I. INTRODUCTION

On February 16, 2017, I was privileged to give the 2017 Dean’s Lecture at the Pettit College of Law at Ohio Northern University. I chose as my topic the two variant approaches to private and Constitutional law prominent in the legal academy over the last few decades, the subject of my recently-published book, Law Professors: Three Centuries of Shaping American Law (West Academic, 2016). In that book I suggested that one approach to the law, typified by a group that we might refer to as conservatives, was to believe that courts ought to feel themselves completely bound by the plain meaning and the original understanding of laws and the Constitution, and another approach, maintained by the vast majority of law teachers in the nation, whom we might describe as progressives or liberals, was to believe that judges ought to be enabled to change or alter the law to meet the perceived needs of the times, and ought to conceive of the Constitution as a “Living Document,” that shifted its meaning as social conditions changed. This sort of a simplistic Cartesian dualism does not, of course, account for all the nuances of legal and Constitutional theory and practice over our history, but it is a useful tool for examining where we are now, what difficulties we are facing, and how they...
might be overcome. In what follows, I will make reference, in the footnotes, to the relevant parts of my book, but I will also seek to recapitulate my argument in a much shorter compass. I begin with a recent event, the confirmation of Attorney General Jeff Sessions, which exposed the sharp divide between American law professors. I continue by describing what was our early understanding of the requirements of American law, and then I examine how that view came under severe criticism until the triumph of a quite different view of the law in the Twentieth Century. I then consider a rear-guard reaction to the dominant twentieth-century view, with which I am sympathetic, and conclude this essay with an appendix, suggesting further reading for any student of the law seeking to understand these developments.

II. JEFF SESSIONS AND THE REACTION OF THE LAW PROFESSORIATE

The recent brouhaha over the nomination of Jeff Sessions as Attorney General might be taken as a strong example of the polarization and politicization of the American Legal Academy. To review a few key elements of that episode: 1,424 law professors, from 180 different law schools in 49 states, a number which was probably a bit less than 10% of America’s teachers of law, signed a petition to the United States Senate, urging them not to confirm Senator Sessions, essentially because of the reasons advanced against Sessions’ confirmation as a federal judge, which confirmation failed in 1986. As the petition explained:

In 1986, the Republican-controlled Senate Judiciary Committee, in a bipartisan vote, rejected President Ronald Reagan’s nomination of then-U.S. Attorney Sessions for a federal judgeship, due to statements Sessions had made that reflected prejudice against African Americans. Nothing in Senator Sessions’ public life since 1986 has convinced us that he is a different man than the 39-year-

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3. Id.
4. See infra Part II.
5. See infra Part III.
6. See infra Appendix.
7. See Statement from Law School Faculty Opposing Nomination of Jeff Sessions for the Position of Attorney General, to Chairman Grassley and Ranking Member Feinstein, United States Senate Committee on the Judiciary (Jan. 9, 2017) (https://docs.google.com/document/d/167C13pVqwzOue7_e7iljew1qGcto0Z5dNlCIbLQWA/pub) [hereinafter Statement from Law School Faculty].
8. See id. According to a posting on the National Jurist website, “From 1998 until 2008, the number of law faculty at 195 ABA-accredited law schools grew from 12,200 to 17,080 . . . .” Law School Faculties 40% Larger than 10 Years Ago, NATIONAL JURIST (Mar. 9, 2010), http://www.nationaljurist.com/content/law-school-faculties-40-larger-10-years-ago. “Law school faculties are forty percent larger than ten years ago.” See id.
old attorney who was deemed too racially insensitive to be a federal
district court judge.

Some of us have concerns about his misguided prosecution of three
civil rights activists for voter fraud in Alabama in 1985, and his
consistent promotion of the myth of voter-impersonation fraud.
Some of us have concerns about his support for building a wall
along our country’s southern border. Some of us have concerns
about his robust support for regressive drug policies that have
fueled mass incarceration. Some of us have concerns about his
questioning of the relationship between fossil fuels and climate
change. Some of us have concerns about his repeated opposition to
legislative efforts to promote the rights of women and members of
the LGBTQ community. Some of us share all of these concerns.9

The statement concluded that “we are convinced that Jeff Sessions will not
fairly enforce our nation’s laws and promote justice and equality in the
United States. We urge you to reject his nomination.”10

The two remarkable things about this statement by a significant
proportion of the professoriate were 1) that the charge that Sessions was
“too racially insensitive” to be a federal district court judge, much less
Attorney General of the United States, and the similar assertions that
Senator Sessions improperly prosecuted “civil rights activists” for voter
fraud, believed in the “myth of voter-impersonation fraud,” supported “a
wall along our country’s southern border,” supported “regressive drug
policies,” questioned the linkage of “fossil fuels” and “climate change,” or
was insufficiently supportive of “the LGBTQ community,” all seemed to
reflect the frequently-heard criticisms of Republicans by Democrats, and the
criticism levelled at Donald Trump, in particular,11 and 2) the implication of
the letter was that the 1,424 law professors believed themselves in a position
better to evaluate the qualifications of Senator Sessions for Attorney
General than his colleagues in the Senate, where Sessions had been serving
for the last two decades (since 1997).12

The transparently political character of law professors’ statement led
one thoughtful scholar, political scientist Jesse Merriam, to acknowledge

9. See Statement from Law School Faculty, supra note 7.
10. See id.
11. See Camila Domonoske, Civil Rights Activists Arrested for Protest Over Jeff Sessions as
508177471/civil-rights-activists-arrested-for-protest-over-jeff-sessions-as-attorney-general.
that while “[l]aw professors, of course, should be concerned about any political official they believe may be insufficiently committed to equal protection under the law,” the charges against Senator Sessions in the statement were unsubstantiated, as Merriam demonstrated, and, he asked, “[H]ow can anyone take the professors seriously when they are so nakedly partisan? More than anything, the legal academy’s attack on Sessions appears to be animated by an irrational hostility toward the sound of Sessions’ Southern twang. This coastal chauvinism is dressed up in legally objective reasoning, but that is only a veneer.”

To similar effect, Michael Krauss, a Professor of Law at the Antonin Scalia Law School of George Mason University, and an expert in legal ethics, declared that the law professors’ statement against Sessions, “shames me as a law professor,” because it was the work of “partisan hacks,” engaged in “casual character assassination.” Krauss explained that “[o]ne of my main goals as a professor of legal ethics is to try to show my students, through my teaching and scholarship, that officers of the court should be pondered and serious,” but, in his opinion, the law professors’ statement on Senator Sessions had failed to meet this standard. Krauss also refuted the particular charges in the law professors’ statement, and concluded by noting that “[t]he ABA Model Rules of Professional Conduct prohibit ‘conduct that is prejudicial to the administration of justice[,]’ and that “the law professors’ statement, which condemns Attorney General nominee Jeff Sessions based on irrelevancies and innuendoes, is just that.”

ONU’s own law professor Scott Gerber observed that the law professors signing the statement included such “leftist luminaries of the law professorate as Harvard’s Laurence Tribe, Stanford’s Pamela Karlan, the University of Chicago’s Geoffrey Stone, and the University of California-Irvine’s Erwin Chemerinsky,” and that this was not the first time that partisan law professors had engaged in an attempt “to influence Congress with preposterous arguments,” noting that the same had been done, for example, in the battle over the impeachment of President Bill Clinton. Gerber concluded that


15. Id.

16. Id.

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. It’s time to start behaving like professors again.¹⁸

I agree with Messrs. Merriam, Krauss, and Gerber,¹⁹ and, in this essay, I want to examine how the law professoriate arrived at a point where so many of its members could appear so nakedly partisan, and what it might actually mean for teachers of law “to start behaving like professors again.”²⁰

III. THE ORIGINAL UNDERSTANDING OF PROFESSING THE LAW IN AMERICA

What, then, should an American law professor profess? What is the meaning of “the rule of law” in America? Countless books and articles have been written on this question, and mine is simply one in a long line,²¹ but that does not diminish the importance or the difficulty of the problem. For our purposes, however, we can probably capture the original understanding of the role of law in America in a relatively few words by looking at the thoughts of four early law professors, one English and three American. Our English professor is Sir William Blackstone, the first of the modern law professors, who was given a chair at Oxford, financed by the author of a highly successful work on English law.²² Blackstone’s undertaking, for the first time, was to teach the young gentlemen at Eighteenth Century Oxford their country’s jurisprudence – the English Common Law – which consisted of the statutes of Parliament and the body, accumulated over centuries, of English court decisions.²³ Blackstone’s students, many, if not most of whom were members of the landed gentry, would themselves be staffing some of the lower courts in the realm, and would also be expected to administer the law as justices of the peace.²⁴ Curiously, until Blackstone, there was no organized teaching of English law to undergraduates, and Blackstone, in a one-year lecture course that later became his famous four-volume Commentaries on the Laws of England

¹⁸ Id.
¹⁹ See Presser, supra note 12. See my own excoriation of the statement’s signers, wondering what made them think they were in a better position to advise the Senators than were the Senators themselves. See id.
²⁰ Gerber, supra note 17.
²¹ See infra Appendix. For some suggestions on mastering this literature, see infra Appendix.
²² See PRESSER, supra note 1, at 11-27.
²³ Id. at 18.
²⁴ See id.
(1765-1769), did succeed broadly in summarizing not only the substance of English public and private law, but also the philosophy behind it.25

For Blackstone, and the many English and Americans who followed him – most of early American legal practice depended on Blackstone’s Commentaries – the task of English law was to secure person and property, in order to promote the happiness of mankind, and in order to follow the plan of God, whom Blackstone believed to be the ultimate creator and source of English law.26 A part of this plan included what came to be called the English Constitution, the outcome of the struggles between the English Parliament and the King in the seventeenth century, which culminated in the “Glorious Revolution” of 1688, which settled this political battle by placing English sovereignty – the power to make law – in the three key elements of English government – the monarch, the aristocracy, and the people themselves (or at least their representatives in Parliament) acting in concert.27 These three orders in society were, in effect, to control each other, in order that no one of them exercised tyrannical power, so that the traditional protections of life, liberty, and property afforded by English law could be preserved.28

For many of the British colonists in America, however, this was an unsatisfactory solution, since it was not clear to them that their interests were safeguarded by the British institutions thousands of miles away, and, indeed, they had no faith that their Creator intended a monarch, an aristocracy, and a Parliament they believed to be corrupt to control their affairs.29 The eventual result was Jefferson’s 1776 Declaration of Independence and the Revolutionary War, and, eventually the formation of the United States and the ratification of the United States Constitution in 1789, establishing a powerful national government for the young republic.30 With no aristocracy and no monarchy, however, the only basis for American government, James Wilson, the first notable American law professor observed in his lectures to his law students, was the will of the American people themselves.31 Wilson, active in the Convention in Philadelphia in 1787 that gave us the Constitution, tried to turn that document in a direction

25. See id. at 12.
27. See PRESSER, supra note 1, at 22.
28. See id. at 22-23 (quoting Horst Dippel, Blackstone’s Commentaries and the Origins of Modern Constitutionalism, in RE-INTERPRETING BLACKSTONE’S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS (Wilfred Prest ed., 2014)).
30. See generally id.
that gave as much power as possible to the people, although his efforts, to a
great extent, foundered, as the general feeling prevailed among the
delegates that in order to preserve order in the new country, it was necessary
to create some checks on what might be the arbitrary behavior of the
American people.32 In order to do this, lifetime tenure was given to the
judges, to create judicial independence, and the elections of the Senators
and the President were indirect, the one by the state legislatures, and the
other by the Electoral College.33 The people were, as Wilson desired, the
ultimate sovereigns, but their power was exercised by a representative
government, and thus the framers created a republic, not a democracy.34

That republic, as Wilson, and his successors, such as Joseph Story, who
taught at Harvard in the early nineteenth century (while still sitting as a
Justice on the United States Supreme Court) understood, was still to be
based on a religious understanding of the nature of law and government, and
was still to implement the basic protections of person and property to be
found in the substantive rules of the English common law.35 Indeed, every
one of the new 13 states passed a statute adopting the English common law
as the rules for American courts, insofar as those rules were consistent with
American institutions.36 This meant, essentially, that except for the facts
that we had no monarch, aristocracy, or established church, the rest of what
was to be found in Blackstone could safely be applied to American
conditions, and, in a series of treatises covering both public and private law,
Story proceeded to demonstrate precisely how this could be done.37 In the
course of this effort Story built on the work of Wilson, and on the thoughts
expressed in the great work on the Constitution itself, the essays by
Alexander Hamilton, James Madison, and John Jay collected in the
Federalist papers.38 For our purposes here, we can boil down the insight of
those essays and the work of Story, in the same manner that he passed them
on, apparently, to Alexis de Tocqueville who immortalized them in his
Democracy in America, where Tocqueville explained that democracy
worked in America because the American people adhered to the

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32. See id.
33. See id. at 38 (citations omitted).
34. See id. at 53-54 (quoting JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF
THE UNITED STATES 314-15 (reprint 1986) (1840)).
35. See id. at 53-54 (citing STORY, supra note 34, at 314-15).
36. See generally PRESSER, supra note 1. For the manner in which the English Common Law
became Americanized, see generally WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW:
37. See PRESSER, supra note 1, at 50.
38. See id.; see generally ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE
FEDERALIST (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) [hereinafter THE FEDERALIST] (these
essays were originally published in a New York newspaper by Hamilton, Madison, and Jay to argue for
the ratification of the Constitution).
Constitutional system of divided sovereignty (between state and national government) – a principle that we now call “federalism” – and also to the similarly important principle of the separation of powers.  

Pursuant to this latter notion, the job of a judge was to follow the pre-existing rules, the job of a legislature was to formulate new rules to meet the needs of changing conditions, and the job of the executive was simply to carry out the mandates of the legislature, the courts, and the American people themselves (as expressed in the Constitution).

All of this was highly abstract, of course, but the remarkable thing was that insofar as it provided a basis for stability and material progress, these legal principles resulted in the rise of the United States, in the course of the nineteenth and twentieth centuries to the status of a great world power. Story’s successors in the legal academy, such as Christopher Columbus Langdell, the great Harvard dean and legal educational reformer, were able to continue his work in essentially preserving the insights of the English common law (in Langdell’s case in the law of contract) and to rework them to enable the rise of a professional cadre of American lawyers who could meet the needs of a maturing capitalist economy. This was done, but not without a Civil War over slavery, and not without considerable strife over the plight of laborers in the nineteenth century urban centers, and the difficulties of assimilating millions of immigrants who fled conditions in Europe to find better lives in America. What was most remarkable from the perspective of one examining legal institutions however, was the extent to which, from Wilson, to Langdell, the outlines of the British Common Law doctrines remained intact, and the framers’ notions of federalism and separation of powers remained relatively constant.

IV. QUESTIONING THE LANGDELLIAN ORTHODOXY: THE TRIUMPH OF HOLMES

By the end of the nineteenth and the beginning of the twentieth century, however, in the American legal academy, there was an accumulating questioning of Langdellian orthodoxy, most prominently in the thought of Oliver Wendell Holmes, Jr., and culminating in the work of Holmes’s acolytes in the movement that we now know as American Legal Realism. American Legal Realism, acknowledged to be perhaps the only “authentic”

40. See generally id. Alexis de Tocqueville’s famous comments on American lawyers, and the manner in which they serve as a needed cure and counterpoise for democracy are found in Book I, Chapter Sixteen of his Democracy in America. See id. at 215-28.
41. See PRESSER, supra note 1, at 61, 65-67.
42. See id. at 79-81.
American school of jurisprudence held, essentially, that logic and precedent were not the determinants of legal decision-making by courts, but, rather, the opinions appellate courts, in particular, rendered were simply after-the-fact rationalizations for the policy preferences of the judges.43 In making this assertion, the more rabid of the legal realists, such as Jerome Frank, were following the insights of Holmes.44 In a famous book review, Holmes had attacked Langdell for what Holmes perceived to be his dependence on logic, and his being a legal “theologian.”45 Developing his argument in his 1881 famous book, *The Common Law*, Holmes insisted that “The life of the law has not been logic: it has been experience . . . .,” that the law “at any given time pretty nearly corresponds [to] . . . what is then understood to be convenient . . . .,” and that considerations of policy were the “secret root” from which judicial decisions were nourished.46

Holmes undoubtedly believed that he was demystifying the law, and shining light on the obscurantist efforts of Langdell and his school of jurisprudence usually labelled “formalists” by latter-day jurisprudes influenced by legal realism.47 Holmes’s influence at the time of writing *The Common Law* may have been relatively limited, but by the first third of the twentieth century he achieved a jurisprudential status unexcelled by any other American, to the extent that he became revered as America’s premier legal sage.48 There have been some dissenters to this view, for example, Albert Alschuler, who, in a brave book, paints Holmes as something of an amoral monster.49 Similarly, H.L. Mencken noted that Holmes had no standards, and was simply prepared to let legislatures do whatever they wanted.50 Despite Menken’s observation, Holmes’s reputation was probably assured when his ideas, and, in particular, his dissent in the *Lochner* case,51 seemed to mesh with the desire of then progressives such as...
Felix Frankfurter, to turn Constitutional doctrine in a direction more favorable to supporting a broad reach of federal and state efforts to shift resources and legal doctrines away from the interests of capital and toward those of labor.\textsuperscript{52}

Franklin Roosevelt, when he launched his attack on the Supreme Court, which in 1932 was threatening the success of his New Deal program, when he lambasted the Court for its narrow construction of Congress’s powers to regulate the national economy, and accused it of wrongly applying a “horse and buggy” definition of interstate commerce, not fit for the times, was, essentially, reading from the Holmesian playbook.\textsuperscript{53} My own, somewhat whimsical, take on Holmes is that as a refined Boston Brahmin, with a cosmopolitanism rare in the judiciary, who could have posed as a dead-ringer for God the Father on the ceiling of the Sistine chapel, his mere appearance and his half-century on the bench guaranteed him deference and, perhaps, overstated the importance of his ideas.

For whatever reason, however, Holmes’s influence is undeniable, and it is now de rigueur for anyone giving a speech on American law to quote Holmes, preferably several times, which is easy and fun to do, given that he was a master of the epigram and that, like Thomas Jefferson, he could be quoted in support of a number of oppositional theories. At the center of Holmes’s thought, however, did seem to be a core of pragmatism, and a recognition that, whatever was in the law books, in action, judicial decisions might be perceived as simply pragmatic. With this insight, Holmes and the legal realists were, of course, essentially following the thought of a centuries-old take on the law, that as Jeremy Bentham, the great critic of William Blackstone, and as Thrasymachus, the villain in Plato’s Republic maintained, “law” or “justice” was simply whatever the powerful in society desired.\textsuperscript{54}

The Supreme Court’s abrupt reversal on the reach of Congress’s power to regulate interstate commerce and to favor labor over capital in 1937,\textsuperscript{55} coming in the wake of Roosevelt’s huge electoral triumph in 1936, seemed to underscore the malleability of the law, and to suggest that Holmes and

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\textsuperscript{52} See \textit{Presser}, supra note 1, at 157-58.
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\textsuperscript{54} See \textit{Presser}, supra note 1, at 23-24, 458 n.1354.
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\textsuperscript{55} See \textit{generally NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937) (representing a major shift, because the Supreme Court accepted a broad interstate commerce regulatory power).
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the legal realists got it right. 56 Two decades later, as Earl Warren became Chief Justice of the United States, and as the Supreme Court, in effect, began an ambitious program of rewriting constitutional law to reform state and federal criminal procedure, to alter the nature of political representation in a much more democratic direction, and to correct decades of racial discrimination against blacks in the provision of public services such as transportation, recreation, and education, it appeared that Holmesian legal realism had become all but unassailable. 57 By the late twentieth century a prominent law professor could confidently assert “we are all legal realists now.” 58

V. THE ATTACK ON HOLMESIAN LEGAL REALISM: CRITICIZING AND DEFENDING THE WARREN COURT

In spite of that, a rearguard action in favor of the old Blackstonian view, some sort of modified defense of the notion that there was firm content to the rule of law, never completely died, even in the academy. The volcanic manner in which the New Deal and Warren Courts and their successors upended previously prevailing constitutional understandings led at least some academic observers to wonder whether what the Court was doing was putting at risk the fundamentals of American law. 59 One sitting federal appellate judge, on the Second Circuit, Learned Hand, widely regarded as the most brilliant judge never to have sat on the United States Supreme Court, pointed out that if the federal courts were making law, as the Warren Court undoubtedly did, they were taking away from the American people themselves their right to select their law makers. 60 This democratic critique of judicial law-making was always a difficulty for the defenders of the Warren Court, and later, of course, for the defenders of Roe v. Wade, 61 and while there were some ingenious attempts to support what the Warren Court had done by claiming that they were increasing the participation in our democracy of previously-discriminated against minority groups, especially

58. See Joseph William Singer, Legal Realism Now, 76 CALIF. L. REV. 465, 467 (1988). “All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.” Id.
60. See generally GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (2d ed. 2011).
African-Americans, or claiming that the Court was simply abstracting “principles” from the rules of law which could legitimately be broadly applied, the intellectual dexterity of these efforts was not enough, really, to conceal the essentially arbitrary nature of much of what the Warren Court had done.

One can sense the extraordinary exasperation, for example, of the most prominent among the early critics of the Warren Court, Herbert Wechsler, a Columbia law professor. In extraordinarily simple language he wrote what became one of the most important articles in our jurisprudence, Toward Neutral Principles of Constitutional Law. His succinct point was made by implicitly drawing on Hamilton’s and Montesquieu’s notions (expressed in the famous Federalist 78) that the job of judges was different from that of legislators. It was wrong, Wechsler explained, for judges simply to dictate results based on their preferences for particular outcomes, because such behavior failed to recognize their obligation to follow past precedents. It was some measure of the triumph of legal realism, and how tenuous was the grip of the rule of law in the Academy that Wechsler’s simple statement of the common understanding of what judges ought to be doing was subjected to withering criticism, and ultimately the assertion by a sitting federal judge, no less, that what Wechsler and his ilk were advocating was simply impossible of achieving.

The power of Wechsler’s logic nevertheless continued to reverberate through the academy, and it found its staunchest advocate in the late Antonin Scalia, a law professor at the University of Virginia and then the University of Chicago before becoming a federal judge. With withering wit, Scalia lambasted the Warren Court and the academy’s embrace of a “living Constitution,” claiming that the only good Constitution was a “dead” one. By this he meant that in order for popular sovereignty to prevail, in order for the rule of law to be maintained (and the former cannot occur without the latter), the understanding of the Constitution and laws had to be fixed, and interpreted according to their “plain meaning” at the time they

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65. See generally id.
66. See id. at 5.
67. See id. at 16-17.
68. See Presser, supra note 1, at 233-35 (discussing the controversy surrounding Herbert Wechsler); see generally J. Skelly Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769 (1971).
69. See Presser, supra note 1, at 385-86.
70. See id. at 395-96.
were enacted. Scalia’s efforts flew in the face of the prevailing reliance in the courts on “legislative history,” to expand and sometimes actually pervert the meaning of the terms of legislation to create favored outcomes, and the prevailing view in the legal academy that it was impossible to return to the world of the eighteenth century and implement an original understanding of the Constitution.

Most legal academics, persuaded by the realists and the idealism of the Warren Court, found it difficult to take Scalia seriously, and one, Robert Gordon, actually referred to the “twin idiocies” of believing that the Constitution and laws could mean anything, or that there was a fixed meaning for all time (the latter being what Scalia advocated). But if Scalia’s views did not overwhelm the academy they resonated with the Republican Party, and it became common for Republican presidential candidates to run on a platform of promising to nominate judges in the mold of Antonin Scalia, or his close jurisprudential colleague, Justice Clarence Thomas. And it was some measure of the ultimate legitimacy of the argument from textualism and original understanding, that by the 1990’s, it was common in important Supreme Court cases, and even in congressional debates, for both sides to make an appeal to the intent of the framers. It must also be of some significance that some pundits believed that the unforeseen election of Donald Trump resulted, in no small part, from his promise to appoint Supreme Court justices in the mold of Scalia, which he

71. See id. at 386-87. Scalia championed what we now call “textualism” as a means of interpreting statutes and “original understanding” or “originalism,” as a means of interpreting the Constitution. See generally id.

72. See id. at 395-96.


[There seems to me a perfectly sensible resolution of this polarity in the commonsense position that the intentions of authors cannot determine any fixed meanings of their texts, but that readers will have a range of plausible meanings set by the conventions of the historically and socially situated communities of interpretation to which they belong. This avoids the twin idiocies of saying the Constitution has only one meaning for all time and that it can mean anything a reader pleases at any time.

Id.


76. See generally Curry, supra note 74. “The specter of Hillary Clinton nominating a replacement for Scalia genuinely frightened many voters, and brought them around to voting for Trump.” Id.
carried out with his nomination of Neil Gorsuch in the first weeks of his Presidency.77

VI. THE LEGAL ACADEMY IN THE POST-WARREN COURT ERA: MOVING TO THE LEFT

As indicated, however, in the legal academy the sensible notions of a Hand, a Wechsler, or a Scalia, their forceful and traditional defenses of the rule of law and popular sovereignty, were not in the ascendance.78 Rather much of the development of legal academic thought in the late twentieth century can best be described as a wholesale rejection of the legitimacy of the accumulated body of legal doctrine, and, indeed, as a frontal attack on the rule of law itself. Thus, for example, Harvard Law Professor and legal historian Morton J. Horwitz, who had been recognized by his peers with the highest honor that the historical fraternity could bestow, the Bancroft prize,79 wrote in a book review that he disagreed with the assertion of British historian E.P. Thompson that the rule of law was “an unqualified human good.”80 Said Horwitz, the rule of law “undoubtedly restrains power, but it also prevents power’s benevolent exercise.”81 Horwitz acknowledged that the rule of law creates formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.82

Horwitz’s views seemed to be replicated in the works of those who began to associate under the rubric of Critical Legal Studies (CLS) in the late seventies and early eighties.83 This extraordinary association of several

78. See supra Part V.
81. Horwitz, supra note 80, at 566.
82. Id.
83. See PRESSER, supra note 1, at 279.
of the brightest minds at some of the most prestigious law schools, clearly influenced by left-leaning European thought, picked up where Horwitz left off, and sketched at least the outlines of what might replace what had formerly existed as the rule of law.84 One of their number, Peter Gabel, a young and brilliant radical who put his ideas to work in educational reform in California, revealed that what he thought the country needed, if it was finally to come to grips with the real needs of the human heart, and leave behind the mechanized consumerism that was dividing us from each other, was a kind of decentralized socialism that has yet to appear in the world.85 Another important CLS scholar, Mark Tushnet, now teaching at Harvard, clearly demonstrating the link between CLS and legal realism,86 indicated that if he were a judge he would disguise the source of his decisions using whatever version of “Grand Theory” was then fashionable and simply do whatever was necessary to advance socialism.87 A paragraph is not enough to do justice to the theoretical richness, power, depth, and passion of CLS thought, and the reader is referred to the chapter in my book in which this is discussed, but this ought to be enough to suggest that what CLS was advocating was an eventual move away from almost all conventional law, and the replacement of our free-market system with something distinctly different.88 Coupled with this advocacy was an assertion that when all was said and done, it would be appropriate to recognize that all law was essentially politics by another name, and that, in short, Thrasymachus got it right.89 Given that, it was appropriate to replace what CLS perceived as our current corrupt and unsatisfactory set of institutions with far more utopian ones.

The fall of the Berlin Wall in 1989 made the appeal of decentralized or any other kind of socialism much less than it had been, and for a while it looked as if CLS was completely dead in the law schools, but the decision in Bush v. Gore90 in 2000, rightly or wrongly, did reinforce CLS’s claim

84. See id. at 281.
86. See Note, ’Round and ’Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669, 1689 (1982). By demonstrating that first principles, not only doctrinal details, are products of historical circumstance and historically specific modes of legal reasoning, the critical legal scholar uses history to disclose that the underlying assumptions of doctrinal fields lack the necessity sometimes claimed for them—to demonstrate that such assumptions represent mere choices of one set of values over another. Id. at 1678.
88. See PRESSER, supra note 1, at 284-85.
89. See generally John Henry Schlegel, Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 STAN. L. REV. 391 (1984). The CLS assertion is that “LAW IS POLITICS, pure and simple . . . .” Id. at 411 (emphasis in original).
90. 531 U.S. at 98.
that constitutional law at least, was politics. And if CLS’s broad-scale push for decentralized socialism remained somewhat muted, other versions of what we might regard as legal revolutionary theory continued to flourish. For example, several strands of feminist theory were deployed by law professors to suggest that what we had in the late twentieth century was a patriarchy that deprived female members of society of opportunity and equality, and needed to be altered by the Equal Rights Amendment (ERA), by comparable worth doctrine, by public funding of abortion, by eradicating pornography, or by more aggressive elimination of sexual harassment. The feminists did not achieve all of their goals, but they made substantial progress, as, for example with the Supreme Court’s decision that found unconstitutional state funding for male-only military academies, or the Court’s ruling that husbands had no right to be informed and consent to their wives’ abortions. The latter decision even expressly repudiated the Supreme Court’s earlier view that the role of a woman was that of wife and mother, supervising only the domestic sphere.

What CLS and feminism began was also carried on by Critical Race Theory, which sought to demonstrate that particular ethnic or racial groups had been systematically oppressed by American law, and, in particular, to illustrate this by “story-telling,” by narratives of individual experience of such inequitable domination to create an opportunity for challenging and changing the application of legal rules. One notable voice in this undertaking was Patricia Williams, a distinguished law professor at Columbia, whose work clearly indicated a core ambivalence, if not a profound aversion to the law itself.

And it was not just the left, in the academy and out, advocating what certainly seemed like an abandonment of the rule of law. Richard Posner,

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93. See id. at 838.
96. Id. at 897, 928-29 (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)) (“Only one generation has passed since this Court observed that ‘woman is still regarded as the center of home and family life,’ with attendant ‘special responsibilities’ that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.”).
97. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996) [hereinafter CRITICAL RACE THEORY].
98. See PRESSER, supra note 1, at 405-12.
99. See id. at 297-301.
the single most-cited legal scholar in late twentieth and early twenty-first century America, appeared to be advocating substituting judicial pragmatism and prudence, in the service of economic efficiency through cost-benefit analysis, for the neutral application of precedent.\footnote{100} Posner, as a latter-day Holmesian pragmatist, was probably a man of the center or the near right (he was, after all, a Reagan appointee), but economics also provided opportunities for attacks on established doctrines from the left.\footnote{101} The most visible instance of this was the work of Cass Sunstein, a colleague and friend of Barack Obama from University of Chicago days, who drew on behavioral economics to challenge conventional assumptions of cost-benefit analysis, like those of Posner, which relied on the notion that people were rational wealth-maximizers.\footnote{102} Sunstein suggested that, instead, because of human psychological frailties, including a tendency to be overly optimistic or self-serving in our analysis, we were incapable of accurately predicting the likelihood of events, we were deluded by the manner in which options were framed for us, and we needed the supervision, or as Sunstein called it the “nudge,” of government planners.\footnote{103} Within Sunstein’s scholarship there seemed to be lurking an advocacy not of decentralized socialism, like CLS, but the traditional top-down variety that had been so spectacularly unsuccessful in most of the twentieth century.\footnote{104}

\section*{VII. The Resurgence of the Legal Academic Right: Scalia, Carrington, and Glendon}

In short, while much of American society seemed to be engaged in a search for greater individual freedom and economic opportunity, much of the American Legal academy appeared to be exploring theories that would promote regulation and redistribution, to be achieved by abandoning or at least radically reworking existing legal doctrines.\footnote{105} The classical rule of law still had some defenders, however.\footnote{106} Antonin Scalia, from the bench of the United States Supreme Court, and, in many public appearances, becoming, in the words of some observers, the “Rock Star of One First Street,”\footnote{107} continued to lament the drift toward the “living constitution,” and
the fabrication, as in the extraordinary *Roe v. Wade* and *Griswold v. Connecticut*\(^{108}\) cases, of new Constitutional rights out of penumbras and emanations from the First, Third, Fourth, Fifth, and Ninth Amendments.\(^{109}\) And a few brave souls in the legal academy continued to mount a rearguard action against the ascendance of the abandonment of the rule of law.\(^{110}\)

Perhaps the most audacious and elegant of those was Paul Carrington, former Dean of Duke University, former army veteran, and former legal education reformer, who actually launched a full-frontal attack on Critical Legal Studies itself.\(^{111}\) Writing in the legal academy’s professional periodical, the *Journal of Legal Education*, and pushing CLS’s analysis that law was politics to its logical end, accused that school of thought of being “legal nihilists,” that is, of being people who believed that the rule of law, and the claim that law could restrain the arbitrary exercise of power by government officials was a sham.\(^{112}\) Carrington suggested that law teachers who subscribed to those views would be undermining their own students, and ought, in conscience, to leave law teaching, perhaps to take up other posts in the University where they could do less damage to the professionals they were training.\(^{113}\) As might be expected, this criticism, which seemed to the defenders of CLS wrongly to imply bad faith on the part of its proponents, caused a minor firestorm, and while Carrington was eventually prepared to acknowledge the possibility of a positive contribution from some CLS thinkers, he remained essentially unmoved in his belief that CLS, on the whole, was on a wrong, and dangerous track.\(^{114}\)

In an even more provocative piece, this time in the Utah Law Review, Carrington took on the entire industry of what he called “Diversity!” suggesting that its practitioners in the academy – which presumably included remnants of CLS, as well as the Critical Race Theorists, and maybe even the feminists – were engaged in an effort at redistribution, and were failing to live up to the standards of objectivity the law and the legal

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Naughty Nino! He goes on tour, playing to packed houses, and those who don’t get in to see him are crestfallen. He thinks orgies ‘ought to be encouraged.’ He has groupies (in addition to the undersigned), as well as a fan club. The conclusion is inevitable: Justice Scalia is a rock star!

*Id.*

108. 381 U.S. 479 (1965).
109. *See id.* at 484.
111. *See id.* at 367-71.
113. *See id.*
114. *See Martin et al., supra* note 73, at 1, 10, 13.
What Carrington seems to have understood is that the push for radical change, an undertaking that CLS, feminism, and Critical Race Theory shared, was, in effect, a surrender to politics and an abandonment of the classical ideals of law teaching demonstrated by Blackstone, Story, Langdell, Wechsler, and their ilk.116

The forces that were roiling the legal academy when Carrington wrote were not simply internal to the teaching of law, of course.117 Beginning in the 1960’s, perhaps in the wake of what the Warren Court had done, and through its encouragement of using the legal system not only to create new rights, but also to bring litigation on behalf of large classes of the population, the law was becoming a weapon of fighting politics by other means, and of altering the exercise of financial, commercial, and social power in America.118 This development prompted other law professors, most notably Mary Ann Glendon of Harvard, a uniquely feminine and Christian voice in the academy, to suggest that instead of fulfilling its traditional integrative function, the law, in effect, was tearing us apart.119

Glendon explained that we were entering an era when we were forgetting that exercising and promoting the rights of individuals is not all there is to law and society, and that our duties, obligations, and relationships were of equal importance, and it was time for the law, once again, to recognize that.120 Glendon reminded American law teachers that other societies, most notably Western Europe, were aware of these integrative responsibilities of law, and that, to pick two examples, in encouraging divorce and abortion at will, we Americans were putting at risk the important stabilizing function of intermediate associations between the individual and the state, such as the family.121 Glendon’s argument is too subtle, refined, and developed to capture in a few sentences here, but her training as a comparativist, and her international activities (for some time she was the American representative to the Holy See) gave her a vision almost completely absent among American law teachers.122

VIII. Conclusion

It was to participate in the endeavor undertaken by the likes of Scalia, Carrington, and Glendon, that I wrote my law professors’ book, to

116. See generally id.
117. See generally id.
118. See PRESSER, supra note 1, at 367-71.
119. See id. at 347-64.
120. See id. at 395-96.
121. See id. at 347-64.
122. See id.
demonstrate, in short, that there was a coherent and noble tradition of teaching law as a series of timeless truths, and that a return to that tradition was sorely necessary in our troubled times. When a rights-obsessed gaggle of more than 1,400 law professors can smear a good candidate for Attorney General, and, tragically, when in the course of doing so, that group of law professors probably believed, in good faith, that they were doing the correct thing, something had gone very badly wrong. There has always been dissention and struggle in the law, of course, but the current fundamental political divide in the United States, the extraordinary polarization of not only our politics, but also our Courts, was, in my view, something unprecedented and dangerous.

As indicated earlier, it is hard not to believe that the perception of that danger was felt by many of the American people, who in the 2016 election, were convinced that the country was on the wrong track, and voted for Donald Trump in the hope that he would restore an earlier understanding of the country, and even of our law. Trump was not, of course, a traditional conservative, but in his jingoistic appeal to “make America great again,” there was an element of bringing us back to a time when we had, not government by judiciary, or a plethora of federal judges and bureaucrats increasingly telling us how we must live our lives, but something that more closely approached, in John Adams’s phrasing, “[a] government of laws, not of men.” In other words, perhaps many Americans had come to embrace the feeling expressed by Learned Hand that the American people were losing the ability to govern themselves, and the election of Donald Trump represented for them, the return of popular sovereignty itself.

The objection to Jeff Sessions as Attorney General, and the court challenges to the Trump administration, which have begun with the battle

123. See generally PRESSER, supra note 1 (the idea of a return to “timeless truths,” or “First Principles,” for those teaching and doing law, was certainly not mine alone). This idea loomed large in the work of Ohio Northern University’s own Scott Douglas Gerber and that of Supreme Court Justice Clarence Thomas. See generally SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999).

124. See generally Statement from Law School Faculty, supra note 7.

125. See Presser, supra note 12; see generally Curry, supra note 74.

126. See Presser, supra note 12; see also MASS. CONST. art. XXX. This famous phrase, an American creed of sorts, appears inter alia, in the 1780 Massachusetts Constitution drafted by Adams:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

MASS. CONST. art. XXX.

over the legitimacy of President Trump’s attempt by executive order to limit immigration to the country\textsuperscript{128}\ suggest that lawyers, and the law professoriate which stands behind them, will not give up their view of what the law and the Constitution ought to be without a struggle.\textsuperscript{129}\ Perhaps it is fanciful to think that the traditional view of the rule of law and republican government, a view clearly anchored in the eighteenth century, is fit for a complex, diverse, and different American society of the twenty-first century.\textsuperscript{130}\ And yet, perhaps there are timeless truths the eighteenth century understood, and that this is what motivated our Framers to set up the system of checks and balances, separation of powers, and federalism in the Constitution, all in the service of rule by the American people themselves, and using the rule of law as the best means to secure popular sovereignty. Donald Trump got himself elected President, in no small part because of his willingness to acknowledge something the law professors had forgotten. Perhaps they should try to remember.

**APPENDIX**

**A SHORT BIBLIOGRAPHICAL ESSAY**

Where might one turn if he or she wanted to understand the conservative philosophical foundation that I have argued underlies our Constitution and that is now alien to much of the law professoriate? And what should be read to better grasp how that understanding was undermined? I thought I might append to this essay a fairly short reading list, to underscore and to supplement the sources cited in the footnotes above.

A fuller bibliography can be compiled by perusal of the text and footnotes of my *Law Professors: Three Centuries of Shaping American Law* (2017),\textsuperscript{131}\ but some influences that led me to write that book can be singled out as a beginning guide. The starting point for anyone seeking to learn about traditional conservatism is Russell Kirk’s, *The Conservative Mind*:

\begin{itemize}
\item \textsuperscript{130}\ See generally id.
\item \textsuperscript{131}\ See generally PRESSER, supra note 1.
\end{itemize}
From Burke to Eliot (Revised 7th ed. 2001). Kirk, though not a lawyer, spends a great deal of time evaluating the contributions of great conservatives versed in the law, and has an intuitive understanding of the necessary undergirding of the law and Constitution by morality and religion.

The four volumes of Sir William Blackstone’s *Commentaries on the Laws of England* (originally published 1765-69, and available in a wonderful facsimile edition with helpful introductions by the University of Chicago Press in 1979) are, of course, a legal education in themselves, and the first volume, in particular, which explains how judges ought to be constrained by previous precedents ought still to be required reading for all American law students. The genius of the framers of the Constitution is best captured in two essential works, the first, Alexander Hamilton, James Madison, and John Jay, *The Federalist* (originally published 1787-88, and available in a fine inexpensive edition edited by Clinton Rossiter and with an introduction by Charles Kesler published by Signet Classics), and the second, the one-volume student edition of the 1833 Commentaries on the Constitution by Joseph Story, *A Familiar Exposition of the Constitution of the United States* (1896 reprint of the 1840 edition by Regnery Publishing, Inc. for the Conservative Book Club, with a forward by Edwin Meese III). Roughly contemporary with Story’s *Commentaries*, and probably influenced by Story himself, is Alexis de Tocqueville’s monumental *Democracy in America* (originally published in French in two volumes in 1835 and 1840, and available, for example, in a fine one-volume edition translated by Harvey Mansfield and Delba Winthrop, published by the University of Chicago Press, 2000). Tocqueville’s work, which Mansfield and Winthrop describe as “at once the best book ever written on democracy and the best book ever written on America,” (*Id.* at xvii) has, as

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133. See *id.* at 36-37.
135. See generally BLACKSTONE, VOL. 1, supra note 134.
136. See generally THE FEDERALIST, supra note 38.
137. See generally STORY, supra note 34.
138. See generally ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield and Delba Winthrop eds., Univ. of Chicago Press 2000).
one of its main themes, how American law and American mores restrain the possible excesses of democracy, and allow the country to flourish.\footnote{139}

For the attack on the Blackstonian view of law, that eventually captured most of the American legal academy, one should tackle Oliver Wendell Holmes, Jr., \textit{The Common Law} (1881).\footnote{140} It is not easy reading, but Holmes’s approach can be grasped simply by reading the relatively accessible first chapter, on Torts, which sets forth his thesis that judges are inevitably involved in a creative exercise.\footnote{141} Similarly crucial is the piece that Richard Posner called the most influential law review article ever written, Holmes’s Harvard Law Review essay, \textit{The Path of the Law}, 10 Harv. L. Rev. 457 (1897), in which Holmes argues that what the courts will do in fact is the only important thing about the law.\footnote{142} Holmes’s argument that what judges say in their opinions is, essentially, an after-the-fact rationalization for what they have decided on practical grounds is developed in a psychological context in the enormously influential \textit{Law and the Modern Mind} (1930), by Jerome Frank, which became, for many purposes, the bible of American Legal Realism.\footnote{143} Frank should be supplemented by Karl Llewellyn’s wonderful \textit{The Bramble Bush} (originally published 1951, available in a 2012 reprint with a helpful introductory essay by Steward Macaulay), which is still one of the best how-to guides for a student seeking to make sense out of the enterprise of learning the law.\footnote{144}

How legal realism conquered constitutional law can be understood by pondering the achievements of the Warren Court, and while there are dozens of fine books about that Court and individual cases it decided, a few key critiques ought to be singled out. Some of these have been mentioned earlier, and they include Learned Hand’s \textit{The Bill of Rights} (1958), Herbert Wechsler’s famous essay, \textit{Toward Neutral Principles of Constitutional Law}, 73 Harv. L. Rev. 1 (1959), Alexander Bickel, \textit{The Supreme Court and the Idea of Progress} (1970), and J. Skelly Wright’s defense of the Warren Court and his attack on Wechsler and Bickel, \textit{Professor Bickel, the Scholarly Tradition, and the Supreme Court}, 84 Harv. L. Rev. 769 (1971).\footnote{145} Two great similar, though more sophisticated defenses of the Warren Court, whose influence in the academy has been considerable are

\begin{itemize}
\item \footnote{139} See id. at xvii.
\item \footnote{140} See generally HOLMES, \textit{supra} note 46.
\item \footnote{141} See id. at 77.
\item \footnote{142} See generally O.W. Holmes, \textit{The Path of the Law}, 10 HARV. L. REV. 457 (1897).
\item \footnote{143} See id. at 457-58.
\item \footnote{144} See generally FRANK, \textit{supra} note 44.
\item \footnote{145} See generally KARL N. LLEWELLYN, \textit{THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY} (Quid Pro Books 2012) (1930).
\item \footnote{146} See generally HAND, \textit{supra} note 127; Wechsler, \textit{supra} note 64; ALEXANDER M. BICKEL, \textit{THE SUPREME COURT AND THE IDEA OF PROGRESS} (1970); Wright, \textit{supra} note 68.
\end{itemize}
Ronald Dworkin, Taking Rights Seriously (1977), which argues that the court was simply and legitimately articulating “principles” inherent in the rules of law, and John Hart Ely, Democracy and Distrust (1980), which rejected Dworkin’s approach, but did praise the Warren Court for what Ely believed to be its representation-reinforcing activities.

Morton Horwitz’s celebrated The Transformation of American Law, 1780-1860 (1977) was an exceptionally bold attempt to suggest that the common law ostensibly praised by Blackstone and Story was altered, quite possibly unconsciously, in the manner that Holmes suggested, in order to promote the interests of the emerging entrepreneurial and manufacturing classes in America and the lawyers who served them. Horwitz’s book had radical implications, and these were later developed first by Critical Legal Studies (CLS), then by feminism and Critical Race Theory. The works of CLS are not easy reading, but there is much profundity and even some romance to be found there. I have found Peter Gabel’s bracing review of Dworkin’s Taking Rights Seriously, 91 Harv. L. Rev. 302 (1977), to be a moving description of CLS’s aim to transform the law to meet the real needs of the human heart. For more extended CLS work, see, e.g., Duncan Kennedy, A Critique of Adjudication: Fin de Siècle (1997), and two works by Roberto Mangabeira Unger, Knowledge and Politics (1975), and The Critical Legal Studies Movement: Another Time, A Greater Task (2015).

A fine example of critical race theory, employing the characteristic method of “story-telling” is Patricia Williams, The Alchemy of Race and Rights: Diary of a Law Professor (1991), and a powerful series of essays outlining one approach to feminism is Catherine MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987). A penetrating book review of MacKinnon’s book by Cass R. Sunstein, 101 Harv. L. Rev. 826 (1988), limns several distinct threads to the modern feminist movement and argues that MacKinnon’s and other feminists’ work ought to be recognized as the same sort of paradigm-shifting enterprises as the New Deal and the work of the Warren Court. For Sunstein’s own work, which also has
radical implications, and was probably influential on his colleague at Chicago, Barack Obama, see, e.g., Why Nudge?: The Politics of Libertarian Paternalism (2014).155

Critical Legal Studies, among other things, may have been a reaction to what was then perceived as the right-leaning posture of law and economics, the core assumptions of which were that people are rational wealth-maximizers, and ought to be, as far as possible, left alone to work out their own ideas of how to live the good life.156 Richard Posner is the most influential thinker of that school, and a good exposure to his approach to law is to be found in his now classic, Economic Analysis of Law (9th ed. 2014), which explains the appeal of cost-benefit analysis in both public and private law.157 Posner’s work rightly emphasizes the primacy of human freedom, but true conservatism of a kind advocated by Russell Kirk and Edmund Burke also recognizes the inevitable necessity for other values, in particular duties and responsibilities to our fellow men, to our traditions, and to the Deity. This is what I sought to demonstrate in my law professors book, and this was also the effort undertaken by Paul Carrington and Mary Ann Glendon, among a few others. For Carrington see his daring attack on CLS, Paul D. Carrington, Of Law and the River, 34 Journal of Legal Education 222 (1984), and his blast at politically-correct legal educators, Diversity!, 1992 Utah L. Rev. 1105.158 For Glendon, see her masterpiece, Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991), and her brilliant Abortion and Divorce in Western Law (1987).159

Finally, these scholarly studies ought to be lightened by some reading in fiction. My favorites, discussed in my law professors book, include the Strangers and Brothers series of novels, eleven in all, by C.P. Snow, published between 1940 and 1970, which collectively are an unmatched fictional treatment of the life of an English law professor,160 John J. Osborne, Jr.’s tale of the fictional American law professor Charles Kingsfield, The Paper Chase (1971), and Scott Turow’s nuanced and exceptionally realistic account, One L: The Turbulent True Story of a First

156. See Presser, supra note 1, at 421-27.
158. See generally Presser, supra note 1; Carrington, Of Law and the River, supra note 119; Carrington, Diversity!, supra note 115.
159. See generally Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991); Mary Ann Glendon, Abortion and Divorce in Western Law (1987).
160. Presser, supra note 1, at 181-225.
Year at Harvard Law School (1977), which, after forty years, might still be the best means of capturing what the process of learning the law entails.¹⁶¹

¹⁶¹ Presser, supra note 1, at 259-76 (citing John J. Osborne, The Paper Chase (1971); Scott Turow, One L: The Turbulent True Story of a First Year at Harvard Law School (1977)).