 chapters and is organized chronologically. He begins with Sir William Blackstone, who lived in England from 1723–1780, and ends with President Barack Obama. In between, he describes James Wilson and Joseph Story from early American history through Richard Posner and Cass Sunstein from the late twentieth and early twenty-first centuries. Altogether he profiles about 30 law professors, with most chapters devoted to one individual. However, there is a chapter that focuses on five professors who were instrumental to the Critical Legal Studies movement and another that looks at two current Yale law professors (Bruce Ackerman and Akhil Amar).

Some of the choices were obvious and would be included by any author writing such a book. Dean Christopher Columbus Langdell is credited with bringing the case method to legal education and shaping the nature of law schools in a way that lasts to this day. Other selections were more curious. Professor Presser devotes two chapters to fictional law professors, Lewis Elliot at Cambridge University (who I confess that I never had heard of) and Charles Kingsfield of *The Paper Chase* (who is everything I have tried not to be in my 37 years as a law professor). Antonin Scalia and Barack Obama are enormously important figures in recent American history, but not for what they did as law professors.

Obviously, anyone making a list of the most important law professors in American history might make different choices. I wondered why he included Roscoe Pound, but not Jerome Frank in presenting the legal realists of the early twentieth century. Herbert Wechsler unquestionably was a hugely important law professor in the mid-twentieth century. But so was Louis Pollak, who served as dean of University of Pennsylvania and Yale Law Schools, and who wrote a compelling defense of *Brown v. Board of Education* in response to Wechsler's attack on it. Richard Posner undoubtedly warrants inclusion, but why not also Guido Calabresi? Why Antonin Scalia and not Ruth Bader Ginsburg since both were law professors before becoming judges, especially since Ginsburg because of her advocacy for women's rights unquestionably had the more important career before going on the bench?

In my field of constitutional law, titans such as Alexander Bickel, John Hart Ely, and Laurence Tribe are mentioned only in passing or not at all. Bickel's writings, and especially his view that judicial review is a deviant institution in American democracy, has shaped constitutional theory for the last half century. Ely's book, *Democracy and Distrust* published in 1980, is the most influential work on constitutional interpretation during my career. Tribe's treatise on constitutional law was brilliant and enormously influential, to say nothing of his advocacy which continues to this day.

It is notable that of the 30 law professors portrayed, only three are women (Catharine MacKinnon, Mary Ann Glendon, and Patricia Williams) and only two, Williams and Obama are African-American; none

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are Latino. Why not Ruth Bader Ginsburg or Soia Mentschikoff or Herma Hill Kay or Deborah Rhode? Why not Derrick Bell or Harold Koh or Richard Delgado? Choices, of course, had to be made to keep the book, which is 471 pages, to an acceptable length. But still it is disquieting that virtually all of those profiled are white men.

Overall, the book is very readable and the profiles are well done. I especially enjoyed the earlier chapters in the book and learned a great deal from Professor Presser's biographical sketches of Sir William Blackstone, Justice Joseph Story, Dean Roscoe Pound, and John Henry Wigmore. I knew something about each of them, but nonetheless found new information in these chapters.

Not every profile is positive in its assessment. Professor Presser's unfavorable portrayal of Justice Oliver Wendell Holmes borrowed heavily from Albert Alschuler's critical biography and concludes that Holmes: "took credit for others' work, had boundless ambition, failed to come up with a single original idea, wrote utterly incomprehensibly, was possibly perverted, delighted in eugenics, was probably a racist and maybe an anti-Semite."

My problem with the later chapters about more recent figures is that Professor Presser's own conservative views greatly influenced his presentations. In writing about Judge Richard Posner, he says that "Posner appears to believe that the judicial task is ultimately legislative." It is interesting that Professor Presser sees it that way, but I highly doubt that Judge Posner — as an academic or a federal judge — would describe it in those terms.

In portraying Cass Sunstein, Professor Presser says: "Just as the Patient Protection and Affordable Care Act gutted the 10th Amendment, if law professors like Sunstein ran the country, it is not clear what would be left of the notion of limited federal government, or limited government at all." Whether the Affordable Care Act "gutted the 10th Amendment" is obviously subject to debate, and Professor Presser's assertion of it as fact is jarring and unnecessary to his portrayal of Professor Sunstein.

Professor Presser's conservatism is especially evident in his chapter on President Obama. He accuses the former president of having a "radical view of the law" that includes "a penchant for redistribution,"

"his ability to choose what parts of laws he will seek to enforce," and of "wholesale rewriting of American immigration law." He says that President Obama may have learned of the "plasticity of the Constitution" at Harvard and believed that "everything may be malleable." I disagree entirely with Professor Presser's characterization of President Obama, but even more importantly found it out of place in a book that started off as a series of ideologically neutral portrayals of law professors. I question whether President Obama belongs in a book about law professors and had the sense that he was included to provide an occasion for Professor Presser to present his sharply critical views of the Obama presidency.

Indeed, the further into the book one wades, the more Professor Presser's conservative ideology is expressed. In his concluding chapter, he accuses American law professors such as Akhil Amar and Cass Sunstein of having "concocted elaborate systems and elaborate justifications for straying from the strict rule of law." He applauds "other members of the academy" — all conservatives — who "are beginning increasingly to understand the need to return to what some have called 'First Principles.'" He sees the approach of liberal law professors "as a danger to the legal and Constitutional foundations on which our Republic rests."

As a liberal law professor, I obviously disagree with Professor Presser. But what is disconcerting is that he asserts his views as self-evident conclusions that need little elaboration or explanation. My guess is that those who are politically conservative will read these words and nod in agreement. But the rest of us will wonder why they are part of this book that is meant to be a portrayal of law professors and expression of his love for legal academia.

Unfortunately, the last few chapters — the sharp criticisms of Professor Sunstein and President Obama and of liberal law professors generally — left me dissatisfied with the book. But still I learned a great deal from it and having spent almost all of my professional career as a legal educator, I appreciate a whole book dedicated to law professors. ★

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